SUPREME COURT ADVISORY COMMITTEE

MEETING OF NOVEMBER 7-8

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VOLUME II - NOVEMBER, 1986 MEETING (continued)

ORIGINAL

SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado
Austin, Texas 78701
November 7, 1986

(VOLUME II)

APPEARANCES

MR. LUTHER H. SOULES, III, Chairman, Supreme Court Advisory Committee, Soules & Reed, 800 Milam Building, San Antonio, Texas 78205

MR. PAT BEARD, Beard & Kultgen, P.O. Box 529, Waco, Texas 78703

MR. DAVID BECK, Fulbright & Jaworski, 1301 McKinney Street, Houston, Texas 77002

MR. FRANK BRANSON, Allianz Financial Centre, LB 133, Dallas, Texas 75201

PROFESSOR WILLIAM V. DORSANEO, III, Southern Methodist University, Dallas, Texas 75275

PROFESSOR J. H. EDGAR, School of Law, Texas Tech University, P.O. Box 4030, Lubbock, Texas 79409

MR. RUSSELL (RUSTY) H. MCMAINS, Edwards, McMains, Constant & Terry, 1400 Texas Commerce Plaza, P.O. Drawer 480, Corpus Christi, Texas 78403

MR. CHARLES (LEFTY) MORRIS, Morris, Craven & Sulak, 600 Congress Avenue #2350, Austin, Texas 78701

MR. TOM L. RAGLAND, Clark, Gorin, Ragland & Mangrum, P.O. Box 239, Waco, Texas 76703

MR. SAM SPARKS, Grambling & Mounce, 8th Floor, Texas Commerce Bank Building, P.O. Drawer 1977, El Paso, Texas 79950-1977

MR. SAM D. SPARKS, Webb, Stokes, Sparks, Parker, Junell & Choate, 314 W. Harris Street, P.O. Box 1271, San Angelo, Texas 76902-1271

MR. **BROADUS A. SPIVEY**, Spivey, Grigg, Kelly & Knisely, A P.C., 812 W. 11th Street, P.O. Box 2011, Austin, Texas 78768-2011

MR. **HARRY TINDALL**, Tindall & Foster, 2801 Texas Commerce Tower, Houston, Texas 77002

HONORABLE BERT H. TUNKS, Abraham, Watkins, Nichols, Ballard, Onstad & Friend, 800 Commerce Street, Houston, Texas 77002

HONORABLE JAMES P. WALLACE, Justice, Supreme Court, Supreme Court Bldg., P.O. Box 12248, Capitol Station, Austin, Texas 78767

PROFESSOR ORVILLE WALKER, School of Law, St. Mary's University, One Camino Santa Maria, San Antonio, Texas 78284

CHAVELA V. BATES
Certified Shorthand Reporter
and Notary Public

VICKI THOMAS
Certified Shorthand Reporter
and Notary Public

SUPREME COURT ADVISORY

BOARD MEETING

November 7, 1986

(Afternoon Session)

CHAIRMAN SOULES: What is the 99?

MR. TINDALL: Okay. If you'll turn in your -- if you've got your rule book, turn to page 144 and look at Rules 99, 100 and 101. And when I circulated the first draft, you know, I started with 103, but it kind of spilled over to 102. And then someone suggested that we combine Rule 99, which is sort of the content -- the issuance of content to citation into one rule.

And so, if you'll see what I did on page 37 on your handout, part of it, in combining it, I took inspiration from the Federal Rule 4, but it's no substantive change.

CHAIRMAN SOULES: Okay. Do you have any -- is there anything troubling about this?

MR. TINDALL: No, I thought it was -- I think it was Bill who suggested that we combine, and I have no pride in authorship. Rule 99 starts out -- well, you can read what it is and I just -- that's a point really -- the citation issuance,

and then you go to the form of the citation and the other one about other -- Rule 100 didn't seem to say much. And then you have the requisite, which I said form the citation. The rest of it seemed to be a redundancy.

CHAIRMAN SOULES: Okay. Does anyone have any --

PROFESSOR EDGAR: I'm just looking at Rule 101, current Rule 101. And it just says the citation shall be styled "The State of Texas," and I don't see that in here.

MR. TINDALL: No. And I'll tell you why. That got back to what Tom Ragland pointed out, I think, that you go to Rule 15. And it says, "The style of all writs and process shall be 'The State of Texas.'" So, it was already covered by Rule 15.

CHAIRMAN SOULES: Writs and process. Why don't we --

MR. TINDALL: See, when you go to Rule 15, which we're not tampering with today, it says that it will be styled "The State of Texas."

CHAIRMAN SOULES: But it doesn't say anything about citation.

MR. TINDALL: Well, not -- writ or

process, and a citation would be a form of process. So, it was -- I didn't put it into 99.

CHAIRMAN SOULES: It wouldn't be -- it wouldn't take much to put the citation, "shall be styled 'The State of Texas' and be signed by the clerk."

MR. TINDALL: Oh, no, certainly not. It's just conceptual -- if you want the issuance and the content of the citation in one rule, then we would combine 99, 100 and 101 into one rule.

CHAIRMAN SOULES: Do you see anything else major or minor, Hadley?

PROFESSOR EDGAR: Well, it just -- 101 continues on it. It says, "It shall date the filing of the petition, it's file number," and I don't see that in here. And I think it ought to have that in it.

MR. TINDALL: Well, let's see.

PROFESSOR EDGAR: And the style of the case, I think that ought to be in there.

MR. TINDALL: Why don't I pull this one down?

PROFESSOR EDGAR: And it also says that it shall be accompanied by the copy of the plaintiff's petition, and I don't see that in

here.

MR. RAGLAND: It's got the 90 days --

MR. TINDALL: Let's pull it down, Luke.

CHAIRMAN SOULES: Okay.

MR. TINDALL: I don't want to rewrite it here.

CHAIRMAN SOULES: We'll just table and --

MR. TINDALL: But if you want to, I'll continue to combine that into one rule.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: We'll table this until the next agenda -- until the next meeting.

MR. TINDALL: Now, have we finished 102 to 107, Luke? Because that's what I had worked on.

CHAIRMAN SOULES: Yes.

MR. TINDALL: I got your mailer this week.

CHAIRMAN SOULES: Yes.

MR. TINDALL: Now, life was going along relatively smooth until we got this Committee on Administration proposal.

CHAIRMAN SOULES: Incidentally, Pat

Hazel, a friend of all of us, is here. Pat is the chairman of the Committee on Administration of Justice, and he's got them moving effectively hearing -- working on new rules.

And they did have a meeting recently and approved some things for us, which that's what Harry is saying here. He got some things late, but that's good because we want to get them all reviewed.

Pat, we're going to report on one of the rules that you had on your committee. Now, Harry is going to report on the citation rules.

MR. TINDALL: Pat, I'm sorry I missed your calls. I did call you on this. Let's assume, because this gets a little intricate -- let's assume 102 through 107 is as we voted here today, and then overlay those changes with what I have just handed you. And I'm sorry, I gave away my only -- do you have one, Luke?

CHAIRMAN SOULES: I've got two, thank you.

MR. TINDALL: All right. First of all, the committee -- if you will look back now, to sort of tell you where we're going -- look on Rule 103. Assume that the changes on 103 that

I've got here have the changes the we voted today so that it would say, "Citation and other notice may be served by any sheriff or constable or other person authorized by law." That would be our change.

The key change is that the Committee on Administration of Justice informs us that you cannot have restricted delivery of -- restricted delivery of certified or registered mail to the addressee only. So that, really, we do not have an effective way of serving someone by mail and getting a green card back.

PROFESSOR DORSANEO: Getting a green --

MR. TINDALL: What?

PROFESSOR DORSANEO: That's just not delivery of restricted addressee only, now, right?

MR. TINDALL: That's right. You don't get that any longer.

CHAIRMAN SOULES: So, you cannot serve by mail. You cannot serve by mail.

MR. TINDALL: You could get lucky and get the defendant to sign it, I suppose.

CHAIRMAN SOULES: Yes.

MR. TINDALL: But you can't restrict

it to the addressee only.

CHAIRMAN SOULES: If that gets the job done, if he signs it. I guess it does. I mean, it sounds silly but service has been pretty technical.

MR. TINDALL: That's right.

CHAIRMAN SOULES: And if you don't mail with restricted to addressee only, certified, you have not literally complied with the rules and you cannot restrict addressee only -- post office -- with no -- its notice available.

PROFESSOR EDGAR: When did they quit that?

MR. TINDALL: The Committee on Administration of Justice says about a year and a half ago.

PROFESSOR DORSANEO: Yeah, a long time ago.

MR. HAZEL: It was quite awhile ago.

MR. TINDALL: So, what we have here, then, is 103 purged of the provision that service by registered or certified mail is deleted. So that you simply say, "service of citation by publication."

We purged 103, as we voted on it before

lunch, of any reference to service by mail. That's the only change that would be done to 103. We voted on it before lunch to incorporate what the Committee on Administration of Justice has proposed.

PROFESSOR DORSANEO: There still is certified mail and registered mail.

MR. TINDALL: Yes. But it's restricted delivery only, not addressee only.

PROFESSOR DORSANEO: Well, I don't see why we can't use service by mail and just use the service by mail that's available even though it's different.

MR. TINDALL: Well, we come to that in the next rule.

PROFESSOR EDGAR: What you're suggesting, then, is on page 39 that we just simply delete "service by registered or certified mail." Is that what you're saying?

MR. TINDALL: That's right. "Service by registered or certified mail and" would be stricken so that it would say, "citation by publication," you see.

PROFESSOR EDGAR: Well, "service by citation." You would strike out "registered or

certified mail and" --

MR. TINDALL: That's correct.

PROFESSOR EDGAR: Okay. I just wanted to know what you're proposing.

MR. TINDALL: Okay. So that it would read "Service of citation by publication shall, if requested."

CHAIRMAN SOULES: Then we're going to come up with a new way to serve by mail.

MR. TINDALL: Yes. Now, that's the only change on 103, if you want to go with what the Committee on Administration of Justice had done.

Now, turn, if you will, your attentions to 106. And let me tell you what this long -- because it's a long, long proposal. It goes on for two and a half pages.

PROFESSOR DORSANEO: It's a copy of Federal Rule 4, basically.

MR. TINDALL: It's exactly Federal Rule 4 with about the only changes using the words "citation" instead of "summons" and using the word "petition" instead of "complaint." And what it would mean is that under 106, you either serve them in person or, in the alternative, you can

mail it to them and they have 20 days to -- well, read what it is. You'll see.

You mail it to them, and if they get it and they want to accept that kind of service, they can and they mail you back the return. If they don't cooperate with you and you have proof of service on them and you have to serve them by sheriff or constable, then the Court will tax the cost which you go through against the defendant unless for good cause shown.

PROFESSOR DORSANEO: So, if they don't send you back the acknowledgment, you're back to go.

MR. TINDALL: That's right.

PROFESSOR DORSANEO: If I advise my clients to throw away the notice and acknowledgment and we have no alternative other than some court order mechanism or something like that.

MR. TINDALL: That's right.

PROFESSOR DORSANEO: That's what I don't like about the federal rule because if they don't send back the damned acknowledgment, then you haven't accomplished anything.

MR. TINDALL: Except this, and this is

where I'm open to it: You have thousands of debt cases and you have thousands of tax cases. And I don't know if it would be an economic alternative in those hundreds of thousands of cases if they couldn't mail them out. If they mailed out a thousand of them, they got four or 500 of those defendants to sign receipt of the papers, that they have avoided a lot of expensive service.

Department stores suing on their accounts. The one thing I changed from the Committee on Administration, Pat, after talking to Luke, was it would be an alternative method of service, not -- the federal rules mandate, as I read them, that you go with the mailing before you can go to the marshall.

PROFESSOR DORSANEO: No. The federal rules don't do that. The federal rules say you follow the state rules or you do this notice and acknowledgment.

MR. TINDALL: Okay.

PROFESSOR DORSANEO: All right.

MR. TINDALL: Now, I'm not that -- I don't practice in those courts that much.

PROFESOSR DORSANEO: And really that's --

MR. TINDALL: That's about what we've done here. If we authorize a sheriff or constable or other persons by law, appointed person, or by this mailing method, we've got a pretty close match to the federal method.

PROFESSOR DORSANEO: Okay. But the federal method is supplemented by the state method, and we kind of --

MR. TINDALL: If we have our method and the mail method, you see --

PROFESSOR DORSANEO: Federal Rule 4 is not a great rule. And the main problem is that if they don't send back the acknowledgment, then you basically have accomplished nothing whatsoever.

MR. TINDALL: Well, I talked to people that do more federal practice. I do nil, so I can't comment upon its efficiency other than it hadn't appealed to me for people who file hundreds of lawsuits. To me, it delays your citation by 20 days because if I have a rush, I'm going to hire someone to go serve the papers. I don't have to wait 20 days to do it. So, I made that -- that's what I didn't like about it.

MR. HAZEL: I know there's -- one of the problems the federal has had, there are two

lines of cases in the circuit courts on whether they get actual notice, and you can prove that even though it didn't whether that's still good or not. One line is saying "yeah" and the other is saying "no." You've got to go back and serve them.

One of the things that this does, you don't have to -- if this doesn't succeed, you don't get it back in the 20 days, you can immediately go to the Court for a substituted motion. You don't have that problem, and so you can get -- have the other kind of process served.

MR. TINDALL: But, Pat, we cured that this morning. We've authorized --

MR. HAZEL: Oh, you're going to cure that.

MR. TINDALL: We're going to eliminate all of those affidavits that you've attempted service and so forth. So, the question is, if the rules would allow service by a sheriff, a constable, anyone authorized by the Court or anyone authorized by law in the event the legislature creates a regulated scheme, would the Committee on Administration of Justice still want this mail method? To me, it's not --

MR. HAZEL: I think -- all the committee on the Administration of Justice was trying to do, I think, was trying to get rid of the addressee only problem, still providing some way of doing it by mail and trying to use the federal as a model for it, and using it rather than going immediately to having a court order, let it trigger the -- you know, the unsuccessful so that the Court can go ahead and order it.

But if you've done away with the need to show some other unsuccessful, you may not need it. I thought one of the things, also, that we had provided -- I thought it was in Rule 103 that the lawyers could mail this. I thought that was --

CHAIRMAN SOULES: Yes.

MR. TINDALL: That's right.

MR. HAZEL: I don't see it on this alternate method. Maybe I'm looking --

MR. TINDALL: Maybe I -- no, it would be 106a(1)(2). I tried to take exactly what the Committee on Administration of Justice did.

MR. HAZEL: Well, I thought we had put it in 103, saying that the lawyers could do it pursuant to 106. But it doesn't provide --

MR. TINDALL: Well, I didn't -- I

didn't -- I changed it a little bit, not trying to change the content of what you did. My federal -- my federal friends -- friends of mine that practice in the federal courthouse tell me they don't like service by mail. It's awkward, it delays getting papers done, and they just don't do it. They use private process.

JUSTICE WALLACE: Does the clerk charge for that citation which you have to send by mail?

MR. TINDALL: Yes, you see --

JUSTICE WALLACE: And then you would have to go back and pay again to get another citation if that one is not returned?

MR. TINDALL: I think that's right. You couldn't just Xerox it and give it to your process server. Isn't that right, Pat?

MR. HAZEL: I'm not following what you're --

JUSTICE WALLACE: In other words, if you send one out by mail, you're going to have to pay the clerk to issue that citation. If it doesn't come back, then you've got to go down and pay again to get another one by some other method.

MR. HAZEL: Yeah, the provision is in there just like it is in the federal rule. If they don't return it, they have got it by mail but won't return it, then you can have the cost charged against them. Now, that sounds more like it's a problem more lawyers aren't going to fool with.

MR. TINDALL: That's right.

MR. HAZEL: Hell, who's going to go down for a hearing to get $35 or something?

PROFESSOR EDGAR: The time expended in that would not be cost effective.

MR. HAZEL: That sounds like a ridiculous kind of provision to me. I really don't think the Administration of Justice Committee is at all, you know, enamored of this other than we've got to get rid of that old addressee only because it just doesn't work except unless it just happens to work, if somebody just happens to sign it.

PROFESSOR DORSANEO: Well, somebody is going to send back something if it's certified mail, right? Somebody is going to send back some kind of a green card. It's going to come back. Something is --

MR. HAZEL: You'll know somebody got --

PROFESSOR DORSANEO: There's some return.

CHAIRMAN SOULES: No. 106a(2) is dead. Texas has no mail service. You cannot serve by mail in Texas at all because 106a(2) says the only way you can do it is to restrict delivery to addressee only and that is not available.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: So, you can -- and service of citation is a very technical thing.

PROFESSOR DORSANEO: What is available?

CHAIRMAN SOULES: Just because you send it certified mail and you get a green card back signed by agent, you have not complied with the substitute service rule, and if you don't, then you don't have service.

PROFESSOR DORSANEO: All right. But we're changing the rule, though.

CHAIRMAN SOULES: Now, this -- what this does -- you know, just speaking for it here, I think it does not make sense to mail a copy of the citation, to have to mail a copy of the

citation.

PROFESSOR DORSANEO: It doesn't. It doesn't at the federal level either because the summons tells you the same thing that this notice tells you.

CHAIRMAN SOULES: So, what I think you should do is mail a copy of the petition with this thing on it. Now, why does that help? If, for example, in family law practice, if you represent the petitioner and you send this to the respondent, the respondent and petitioner probably have communications and you can communicate to the respondent that if he doesn't send this acknowledgment back, he's going to have to pay some court costs. There is some motivation. There is some reason for them to take action -- that they're going to have to pay the cost of issuing a citation and I think we put in here attorney's fees. Is that in here now, Harry? We talked about that.

MR. TINDALL: No, I didn't get that. I didn't have time to incorporate how that would be done, the taxing of it, and just -- what's provided is down at the bottom on the alternate proposal page is that however and unless for good

cause -- "Unless good cause is shown for not doing so the Court may order the payment of cost of other methods of personal service by the person served if such person did not complete returning of it."

CHAIRMAN SOULES: The cost including reasonable attorney's fees and --

PROFESSOR DORSANEO: You would have to change the form then.

CHAIRMAN SOULES: What?

PROFESSOR DORSANEO: Change the form. And I'm prepared to vote for this if you -- notice an acknowledgment -- if you take out, as you suggested, the citation because that's stupid in the federal rule, too. Because there are alternate ways to provide someone with the information they need to have in order to know what to do after they receive a copy of the petition complaint. Federal rule shouldn't say send the summons either. That's just dumb in it.

CHAIRMAN SOULES: Yeah.

PROFESSOR DORSANEO: Okay. So, we shouldn't copy what the federal rule has that is silly in that respect. But I don't think the people are going to send back the acknowledgment.

I just don't think that they're going to. So, I think we end up with a nice superstructure that's going to accomplish really nothing.

MR. TINDALL: Well, that's what my federal -- lawyers in the federal courthouse say it's just not used. Does anyone here have an experience otherwise?

CHAIRMAN SOULES: I wouldn't have any hesitation at all using the family law case -- TRO -- saving money.

MR. TINDALL: Right. Well, what happens in those is you just write the defendant and tell him to go get a lawyer and you'll serve him.

CHAIRMAN SOULES: Yeah, but now he's coasting. He's got the walk. But there is no sanction.

MR. TINDALL: That's right.

CHAIRMAN SOULES: There is nothing to cause him to send it back.

MR. TINDALL: Embarrassment at work.

CHAIRMAN SOULES: Yeah, you can say that. But here --

PROFESSOR DORSANEO: I mean, this would be fine. It will work when it works, if

you're fixing to take that citation part out of it.

CHAIRMAN SOULES: Then why not give it a try? I mean -- David.

MR. BECK: Well, I just have a question, Bill. When you say take the citation part of it out, you would just be sending them a copy of the petition?

CHAIRMAN SOULES: That's right, but see they acknowledge --

MR. TINDALL: No, you would send --

PROFESSOR DORSANEO: Read this.

MR. BECK: Pardon me?

PROFESSOR DORSANEO: Read what this letter says.

MR. BECK: That's the acknowledgment.

PROFESSOR DORSANEO: The notice says -- it says, "You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days." All right. "If you do not complete and return the form to the sender within 20 days, you may be required to pay any expenses incurred in serving a citation. If you do complete and return this form, you must answer the petition as required by

the provisions of the citation." We have to change reference to the citation to say you must answer the petition at a certain interval.

MR. BECK: That's what was bothering me because it was a citation telling us what they have to do.

PROFESSOR DORSANEO: I didn't read this. I assume it was the same as the federal form. It's a little bit model from being changed --

MR. HAZEL: I still want to mention something, though. If you adopt this, it seems to me the only person allowed by these rules to mail this is the sheriff or constable.

PROFESSOR DORSANEO: That's right.

MR. TINDALL: No.

MR. HAZEL: And that's not what I think -- that's not what we intended. We intended for lawyers --

MR. TINDALL: I didn't intend -- Pat, I did not intend that in drafting this. I simply took 106 --

MR. HAZEL: Well, it doesn't say anywhere in 106, that I see, who can mail it, but 103 says who can serve and that's only the sheriff

or constable.

PROFESSOR DORSANEO: Or authorized person.

MR. TINDALL: Well, except for -- all right. I understand what you're saying. But I intended for the attorney to go down, if we adopted this, file the suit, get the citation, bring it back to his office and mail it to the defendant.

CHAIRMAN SOULES: I think this ought to be in a different rule, something like "notice of petition," not really "service." This doesn't get service.

MR. TINDALL: It really doesn't. It delays it.

PROFESSOR DORSANEO: It supposedly works in California. That's where it was copied from. That's where the feds got it, the notice and acknowledgment procedure.

CHAIRMAN SOULES: Notice of suit. And I frankly think -- I think there is something unfair about requiring a party who's acknowledged service to answer. I think this ought to be when it's filed by the -- plaintiff's attorney ought to constitute it.

MR. TINDALL: Could I propose this, Pat, if this wouldn't do violence to your committee's work? We just voted this morning to make substantial changes in the way the papers can be served that we not adopt this mailing process at this time and let's see how the new provisions for court appointed persons or anyone else works.

MR. HAZEL: Well --

MR. TINDALL: I'm not trying to fight the Committee on Administration of Justice.

MR. HAZEL: No, I understand. I don't think you're going to fight. We set this up primarily trying to handle that addressee only problem. That was the problem.

PROFESSOR EDGAR: It's obvious, Pat, and you're right, that 106a(2), as it is now in our rules, is no longer effective. I mean, we can't serve that way any longer and we've got to do something with that.

MR. HAZEL: Yeah, that's got to be gotten rid of.

PROFESSOR EDGAR: And I --

MR. TINDALL: That's a separate issue, though.

MR. HAZEL: And we were trying to come up with a federal method if we want a mail method. Now, if you revamp it entirely so you've got -- our big problem we were having, I remember -- because Luke was there -- with getting the private process servers is we didn't want to get the Texas Supreme Court in the having to get in the business of regulating those folks. The legislature is going to have to do that sort of thing. And that's why we wanted to leave some room that that could be put in because we didn't want to put it in.

PROFESSOR EDGAR: Well, if we deal with the problem that we know we have, that is, deleting the restriction addressee only, then we kind of get into the problem, though, that you have presented in your alternative here to Rule 106.

I mean, it seems to me that simply deleting the term "with delivery restricted to addressee only" creates more problems than it solves. I mean, we've got to go further. Am I right about that or --

MR. TINDALL: You're right.

CHAIRMAN SOULES: You know, when this

rule was first adopted -- or recommended by this committee and sent to the Supreme Court, that business with delivery restricted to addressee only was, in my judgment, unnecessary. And I argued against it in this meeting whenever it was, six, seven years ago. Because it was my feeling that if you got a green card back, just an everyday certified return receipt green card back, that appeared to have a signature on the addressee, or if it's not, it's a signature of somebody purporting to be his agent, that that was enough due process. It's probably barely enough, if it is enough.

But if it is enough, then you've got him for a default judgment. And I could never see this addressee only working because, you know, as soon as you get to that point in getting the green card signed, you've got somebody's attention and he ain't going to claim it. And that's why it hadn't worked particularly well.

PROFESSOR EDGAR: What happens, then, if the defendant's name is John Smith and it comes back signed by Pete Jones?

CHAIRMAN SOULES: He can always -- I believe a defendant can prove that you never got

personal service and get a judgment voided in the bill of review. Isn't that right?

PROFESSOR EDGAR: Yeah.

CHAIRMAN SOULES: At any time. So, he comes in, you've got a default judgment, you send notice of judgment. You've got whatever his name is -- John Jones signed on for Sam Smith and it says, "agent of addressee." "John Jones, agent of addressee," that's printed on the form.

You take a default judgment, send out notice of default judgment. He either gets it and comes in or doesn't get it and never comes in until execution comes. But even whenever the sheriff shows up on his door, if he can come and show that it wasn't his agent, he doesn't know anything about this, then that default judgment -- and he never had personal service -- that default judgment is voided for lack of personal service. And I always felt that somehow that all played out if you just plain certified return receipt -- is the registered mail still -- does that still exist?

MR. TINDALL: Uh-huh.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: You still get a

green card back, it just doesn't --

CHAIRMAN SOULES: It's not addressee only.

PROFESSOR DORSANEO: But that never worked anyway. I mean, as you say -- I mean, the postman never did that.

CHAIRMAN SOULES: It never did -- no they -- they just take it like a regular green card and you get John Smith or whoever -- whatever names I've been using.

MR. HAZEL: That's why they dropped it because the postman --

CHAIRMAN SOULES: And it's never been used. Probably if we took out "delivery restricted to the addressee only," the Texas process as it all plays out in all the rights that a judgment debtor has access to probably protect us from the due process challenge.

JUSTICE WALLACE: We've got another problem here. If the green card comes back with the addressee's name on it, there's no way you can tell whether he signed it, his kid signed the card, or his wife signed it for him or who.

Right now on our bar there's a stack of green cards, about four or five of them. The mailman

leaves them there and says, "Sign a couple of these and put it under the mat. When I've got a letter for you, I'll pick it up and I'll leave this for you."

And so you don't have the safety of the mailman saying, okay, so and so must sign this so I give it to you." And if our mailman does it -- we've had about three in the last month and every one of them follow the same procedure. I assume the entire postal service in Austin is delivering that mail on that same basis. All they want is a card signed and they've done their thing. And you're just begging for problems on default judgments and you try to get one based upon somebody's name being on that green card.

PROFESSOR DORSANEO: I think I'm convinced that the notice and acknowledgment procedure, as defective as it might be, is going to work a little bit better than nothing at all, which is what we have if we use certified or registered mail and erase the words "delivery restricted to the addressee only."

MR. TINDALL: Well, that gets us back then, you see. If we go that route, Bill, look at the alternate proposal then. 103 sanitizes the

reference to mail. And 106 deletes that restriction. 106a(2) is deleted, and substituted in its place is this acknowledgment procedure.

CHAIRMAN SOULES: And this needs to be a completely separate rule, though, this thing what we've got here. Because 106 says how people authorized by 103 can effect service, the 106 that we talked about before lunch.

Now, we're talking about how lawyers and parties can give notice of suit to others and invite them to acknowledge that they have notice of suit. It seems to me those are -- Hadley, I think you were pointing out, and someone else, that the 106 is restricted to people described in 103.

PROFESSOR DORSANEO: Although that would be easy to change by modifying (a) -- the introductory language part A -- cover only (a)1.

MR. TINDALL: Pat, I did not --

CHAIRMAN SOULES: What about this situation, though? Shouldn't -- if a party is going to cooperate to the extent of returning an acknowledgment of notice of suit, when that's filed by the plaintiff, shouldn't that constitute an answer? Why?

PROFESSOR DORSANEO: I want to have more -- I want to have the time to answer. See, I want to --

CHAIRMAN SOULES: I mean to prevent a default judgment. See, this says if you don't do something else -- and I don't know whether a lay person really is going to read all that or not. He just says oh, I'm just acknowledging the suit. He sends it back. It doesn't really sink in that he's got to do something else.

Why isn't this an appearance? Stop calling it an answer. When this is filed, why should it not be the appearance of the person who has cooperated in acknowledging suit? What -- then at least you've got a contact if you want to try to start discovery. He's in the lawsuit. You don't have to serve the citation. And you've got 21(a) and all the alternative methods.

PROFESSOR DORSANEO: What you're saying is the notice and acknowledgment procedure that may work reasonably well in the federal court system because of the nature of the cases and the parties may not work so well down in the county court at law where some poor schnook has been sued for, you know, a couple thousand dollars.

MR. HAZEL: Well, you've raised another interesting point. If you file one of these things, have you made an appearance and have you waived venue?

MR. TINDALL: I know. Venue pleas to the jurisdiction, I mean --

MR. MCMAINS: Venue in 120(a). I mean, what do you do with all -- if you treat it as an appearance, then there's a lot of things that are going to go by the board before a lawyer gets in.

MR. HAZEL: Yeah, you better not -- you better not call it an appearance. This has to be some kind of an acknowledgment of notice.

MR. TINDALL: Well, that's all that's in the --

MR. HAZEL: It would have no other function except --

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Do we want to surrender to the problem that mail service is a real problem and just eliminate a(2) from Rule 106 for now?

CHAIRMAN SOULES: I'd rather eliminate "restricted to addressee only" and let people try

it.

PROFESSOR EDGAR: See if it works.

CHAIRMAN SOULES: And see if it works. And if somebody wants to try it and take a default judgment, why --

MR. TINDALL: I'd go with Luke.

CHAIRMAN SOULES: -- power to them.

MR. TINDALL: Let's eliminate that.

PROFESSOR DORSANEO: And put this notice and acknowledgment thing on for further study?

CHAIRMAN SOULES: Put it on our next agenda. I think it's got some -- it really needs some study.

PROFESSOR DORSANEO: Maybe check to see how it really is working in California where it apparently is in use in the state superior courts.

CHAIRMAN SOULES: See, if it takes another motion to get a default judgment in California, like it does in federal court, then you don't have the same problem with going and filing an acknowledgment of suit that this raises. And, that is, the next thing the guy knows he's got a judgment against him. He thought

he was cooperating. That doesn't seem quite cricket (phonetic) to me. Shall we table?

MR. MCMAINS: Have you already done the 106 thing you were talking about?

CHAIRMAN SOULES: No.

MR. TINDALL: We need to go back and amend --

CHAIRMAN SOULES: The other thing would be to go to page 42 and 106a(2), line two. Delete only the words "delivery restricted to addressee" only. We've talked about it. Are we ready to vote on that? Those in favor show by hands. Opposed? That's unanimous.

Then we'll -- Harry, can we -- of course, we're all in your report but you're get a lot of work. Can you give this some study to the mail out?

MR. TINDALL: The other part -- I don't want to delay the change in 106 that we voted on today.

CHAIRMAN SOULES: Exactly. No, that's done.

MR. TINDALL: Okay.

CHAIRMAN SOULES: But as far as referring to --

MR. TINDALL: Sure. I'm very interested in this area.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: What about the default judgment rule?

MR. TINDALL: I want to bring -- Bill, I know we talked about it otherwise. Look on 107 for a minute, you-all. I want to do something that's always seemed an anomaly to me. Last line about default judgment being on file for 10 days, there's an odd way of computing that. It says, "exclusive of the day of filing and the day of judgment." There's no other rule where you compute excluding the day of the hearing. Everything else, you know, you always exclude the day of filing but you can include the day of hearing.

PROFESSOR DORSANEO: Well, actually, the computation rule only works in one type of computation. We have problems with the computation rule, generally, is that it doesn't cover all of the computations that one has to make. For example, it doesn't cover a computation of the time period when you have to take action within a certain number of days before a hearing.

The computation rule will not tell you how to make that computation.

CHAIRMAN SOULES: It doesn't count backwards.

PROFESSOR DORSANEO: It doesn't count backwards.

MR. MCMAINS: The fact of the matter is that really and truly this isn't a change in the computation of the matter because it's not a question of the day of hearing. It's -- this says it's got to be on file 10 days. All this is saying is that means 10 days before the hearing.

PROFESSOR DORSANEO: 10 full days.

MR. MCMAINS: Yeah. Because if you have the hearing on the 10th day, it hadn't been on file 10 days, because a day is defined as an entire business day.

MR. TINDALL: Okay. I'm not -- well, when you compute, though, under Rule 4 --

MR. MCMAINS: But under Rule 4 you always exclude the day of filing. You know, the day -- the first day is excluded.

CHAIRMAN SOULES: That's right.

MR. MCMAINS: And the last day --

MR. TINDALL: Is included.

MR. MCMAINS: -- is included.

MR. TINDALL: But this excludes the last.

MR. MCMAINS: That means you have it -- but that's when you have to do an act. That means you have until the end of the business day to do the act.

MR. TINDALL: You're right.

MR. MCMAINS: This is really a rule -- one of the backward-looking rules like Luke was talking about.

MR. TINDALL: That's right. This is not a within rule; this is a without.

MR. MCMAINS: It's got to be filed 10 days before you get to hearing.

MR. TINDALL: This is a without rule, not a within rule. I'm going to withdraw my suggestion.

CHAIRMAN SOULES: Leave it like it is?

MR. TINDALL: Yeah. Unless you-all --

MR. RAGLAND: Mr. Chairman.

CHAIRMAN SOULES: Tom Ragland.

MR. RAGLAND: I see absolutely no need for the last paragraph of Rule 107, and I move that we just strike it in its entirety, and that

will eliminate all this counting.

PROFESSOR DORSANEO: Does anybody have any idea why that is in there?

MR. RAGLAND: Absolutely no reason whatsoever.

PROFESSOR DORSANEO: But it's not the kind of thing that just would have occurred -- would have appeared. There must have been a reason for it sometime.

MR. MCMAINS: I strongly suspect that the reason may be of the delay of the citation having been filed and having -- actually getting to the file.

MR. RAGLAND: It would make no difference, though. I mean, the citation is timely served and the answer date has not yet come about, you can't get a default judgment. If it has, there's no need to give them another 10 days. If the defendant is served on the 1st day of the month and his answer is due on the 21st, it makes no difference when the sheriff's return is filed. He still has the same amount of notice.

CHAIRMAN SOULES: I really don't know. I know it's saved my bacon twice and I love it.

PROFESSOR EDGAR: I wonder maybe, though, Tom, if the reason for it, though, might be that if the rule were otherwise, the Judge would probably have to rely upon some oral representation that was made by somebody that citation had, in fact, been perfected. Thus, this case was now ripe for judgment, when, in fact, it may not be. And that's why we require --

MR. RAGLAND: The trial judge is going to grant a default judgment unless he has the sheriff's return properly executed and in the court papers.

MR. MCMAINS: As long as it's clear, why should it make any difference?

PROFESSOR EDGAR: If this entire rule is eliminated, there is nothing in the rules that would require that.

CHAIRMAN SOULES: Tom, I will entertain any suggestion you would like to make for our next agenda on 107. We really do have a lot of work to do, though. And I think that that's going to take us some time to talk about whether that's right or wrong to have that on file, and we really -- we've got other people that are appealing to us. I mean, at least delay it to

the end of the day and see if we have time then.

Does that complete your report, Harry?

MR. TINDALL: I believe we've done 102 to 107; it's the mandate. And 99 to 101 I'm going to replow again. And I believe that completes my work.

PROFESSOR DORSANEO: You thought you were finished, didn't you?

CHAIRMAN SOULES: Harry, thanks a lot.

MR. RAGLAND: Can I make just a clarification on the 103?

CHAIRMAN SOULES: Yes.

MR. RAGLAND: As we talked about earlier here, where it refers to an order for substituting service or another person to serve other than the sheriff or constable, does that contemplate that in each individual case if you want someone other than the sheriff or constable to serve the paper that you must get a court order, or may the district courts enter a blanket order, as they do in the federal court, which says, John Smith is hereby authorized to serve citations.

MR. TINDALL: I think we -- that

indicated that it would have to be an order of the court in that case.

CHAIRMAN SOULES: No, that hasn't been done.

PROFESSOR EDGAR: That's not what the rule says.

CHAIRMAN SOULES: That has not been discussed. And what difference does it really make if the Judge decides that he is going to let --

MR. TINDALL: If the judge let's Bill Smith serve all the papers in his court, who cares?

MR. RAGLAND: Well, I'm in favor of it. I would like for the Judge to be able to designate a certain person in that county and you not have to go over there and get an order in every individual case. I want to short circuit the sheriff and the constable, quite frankly, because they're incompetent.

MR. TINDALL: This doesn't preclude that, the way we've written it.

CHAIRMAN SOULES: It doesn't. And --

PROFESSOR DORSANEO: I would want to get that order filed in this case file, if it's

going to be a default judgment situation, before I would be confident that the record --

MR. RAGLAND: The point I'm making is the courts can enter general orders on the minutes there that says that so and so is, you know, authorized to serve papers in this cause, and it's there until its revoked.

MR. MCMAINS: Yes. But how -- if you do that, how does it get to this file?

MR. RAGLAND: Well, if you need it, I guess you can go get a certified copy.

MR. MCMAINS: No. I understand. I'm just saying, though -- but what Bill is talking about, you've got to be able to show that the service was properly completed on the face of the record of the papers in the cause.

MR. RAGLAND: Well, I assume that the Court is going to take judicial notice in the orders he signs in his own court.

PROFESSOR EDGAR: Yes, the trial court can, but the appellate court can't.

MR. MCMAINS: You have to get it done then or it won't support your default.

CHAIRMAN SOULES: Judge -- a judge can take judicial notice of anything that's in the

clerk file whether it's in his file or not.

PROFESSOR EDGAR: Yes. The trial judge can, but the appellate court can't in reviewing that judgment.

MR. MCMAINS: The point is he has to do it in order for it to appear of record so that the appellate court can see that it was done.

MR. RAGLAND: Well, obviously, if you're going to have that issue in the case, if the plaintiff's lawyer hasn't got enough sense to go get a certified copy of it and put it in the record, he ought to have his license lifted.

CHAIRMAN SOULES: Or at least he can get it in the appellate record.

MR. TINDALL: That's right.

PROFESSOR EDGAR: All I'm saying is that you can't rely upon the judicial notice provision of the trial judge in the appellate court. You've got to do something else.

CHAIRMAN SOULES: Unless you put in the transcript.

PROFESSOR EDGAR: That's all I'm trying to say.

CHAIRMAN SOULES: Okay. You're right.

PROFESSOR EDGAR: You can't just say

judicial notice will take care of it, because it won't.

CHAIRMAN SOULES: That's right.

PROFESSOR DORSANEO: I don't think we need to add anything. I think lawyers can figure out what to do.

MR. TINDALL: One thing for our minutes. Luke, on 103 --

CHAIRMAN SOULES: Okay. Harry, you have the floor.

MR. TINDALL: Since lunch, I think we did -- for housekeeping, we are going to take out of 103 by -- well, no -- we were to leave 103 unchanged as we voted on before lunch. We'll still leave in "service by registered or certified mail."

CHAIRMAN SOULES: That's right.

MR. TINDALL: That stays in. I'm sorry.

PROFESSOR EDGAR: But that now reads "citation and other notices," though --

MR. TINDALL: That's correct.

PROFESSOR EDGAR: -- rather than "citation and process."

MR. TINDALL: That's right.

CHAIRMAN SOULES: It does.

MR. TINDALL: And the other change on 106 is "restricted delivery." That completes my report.

CHAIRMAN SOULES: Thank you, Harry. A job well done. Bill, did you have something now on --

PROFESSOR DORSANEO: Well, I have this. It will probably go pretty quickly. Rule 182. And I've passed --

CHAIRMAN SOULES: Does anybody need 182 that doesn't have a rule book?

PROFESSOR DORSANEO: Well, I made Xerox copies of these three pieces of rule book, and they were handed out earlier, I believe. And there are more of them here if you didn't -- anybody else need these? All right.

The issue is a simple one, and it's whether Rule 182 of the Texas Rules of Civil Procedure "Testimony of Adverse Parties in Civil Suits" should be repealed because of coverage of the same matter in a different way in Rule 607 and 610 of the Texas Rules of Evidence.

Now, Rule 607 very cryptically did away with the voucher rule that existed before. You now can

attack the credibility of any witness even if you've called that witness. All right. That makes Rule 182 unnecessary to the extent that Rule 182 says that you're not bound by the testimony of an adverse party or other person covered by Rule 182.

Rule 610 of the Texas Rules of Evidence talks about the nature of examination. It is now going to become Rule 611, according to Justice Wallace. Well, Justice Wallace showed me a change by amendment effective January 1, 1988, basically saying the same with a slight modification to paragraph C. "Leading questions should not be used on the direct examination of a witness," and then it goes on in this amended version, "except as may be necessary to develop the testimony of the witness."

All right. The long and short of it is that 607 and 610 do everything that's done in 182 and do it better, except for this language at the very end of Rule 182 that's underlined on this page that I've handed out. 610 does not go on to say, all right, after saying, "When a party calls a hostile witness, an adverse party" -- and I'm reading from 610(c) which will become 611. "When

a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

It doesn't go on to say, "but opposing counsel shall not be permitted to ask such witness leading questions or in any manner lead such witness." Okay. It doesn't go on to say that. Some members of the Evidence Subcommittee, chaired by Professor Blakely, thought that they liked that language and wanted Rule 182 retained because it included it. Other members thought it was kind of unnecessary. I basically agree with the other members, don't think that it's necessary, and don't frankly think that it's a good idea to have a blanket prohibition against using leading questions on cross examination of your own party who was called as an adverse party by the opponent. I just think it's unnecessary.

I think Rule 182 is unnecessary from top to bottom. It has been since the Texas Rules of Evidence were promulgated. I think it's inconsistent. We should throw it out, and I so move.

MR. BRANSON: Well, what if we write the Evidence Committee and suggest that they add

that language to 610?

PROFESSOR DORSANEO: All right. Let's stop there. I don't think that language is a good idea insofar as it's a blanket prohibition.

MR. BRANSON: Well, I disagree with you. If I call an adverse doctor to the stand who's a party, I don't expect his attorney to be able to lead him when he takes him on direct.

PROFESSOR DORSANEO: All right. I don't think there's anything that -- I see what you're saying, but let's look at 6 -- see if that's really a problem in terms of --

PROFESSOR EDGAR: It could be --

MR. MCMAINS: How does it define cross examination, is the critical question?

MR. BECK: Yeah, I mean it could be controlled. Bill, why don't we --

PROFESSOR EDGAR: It could be controlled. Frank, it could be controlled by the Court under Rule 610(a) if the Court wanted to prohibit the doctor's attorney from asking him leading questions on quote, "cross examination," unquote. But, on the other hand, the Court in its discretion may decide to allow it, too.

MR. MCMAINS: But it's not cross

examination.

PROFESSOR EDGAR: Well, I put it in quotes.

MR. BRANSON: It's direct of an adverse witness.

MR. MCMAINS: What I'm saying is I don't have any problem with not having a blanket prohibition against leading questions. There shouldn't be anymore -- if we're expanding the discretion of the trial court to permit leading questions, you know, even when you're on direct examination, as I understand this rule to do -- then I don't have a problem keeping that, but you should define out of cross examination in an automatic assumption of the right to ask leading questions because this is not cross examination.

PROFESSOR DORSANEO: Well, the Rule 611(c) is proposed in 610(c) as is currently in existence -- this may not be good enough for you. It says, "ordinarily leading questions should be permitted on cross examination." It doesn't --

MR. MCMAINS: I know, but is there a definition of "cross examination"?

PROFESSOR DORSANEO: Well, probably you'd find cross examination defined in the -- in

various ways in the cases. I don't think there's a definition in the rule book.

MR. BRANSON: Under what circumstances would you not permit leading questions on cross examination? I don't know why -- I'm on that evidence committee. I must have missed that meeting. I don't know why we put "ordinarily" in there.

MR. TINDALL: This is straight from the federal rule, Frank.

PROFESSOR DORSANEO: I think it probably contemplates this situation. What else could it be? Your doctor.

MR. BRANSON: You could have a hostile trial judge that just didn't want cross examination.

PROFESSOR DORSANEO: Maybe a child.

MR. BRANSON: Yeah. I can see that. Maybe an infirmed witness.

MR. MCMAINS: A dummy.

MR. BRANSON: I just would hate to do anything to encourage the trial courts to allow a party called as an adverse witness to be led by their counsel when they took over what is truly direct examination.

MR. TINDALL: Frank, I agree with you if it's a party. I just concluded four days in a trial, though, where the other side called my client's accountant and ragged him around for a day. It's very hard when you've got your case topsy-turvy to then be restricted in trying to move along in the trial to not asking some leading questions to clarify a lot of tough cross examination. If you have --

MR. BRANSON: Leading questions, really, have always been discretionary, depending on the witness, on the case law. At least that's the way I've interpreted the case law. If the trial judge really felt the witness needed to be led to make his testimony comprehensible, he had that discretion with the rule.

MR. MCMAINS: I, frankly, am not aware, and Bill may have looked at it before, of any case that's ever reversed on either the allowance or disallowance.

PROFESSOR DORSANEO: The ones that -- the thing that would satisfy Frank's problem would be to take that underlined language from Rule 182, "but opposing counsel shall not be permitted," to modify it with an "ordinarily" or something like

that, and suggest that that be considered for inclusion in this Rule 611(c) that's going to be changed anyway.

JUSTICE WALLACE: It was changed Thursday afternoon by order of the Court. We followed exactly the recommendations of the Rules of Evidence committee and this committee. I double-checked with Newell Blakely word for word, taking what Luke had sent me of this committee's action, and the Court approved it Thursday. And we didn't operate on 182. That was strictly on the 610 and 611.

PROFESSOR DORSANEO: And I do think --

MR. BRANSON: Tell me again, Your Honor, what you added to 610 and 611.

PROFESSOR DORSANEO: I'll show you, Frank.

JUSTICE WALLACE: It did not get into cross examination, adverse witness, leading questions in order to develop a witness's testimony.

PROFESSOR DORSANEO: I think the worst thing we could have is to retain this Rule 182, or even retain an odd sentence from it that is supplementary to what's talked about principally

in the Rules of Evidence rule book at Rule 610. I don't think the problem is a large enough problem to have that kind of a crazy quilt rule book.

CHAIRMAN SOULES: Isn't it pretty fundamentally understood that when you're examining your own party, you're not on cross examination?

MR. BRANSON: It is, but it's been that way because it's been in the rules.

CHAIRMAN SOULES: Well, I don't see any rule that says that, Frank.

MR. BRANSON: Well, isn't that basically what the last sentence of 182 says?

CHAIRMAN SOULES: It doesn't say a thing about cross examination or direct.

MR. BRANSON: It says you can't lead him. About the only advantage is being on direct.

PROFESSOR EDGAR: How about -- Judge Wallace made reference to a change in Rule 611(c) and I --

PROFESSOR DORSANEO: That's 610.

JUSTICE WALLACE: 610(c). We put in a 610 and moved 610, 11 and 12 on up to the next numbers. So, they now correspond with the federal

rules.

PROFESSOR EDGAR: I see. May I see, then, what the change -- I've forgotten it.

MR. BECK: Bill, there's more in 182 than just that reference to leading questions. Did you check to make sure that all the other items in 182 are somewhere in the Rules of Evidence --

PROFESSOR DORSANEO: Yes.

MR. BECK: -- like calling a managing officer or director of a corporation?

MR. MCMAINS: It's actually much more liberal.

PROFESSOR DORSANEO: It's much more liberal than 182.

MR. MCMAINS: It says anybody identified or possibly --

MR. BECK: I just wanted to make sure.

PROFESSOR DORSANEO: I think the professors are in the agreement that the only thing that the Rules of Evidence don't deal with expressly is dealt with in Rule 182 is that "but" language.

CHAIRMAN SOULES: Any new discussion? Or let's see, did anyone second Bill's motion to

repeal 182?

MR. BRANSON: I would like to offer an amendment that we write the Rules of Evidence Committee and tell them that we recognize the conflict between 610 and 182, and tell them that we would like to repeal 182 but need to add the last sentence, or the last phrase picking up with "but" on Rule 182.

CHAIRMAN SOULES: Does anybody second Bill's motion, first?

MR. TINDALL: I do.

CHAIRMAN SOULES: Okay. Bill moved and Harry seconded it. The amendment here is that we add a letter to it. And anything new?

MR. MCMAINS: Well, I was going to suggest a different amendment. And that was a commentary, when we repeal it, saying the subject is covered in the Rules of Evidence but that it doesn't change the fact that, ordinarily, examining your own witness is not cross examination.

MR. BRANSON: That's fine. I'll accept that.

MR. MCMAINS: I mean, if you just put it in a commentary that --

MR. TINDALL: Yeah. That's a -- the federal commentary on that very point directs the discretion of the judge to stop that. It's real clear. I don't -- if you read the federal rule --

MR. MCMAINS: Doesn't it accomplish it that way? That's a patchwork fix until the next amendment.

PROFESSOR DORSANEO: Commentary to what is no longer Rule 182.

MR. MCMAINS: That's right.

MR. BRANSON: It, procedurely -- in going through the rules of evidence --

JUSTICE WALLACE: Nothing says you can't.

MR. TINDALL: This is stronger, though.

MR. BECK: We're repealing a rule and at the same time referring this to the committee on the Rules of Evidence?

MR. BRANSON: No. What we were going to do was write to the Rules of Evidence Committee and say subject to them making that correction we'll repeal the rule.

PROFESSOR DORSANEO: But the Supreme Court has just dealt with these rules, and they're

not going to want to go back and deal with it all over again.

MR. BRANSON: I agree with Rusty, procedurely adding that commentary to the repealed rule would be easier than going through the Rules of Evidence Committee.

MR. TINDALL: Why don't we just repeal it? Anyone who really gets to this serious point can very readily look at the commentary to the Federal Rule 611, and it's very clear that the trial judge has discretion to deny that type of leading questioning of your own witness or party.

MR. MCMAINS: Let me suggest this --

MR. BRANSON: Except if you inevitably get out in someplace like Tulia, Texas and be trying to convince some trial judge that the rules really haven't changed, you will need something to point to.

MR. MCMAINS: It may satisfy some of this problem. You have passed the rule. You really don't -- the Court really doesn't pass the commentaries, right?

JUSTICE WALLACE: Well, we put commentaries on a couple of rules to verify it. One, on this particular rule, we already put a

commentary there.

MR. MCMAINS: What I'm getting at is, does it require the same procedure? Can we just fix the commentary to the rule?

JUSTICE WALLACE: I strongly suspect that we could.

MR. MCMAINS: And just put the same basic caveat that is in the federal rule that's --

PROFESSOR EDGAR: In rule 610.

MR. MCMAINS: Yes, where it belongs. But just in the commentary, just to say ordinarily --

JUSTICE WALLACE: I think that could be done.

MR. MCMAINS: I mean, it would seem to me that does it. You don't have to promulgate the commentaries. So, we can fix the commentary before it has to go to the printer and it leaves it all in one place. And then with the repeal you can just say, "see amended rule of evidence" -- you know, this -- it has been replaced by the rule.

JUSTICE WALLACE: Let me make sure that's what you want in, if this will do it. "This rule conforms with tradition in making the

use of leading questions on cross examination a matter of right. Purpose of the qualification, ordinarily, is to furnish a basis for denying the use of leading questions when the cross examination is cross examination in form only and not in fact as, for example, with cross examination of a party by his own counsel after being called by the opponent or of an insured defendant who proves to be friendly with the plaintiff."

PROFESSOR DORSANEO: Bull's-eye.

MR. TINDALL: That's a bull's-eye.

MR. MCMAINS: That's it. That's fine.

MR. BRANSON: Now, wait a minute. An insured defendant that proves to be friendly with the plaintiff, I'm not sure I like that.

CHAIRMAN SOULES: Okay. We would, then, resolve that the language that Justice Wallace just read be appended as a comment to the newly promulgated Rule of Evidence 611. And we ask for the Court to do that, and if it chooses to do so, we urge them to do it.

And with that request, then, to the Court for that action, those in favor of the repeal of Rule

182, please show by hands. Opposed? Okay. Let me see the count of hands again because there is a -- nine. And against? One. Okay.

PROFESSOR EDGAR: Now, have we also tied into the repeal of Rule 182 a relationship over to Rule 611 that the reason we're repealing it is because it's now covered by Rule 611?

CHAIRMAN SOULES: Comment right.

PROFESSOR DORSANEO: It's covered really by 607 and 611.

PROFESSOR EDGAR: Whatever. Whatever it is. But we're going to tie that repeal in to refer the reader to those rules.

CHAIRMAN SOULES: Say -- which numbers again? 607 and 611?

PROFESSOR DORSANEO: Uh-huh. Unless 607 moved up to be 608.

JUSTICE WALLACE: No. We had left Federal Rule 610 in the Rules of Evidence having to do with the religion of witness's power. We put that back in the same place you find it in Rule 610 of the federal rules. Therefore, we need to move 11, 12 and 13, I believe, forward so that now the numbers in our Rules of Evidence will correspond with the rules -- numbers in the

Federal Rules of Evidence.

CHAIRMAN SOULES: Okay. Hadley, are you ready to do 205? Does that complete your work, Bill?

PROFESSOR DORSANEO: Yes, sir.

CHAIRMAN SOULES: Thank you a lot.

PROFESSOR DORSANEO: Thank you.

CHAIRMAN SOULES: I appreciate it.

PROFESSOR EDGAR: You mean 209?

CHAIRMAN SOULES: 205 to 209?

PROFESSOR EDGAR: I didn't do 205.

CHAIRMAN SOULES: 209. Page 64.

MR. TINDALL: Rule 209?

CHAIRMAN SOULES: Page 64.

PROFESSOR EDGAR: I'm sorry. Yes, it is. It is -- what I did -- you asked me to specifically work on Rule 209, but there was the housekeeping chores that needed to be implemented with respect to 205 and 208. So, the only -- the first thing we need to look at, I think, is Rule 209, which appears on page 69 of your agenda book. And if you recall, this was a subject of several prior meetings concerning the concern that many clerks had that -- well, I think that Sam Sparks suggested -- El Paso Sam -- that there

wasn't any policy. And some clerks were keeping things ad infinitum and other clerks were throwing them away. And this was an effort to try and standardize the procedure.

So, what we had approved at our last meeting was Rule 209. The problem was the order -- the Supreme Court order which appears on page 70 and how to solve that problem. And based upon the discussion and recommendations at the prior meeting, I have tried to comply with those in a redraft of the order which appears on page 70.

One thing we did in the second paragraph, Judge Pope pointed out we needed to think about citations by publication, and that motions for new trial could be filed within two years after judgment. So, we wanted to retain those records, and I have attempted to include those as well.

MR. MCMAINS: Do you want to say judgment "rendered" or "signed" there, Hadley? I mean, doesn't that motion for new trial rule relate to signing?

PROFESSOR EDGAR: Just a minute. I think if we look -- let's look at Rule 329. I think it speaks in terms of rendition.

MR. MCMAINS: Okay.

PROFESSOR EDGAR: Just a minute. Let's take a look at Rule 329. Yes. See, Rule 329, the citation by application rule, talks about judgments rendered, not judgments signed. That's why I used that term.

MR. MCMAINS: Of course, we have another rule, though, that says -- 306 is where our rule says it's the date it's signed.

CHAIRMAN SOULES: 329 should be signed.

PROFESSOR EDGAR: Well, I know, but I'm saying that's why I used the word "rendered."

MR. MCMAINS: I mean, if you're trying to make this an admininstrative rule it would seem to me that we ought to have -- it ought to be some way that there would be some ease of administration, rather than trying to figure out whether it is --

PROFESSOR EDGAR: I apologize to you. Rule 329 subparagraph (b) -- no (a) talks about two years after the judgment is signed. So, I just misread that. You're right. It should be "signed."

Now, the second provision, though, relates to the entry of judgment rather than the signing of

judgment. Okay.

CHAIRMAN SOULES: Where was that, Hadley?

PROFESSOR EDGAR: Still in the second paragraph on page 70.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: But here we're talking about entry of the date judgment was entered, rather than the date judgment was signed. Now, do you want to make that entry on two years after judgment on service by publication, as well? In other words, do we want these times of disposition to run from the date of entry of judgment as distinguished from the signing of judgment? And that's just a question for the committee.

CHAIRMAN SOULES: Why do we even need the words "rendition of"? "Order of dismissal or final judgment."

PROFESSOR EDGAR: Pardon?

CHAIRMAN SOULES: Do we need the words "rendition of"?

PROFESSOR EDGAR: Well, no. Before we get to that, though, I think that's another issue. The question is --

CHAIRMAN SOULES: I apologize.

PROFESSOR EDGAR: This paragraph is talking about which orders will be subject to destruction or disposition by the clerk.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: Now, should that run from two years after the judgment was entered or 180 days after other types of judgments were entered, as distinguished from the time period commencing upon the date the judgment was signed?

And my thought -- I was trying to use the later date because, theoretically, you have the rendition, signing and then entry. Entry occurs last. And since we're talking about "disposition of records by the clerk," if we gave them the authority to dispose of those after the last date, then that would be more than the time allowed for appeal by motion -- for the disposition on the appeal with respect to signing.

CHAIRMAN SOULES: Do we know what date the clerk enters the judgment in its minutes? Is that something made?

PROFESSOR EDGAR: Well, the clerk should know. The clerk will know.

CHAIRMAN SOULES: Is a record made of

that, what day he actually --

PROFESSOR EDGAR: Yes. It's a date.

CHAIRMAN SOULES: What?

PROFESSOR EDGAR: Judgment entered and there's a date. There should be.

CHAIRMAN SOULES: I just I haven't looked for that.

MR. MCMAINS: There's an entry on the minutes.

PROFESSOR DORSANEO: I think "entry" would be fine. "Signed" would be fine in both places if you made it --

PROFESSOR EDGAR: Presuming they occurred on the same day. But, you see, theoretically, entry can occur subsequent to signing.

PROFESSOR DORSANEO: Uh-huh.

PROFESSOR EDGAR: And it does, in fact, but, I mean, it could be a day or two later.

PROFESSOR DORSANEO: Well --

PROFESSOR EDGAR: And I was just trying to give the outside period of time rather than the inside period of time. And that's why I used the term "entry."

PROFESSOR DORSANEO: Well, "entered" would be fine. I wonder really -- this 180 days, I presume, has to do with writ of error appeal time frame.

PROFESSOR EDGAR: And trying to tie it in with giving outside times under Rule 329(b).

PROFESSOR DORSANEO: And the problem I guess I have is -- we should probably have talked about this before -- is that six months could be more than a hundred -- could be more than 180 days during certain periods of the year.

CHAIRMAN SOULES: You start counting 31 January back, you're going to be more than -- yes.

PROFESSOR DORSANEO: So, I would suggest we could use either "signed" or "entered," but change it to 190 days and that would require crossing out the 8 in the parenthetical rather than the 9 in the parenthetical, which says --

PROFESSOR EDGAR: I didn't see that typo. Sorry about that. All right. You want to make it, then, to run from date of signing?

PROFESSOR DORSANEO: Yeah, but make it 190 days -- or 185.

PROFESSOR EDGAR: Or what about two

years, though?

MR. MCMAINS: Well, but we're really referring to a motion for new trial having been filed within the times prescribed by the rules and those rules run from signing.

PROFESSOR DORSANEO: Those rules run from signing, yeah. I would prefer "signing" because I don't guess lawyers are going to be involved. This only has to do with the clerks.

PROFESSOR EDGAR: That's right.

PROFESSOR DORSANEO: So, I would just prefer "signing."

MR. MCMAINS: You are if you're looking for a deposition.

PROFESSOR DORSANEO: Well, if they've thrown it away, you're just too late.

PROFESSOR EDGAR: Okay. You want to say "signing" and then "190 days"?

PROFESSOR DORSANEO: If there is any magic of king, it is this to the writ of error timetable.

PROFESSOR EDGAR: Well, that's why I did it.

PROFESSOR DORSANEO: That would make me happy, if that's important. I don't guess it

is.

CHAIRMAN SOULES: How are we going to rewrite that second alternative? "In all other cases in which judgment has been signed."

PROFESSOR EDGAR: "By the Court."

CHAIRMAN SOULES: I guess just "signed" is enough.

PROFESSOR EDGAR: "Signed by the Court."

CHAIRMAN SOULES: Just "signed for."

PROFESSOR EDGAR: "For 180 days" -- "190 days."

JUSTICE WALLACE: Would there not be any need to keep these around until he can talk to him for bill of review is passed, writ of review?

PROFESSOR EDGAR: Well, the only problem with that is that, theoretically, a bill of review could be filed at any time.

JUSTICE WALLACE: Well, two years --

PROFESSOR DORSANEO: Four.

MR. MCMAINS: Governed by the four-year statute.

PROFESSOR DORSANEO: Governed by Civil Practice of Remedies Code 16051, I think. Unless it's a probate case. If we're going to keep it

around that long in order to protect those few people, we're really not accomplishing the old objective.

PROFESSOR EDGAR: Well, it seems to me, then, that isn't that the -- let's think through that a minute. We have a default judgment, and if the -- wouldn't the plaintiff have an interest in wanting to keep those papers available, or would he have an interest in wanting them destroyed?

MR. RAGLAND: What papers? There's not going to be a deposition in a default judgment.

PROFESSOR DORSANEO: Not very likely.

PROFESSOR EDGAR: Well, there could be. Judge Pope pointed out that you might have a situation in which you have some heirs -- and this is a problem he raised that might not have been properly cited -- or were not given notice, and other people had. So, you might have actually had -- you might have actually had some assemblance of trial as to some people but not as to others. And he suggested that we might have more than just the bare minimum papers on file in some cases.

JUSTICE WALLACE: And there are some

cases where you would want the deposition of a witness you couldn't get there in person that would make your case.

PROFESSOR EDGAR: Yes.

PROFESSOR DORSANEO: And now under the proposed rules for use of depositions -- useable.

JUSTICE WALLACE: The question is, on a bill of review you've got to show there is no negligence on your part, and not being there that you had a meritorious defense and a couple others. Is there anything connected with that that would show up in that deposition? That would be the question.

MR. MCMAINS: Well, the problem is, though, in the bill of review you have to try the merits as well as the bill of review points.

JUSTICE WALLACE: Yeah.

MR. MCMAINS: And if you are in a situation where the -- for instance, you don't get notice, don't know that there is a judgment out there, and the clerk hasn't complied with their obligations, there are cases holding that the bill of review is an appropriate remedy to treat that as misconduct on the part of the court personnel.

PROFESSOR EDGAR: Official misconduct.

MR. MCMAINS: And, therefore, something that you can use a bill of review to set aside.

PROFESSOR EDGAR: But that won't appear in any of the papers, though, that this is designed to eliminate from the clerk's file.

MR. MCMAINS: No, you're talking about eliminating depositions. If you try a bill of review -- I mean, if a case is -- you know, if a case gets set for trial or determined on a sanctions order or something else, if you don't get notice of the judgment, you -- when you finally do get notice of the judgment, you may be outside the six-month period, but you still have a writ by bill of review. But when you go try the bill of review, you have to try both issues. One, as to whether or not you're entitled to reveal setting aside the judgment; and, two, the merits.

And if you've destroyed all the depositions -- I'm not just talking about a default. It could happen any number of ways. Dismissal for want of prosecution is the most likely mess-up in terms of that.

PROFESSOR DORSANEO: But I'd say if we go to the bill of review and wait that long, then

really you're saying that nothing gets destroyed until four years after the judgment is signed --

MR. MCMAINS: I understand the problem. I'm not suggesting that --

PROFESSOR DORSANEO: -- in every case. And I -- this bill of review is a new proceeding. How likely is it going to be that that deposition that was on file, that was taken by the original plaintiff, would be useful in the later bill of review case?

CHAIRMAN SOULES: Could be.

PROFESSOR DORSANEO: Could be, but --

MR. MCMAINS: Well, it would be. I mean, you've got to try the merits.

PROFESSOR DORSANEO: Well, yes.

MR. MCMAINS: In the bill of review you've got to show that there was a merits issue that -- you have, in fact, have to show in order to even get to the point of trying the merits make prima facie showing that you have a merits issue.

PROFESSOR DORSANEO: But, look at it this way: If it was a default case, all right -- as you said, there probably wasn't any deposition. If it was not a default case, then probably you have your own copy at your own

lawyer's office of the deposition and you don't need the deposition that was on file. All right. And I can see that there will be cases when you don't have your own copy and you can't get a copy anywhere else and it's just gone, and you're just in the soup. But that's the way the world is now.

PROFESSOR EDGAR: But you're also assuming, though, that you could not obtain that evidence independently at this time. I mean, you could develop that evidence on the case on the merits. So you're narrowing further, it seems to me, the likelihood that the destruction of the deposition is going to be critical. Now, that's all I'm saying. It may still be critical, but it's going to be even less so.

PROFESSOR DORSANEO: I think it's too small a problem to make the clerks wait four years from the date of judgment to start destroying things or sending out notices.

MR. MCMAINS: Okay.

CHAIRMAN SOULES: And he's got to give notice to all attorneys of record. So, if you've got a case --

MR. MCMAINS: I suppose if they send notice they're going to destroy your depositions,

you'd better figure out something happened to them.

CHAIRMAN SOULES: Maybe you better go over and get them.

MR. MCMAINS: No, I mean, if you didn't know you had a judgment against you or that --

CHAIRMAN SOULES: Well, the party that's going to want to use that deposition, isn't it most likely be the party who's wanting to protect the judgment?

PROFESSOR EDGAR: Well, that's what I was trying to think through awhile ago. It may not be. Maybe it's the party who is trying to attack the judgment. But I think the risk is -- if this is really a serious clerical problem, and from what I've understood at these meetings it is in some counties, then I think this is a risk worth taking.

CHAIRMAN SOULES: Okay. Anything new?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: The time, even at 190 days, under Rule 106(a) -- 306(a), where we come

down is that you've got to -- actually, if somebody didn't get notice of the judgment within 20 days, then the times don't start to run until they get notice, not to exceed 90 days.

So, in reality, you have to start the time for signing a judgment 90 days down the road and then compute your plenary jurisdiction period there. That plenary jurisdiction period is at least a 105 days from that day.

CHAIRMAN SOULES: Why don't we make it one year?

PROFESSOR DORSANEO: Sold.

CHAIRMAN SOULES: Any opposition to that? Okay. 180, now 190. It's going to be one year there. I thought you-all may have created a new bar exam question, "What period in the rules is 190 days?"

MR. MCMAINS: 195.

CHAIRMAN SOULES: 195. Now, it's one year. All right. Anything new on this? Those in favor, then, of 209 on the proposed order, please show by hands. Opposed? That's unanimous. And then we have, in light of that, some housekeeping to do, don't we, Hadley, back at 205?

PROFESSOR EDGAR: Yes. All I did was

205 and 6 and 7 -- 6, 7 and 8. Let's see, 205 -- yes, 206 is at the bottom of page 65. It's simply to try and make clear that the document that we always refer to as a deposition is really a deposition transcript, that a deposition is really the act of taking a deposition. And that's all I've done here is try and change those terms.

CHAIRMAN SOULES: And it's about time.

PROFESSOR DORSANEO: Mr. Chairman.

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: I have a question. In this -- Professor, do you have this blue thing?

PROFESSOR EDGAR: I'm looking at the agenda. I've got a blue one. What page is it?

PROFESSOR DORSANEO: On page --

CHAIRMAN SOULES: They're not numbered.

PROFESSOR DORSANEO: There is a Rule 205 in here.

PROFESSOR EDGAR: Rule 205. I don't know. I haven't looked at it. I did. I called in a change or two maybe. I don't know. I've got it right here. I didn't -- I did not make the changes that appear in this book, Bill. I didn't

make these changes.

PROFESSOR DORSANEO: Well, that's all I was just pointing out.

PROFESSOR EDGAR: I don't know. I haven't seen this. I was just looking at the agenda book. I don't know who made these changes. I'm not familiar with them.

CHAIRMAN SOULES: It may have been Sam Sparks.

MR. MCMAINS: Yeah, I think it was.

PROFESSOR EDGAR: I don't know.

PROFESSOR DORSANEO: Well, this says here it was unanimously approved by the committee.

CHAIRMAN SOULES: This is one earlier this year.

PROFESSOR DORSANEO: Yeah. So, we're going to have to do an overlay.

PROFESSOR EDGAR: Right.

CHAIRMAN SOULES: Well, see, this was -- part of 205 change was to tell us what a transcript was. The original deposition.

MR. MCMAINS: That's in there.

CHAIRMAN SOULES: Pardon me?

MR. MCMAINS: The deposition transcript changes are already in the one that's

in our book.

PROFESSOR EDGAR: No, that's not right. Look at Rule 206, for example. It's in 205, but it's not in 206.

MR. MCMAINS: Yeah, but I was just talking about 5.

PROFESSOR EDGAR: I was just looking at all of them here. And, also, Rule 206, you need to incorporate those changes with respect to the paragraphs numbers 2, 3, 4 and 5. See, he says "no change" on his. Look at 206, Luke. See, he says "no change."

CHAIRMAN SOULES: All right.

PROFESSOR EDGAR: But changes do need to be made to make these housekeeping changes.

CHAIRMAN SOULES: Okay. Yeah, sure do. Okay.

PROFESSOR EDGAR: And also -- 207 also needs to take those housekeeping changes into consideration as does -- and then 209 is a new rule.

I don't know why -- if we have already approved the material that we have in this book, then I don't know why the committee can't just go ahead and approve these with the instructions that

the housekeeping changes reflected in our agenda book be made, rather than sitting here spending all the time to go through it, if that meets the committee's approval.

CHAIRMAN SOULES: All right. Is that a motion?

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: Second?

MR. MCMAINS: Second. May I make a comment first?

CHAIRMAN SOULES: Yes, sir. Rusty.

MR. MCMAINS: His Rule 205 in his agenda is different in terms of it deals with exhibits. That's not in the 205 in the book.

PROFESSOR DORSANEO: Look at the bottom of the page.

PROFESSOR EDGAR: My suggestion -- you see --

PROFESSOR DORSANEO: That's 206.

PROFESSOR EDGAR: -- this material. Rusty, this material right here has substantive changes in it which the committee has already approved.

MR. MCMAINS: Yes, I agree.

PROFESSOR EDGAR: I was playing with

another deck of cards and I was making simply housekeeping changes to include transcripts and things like that. And since we've already approved this, I'm just suggesting that we go ahead and allow --

MR. MCMAINS: I'm not disagreeing with that. What I'm saying is that 205 in the agenda, though, has an exhibit section that's not --

PROFESSOR DORSANEO: No, it doesn't.

MR. MCMAINS: Where is it?

PROFESSOR DORSANEO: 205 in the agenda ends on page 65.

MR. MCMAINS: That's right. That is 206.

PROFESSOR EDGAR: Yeah, that's 206. It's at the bottom of the page.

MR. MCMAINS: Put it this way then: Then those changes are not in it, you're right. So, we're not really dealing with 205. But the exhibits portion of 206 in the agenda are not in the 206 that's in the book.

PROFESSOR EDGAR: That's right. You see, he said there was not -- when he prepared his 206, he said there wasn't any change.

MR. MCMAINS: Okay.

PROFESSOR EDGAR: But there is a change because we're adding "transcript."

PROFESSOR DORSANEO: There's a change for 2 and 3 and 4 and 5 as well as 1 of 206.

PROFESSOR EDGAR: That's correct.

CHAIRMAN SOULES: We'll make those changes. The editing committee will make those changes.

PROFESSOR DORSANEO: You move over into the light down there.

CHAIRMAN SOULES: Okay. Is the consensus, then, that we make these changes and the updated version of the completed Rules 205 through 209, and then as the local adjustments are made, that they be recommended to the Supreme Court, these rules, for promulgation.

PROFESSOR EDGAR: I move.

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Bill Dorsaneo, second. All in favor, show by hands. Opposed? That will be unanimous. Thank you, Hadley.

PROFESSOR EDGAR: One thing. Look at your Rule 207, also, Luke.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: Yeah, right there,

Rule 207. It indicates that paragraph No. 3 -- flip the page, no change. There is a change.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: Page 68 of the agenda book.

CHAIRMAN SOULES: Thank you.

PROFESSOR DORSANEO: Since you mentioned 207, why did this committee -- oh, never mind. Strike that. I'm misreading. Never mind.

CHAIRMAN SOULES: Hadley, does that wrap up your report then?

PROFESSOR EDGAR: Yes. Let me just double-check one more thing.

CHAIRMAN SOULES: Sure.

PROFESSOR EDGAR: Look on your agenda -- I mean, on your final book there on 208. There will be no change in 208, paragraph 2, 3 and 4, but there will be in paragraph 5 as it appears in the agenda book on page 68 and 69.

CHAIRMAN SOULES: That helps a bunch.

PROFESSOR EDGAR: Okay.

CHAIRMAN SOULES: Thank you, Hadley, very much. Broadus, on page 2, then, we've got some justice court rules. Is he here? He skipped out.

MR. MORRIS: Do you want me to go out and see if I can find him?

CHAIRMAN SOULES: Lefty, you might let him know that --

MR. BRANSON: Pat Beard said to tell you that he had an emergency arise. He said some emergency came up. He had to leave.

CHAIRMAN SOULES: Does anyone have something short we can --

PROFESSOR EDGAR: Do you want to take up those housekeeping chores back there in the stuff that you sent me on Kronzer?

CHAIRMAN SOULES: Yes, we could do that. Let's see. Well, why don't we just go ahead and take these rules, then, because we've got to do them. We'll just start on page 211 and then we'll go to those, Hadley.

PROFESSOR EDGAR: Okay. Page 211? I can't find anything in this book anymore.

CHAIRMAN SOULES: It should be in numerical order. I can't either.

PROFESSOR WALKER: Nobody else can either.

PROFESSOR EDGAR: We go from the district court rules to ancillary proceedings, and

then we jump over to Rules of Evidence and then we go to the Rules of Appellate Procedure, and maybe there's some assemblance in all that, but I can't figure it out yet.

PROFESSOR WALKER: No order at all.

(Off the record
(discussion ensued.

CHAIRMAN SOULES: On Page 210 of your purple book.

PROFESSOR EDGAR: 211.

CHAIRMAN SOULES: 211, okay.

PROFESSOR EDGAR: See, it's now before Rule 5 -- between 527 and 528, and it really belongs right before 24 and 25.

CHAIRMAN SOULES: Any objection to that? That stands as done. Next, I think we ought to just strike "supported by affidavit" and not put in compliance with Rule 568 because Rule 568 doesn't apply to every case.

PROFESSOR DORSANEO: We'll strike Rule 568 while we're at it.

CHAIRMAN SOULES: In other words, if they're trying to set aside judgment for other

than -- other than based on legal authorities, new evidence or something like that, it ought to be supported by affidavit. I guess that's what the -- if you're going to say there's new evidence of something other than a legal argument, that you would support it by affidavit.

PROFESSOR EDGAR: Would there ever be a ground other than the verdict or judgment is contrary to the law of the evidence? Could you have any type of contrary to the facts? That's the evidence.

CHAIRMAN SOULES: That's just to set aside judgment. He might also grant a motion for new trial. It doesn't say that he does anything but set aside his judgment.

PROFESSOR EDGAR: Maybe this is default judgment. We're talking here about judgment by default, though, see, under 566. But yet Section 5 is talking about new trials.

CHAIRMAN SOULES: At any rate, it looks to me like what their complaint is, is that not every 566 motion needs to be sworn. Only in circumstances described by 568 do those kinds of motions have to be sworn. But 566, the way it's written, says they all have to be supported by

affidavit. So, what they're trying to do is work it out so that if it's just a plain 566 motion, you don't have to have an affidavit unless it's within the ambient of 568.

PROFESSOR EDGAR: Well, I'm not sure that's the comment, though. It seems to me that what they're saying is that they just want -- not that it has to be -- I mean, I don't read this amendment to require that it be sworn, but rather simply refers to the basis for setting aside the default judgment. So, I really don't know. Do you see what I'm saying, Luke?

CHAIRMAN SOULES: Well, 568 is a narrow -- I mean, it's a small universe. It's not the whole universe. 566 is a whole universe. Under 566 you've got to have it supported by affidavit in the whole universe. And I think they're trying to eliminate that, and say only the small part of the universe is other than -- you know, 568 shouldn't have an affidavit.

PROFESSOR EDGAR: That's one construction.

CHAIRMAN SOULES: Okay. Now, I didn't follow yours. I apologize.

PROFESSOR EDGAR: Well, I think maybe

this is susceptible of being interpreted to mean that -- not that you have to -- not that the motion has to be sworn to, but that it has to be based upon the fact that the verdict or judgment is contrary to the law of the evidence or the Court erred in some matter of law. I think it's capable of that construction. When I read the comment, that's kind of what I thought they were driving at.

PROFESSOR DORSANEO: Why don't we just take "supported by affidavit" out of Rule 566 and don't put anything in 566 to replace it. This 568 matter probably is going to cover equitable motions for new trial, cratic motions, because, as you point out, what else could it be about?

PROFESSOR EDGAR: I don't know.

PROFESSOR DORSANEO: And if that's all that it's about, we can just let it be, without cross-referring to it in 566.

CHAIRMAN SOULES: That's what I think.

PROFESSOR EDGAR: Well, but there's just one other problem.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: 566 talks about motions to set aside default, right?

CHAIRMAN SOULES: Uh-huh.

PROFESSOR EDGAR: 567 talks about motions for new trial generally. Now, then 568 says it's the ground of the motion. Now, is that a 566 motion or a 567 motion?

PROFESSOR DORSANEO: I see what they did.

PROFESSOR EDGAR: Do you see what I'm saying, Luke? So, I would suggest that what we would do is eliminate 568 and leave 566 alone.

PROFESSOR DORSANEO: No, but this doesn't even say motion for new trial.

PROFESSOR EDGAR: On a motion in writing. See, it is talking about a motion for new trial.

PROFESSOR DORSANEO: Okay.

PROFESSOR EDGAR: Both of them pertain to motions, but they're different motions. So, 566 is about the same thing that 568 is about, or is it? And I think that's really what they're trying to say here because they say the purpose of this proposed amendment is to bring 566 into compliance with Rule 568 and eliminate the possible conflict between the requirements under the two rules.

CHAIRMAN SOULES: See, 567 motion might be on new discovery evidence.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: And you don't have to have all these hearings. They're just all trial de novo anyway, and things are done a lot less formally than what they're saying here. I guess you wouldn't bring anybody in. You wouldn't need a witness. You just need an affidavit that you did a discovery evidence -- judgment discretion be granted. But you can't just recite new discovery evidence without having some kind of an affidavit.

PROFESSOR DORSANEO: The problem with these rules is that we never ever find out what they do mean because the cases never get to --

CHAIRMAN SOULES: They never come up.

JUSTICE WALLACE: I guess in some instances we can appeal from the county court. You can appeal -- the appeal is taken to the county court, isn't it?

PROFESSOR DORSANEO: Yes. But this has already probably gone away by then.

PROFESSOR EDGAR: This would have all sifted out by then, though.

PROFESSOR DORSANEO: It's de novo.

JUSTICE WALLACE: That's what I say -- trying to figure out. Now, what difference does it make? We've got about 25 to 30 lawyers who are JP's out -- and we can't understand what these rules say. I would like to be listening when they try to figure them out.

PROFESSOR EDGAR: Let me just ask a question. If we just eliminated Rule 568, wherein are we any worse off? Because under 566 we are already saying that the motion has to be supported by affidavit. We've already said that. Whatever the ground for setting aside the default judgment it has to be supported by affidavit.

Then, on a 567 motion for new trial, which is just a plain vanilla motion for new trial in the JP court, leave it like it is. I don't really see where 566 adds anything -- I mean, 568 adds anything. It aside a little. It has a negative attitude, but it doesn't have much positive value to it.

PROFESSOR DORSANEO: I agree with Professor Edgar. It seems to me to add proplexity only.

PROFESSOR EDGAR: So, I would move

that 568 be deleted. And I'm saying that, really, with some hesitancy because I don't really know that much about the area.

PROFESSOR DORSANEO: Well, what would the conflict be? I guess the conflict would be that if it's a judgment by default and what you're doing is setting aside the judgment by default because the evidence was unsatisfactory rather than on cratic grounds, then there could be a conflict between supported by affidavit in 566 and the first part and the last part of 568.

PROFESSOR EDGAR: I think that's right. But don't you solve all that by eliminating 568?

PROFESSOR DORSANEO: One or the other. You never need supported by affidavit or you always do.

PROFESSOR EDGAR: Well, a judgment by default, under this version, would be have to be supported by affidavit.

PROFESSOR DORSANEO: Even if the grounds for setting it aside were not cratic grounds --

PROFESSOR EDGAR: That's right.

PROFESSOR DORSANEO: -- but they were

because there wasn't sufficient evidence presented at the default hearing.

CHAIRMAN SOULES: If you want to read these in harmony for the way they're set out, you would say judgment by default -- in a case where there's a judgment by default, every motion for new trial is sworn. Second, in a judgment rendered after trial, Rule 567 motions do not have to be sworn unless they're 568 type-567 motions, and 568 only applies to 567.

Now, if you read them that way, you don't need to change anything. Because 566, which applies to default, is not in conflict with 568 because that would apply only to trials, and that doesn't say that.

PROFESSOR EDGAR: But 568 does not delineate between 566 and 567 motions.

CHAIRMAN SOULES: The only way that you can delineate is -- the requirement for affidavits is different. 566 has an expressed self-contained requirement for affidavit. It has to be there every time. So, you don't need a special 568 for that. The only time you need a 568 is if you have a 567 post trial motion for new trial where you've got to have some something

special.

PROFESSOR EDGAR: Then, if that's the intent, then what you should do, then -- the Rule 568 "sworn motion" caption should be deleted, and the body of 568 should be added as a second sentence to Rule 567.

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: And then you've eliminated the problem, if that's what all that's intended to do.

CHAIRMAN SOULES: But you can read them so that there is not any conflict between them.

PROFESSOR EDGAR: If 568 pertains only to 567, then just simply strike that out and move it right up there.

CHAIRMAN SOULES: Then you've got an affidavit requirement of post trial motions different from the affidavit requirement of default, but they're in separate rules, so it doesn't matter.

PROFESSOR DORSANEO: My preference, just for the sake of simplicity, would be to eliminate all requirements that any of these motions be supported by affidavit or that they be

verified or any other thing. I do not think that that would tell JP's that they have to grant motions to set aside default judgments whenever they're filed, even if they're not supported by anything.

If this is JP court practice, why shouldn't somebody be able to go in there and say, woops, I didn't comply with your timetable because I screwed up without having a lot of formalized technical requirements?

JUSTICE WALLACE: Well, on the other hand, if you're trying to set aside a judgment, even though it is a JP court judgment, the JP should be able to at least know, well, this guy is serious enough about what he's telling me he made himself subject to perjury, before I'm going to go through all the trouble of setting this aside and get the parties back in and rehearing this nonsense.

CHAIRMAN SOULES: Now, these can be, you know, multimillion dollar cases.

PROFESSOR EDGAR: You bet. Forcible entry detainer cases.

CHAIRMAN SOULES: You can have a big shopping center location where a guy is badly in

default. You've got a tenant waiting in the wings to take it and you can't get the old one out, and you need him out because you've got a big deal coming. There you are down there in JP court.

PROFESSOR EDGAR: Why don't we go ahead and delete the caption to 568 and include it as a second paragraph in 567?

CHAIRMAN SOULES: So, every default motion would need to be under affidavit and post trial motions --

PROFESSOR EDGAR: That fit the category of 568 would also have to be supported by affidavit.

CHAIRMAN SOULES: We can do that. Is there a great deal of controversy on this? So, we're just going to merge 567 and 568. That's what we're doing to do.

PROFESSOR DORSANEO: Before we amend it, do we want to desex this thing?

CHAIRMAN SOULES: Why don't we not do that? Okay.

PROFESSOR DORSANEO: I don't want to talk about these JP rules anymore.

CHAIRMAN SOULES: We've managed to avoid them up to now, but I guess we can't any

longer.

PROFESSOR EDGAR: Now, we're on page 213.

CHAIRMAN SOULES: Okay. Let's see, 525. 749, okay. We're on page 250 of the purple book.

PROFESSOR EDGAR: All right. Let me tell you what's involved here in part. And this is some stuff I got that you sent me, Luke.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: Let me get -- just a second. Let me get the materials here. One of the problems that was presented was since no pleadings are required to be filed in the justice court -- let's assume that we have a trial and the defendant prevails, okay? Now, the plaintiff wants to appeal that on a trial de novo. Rule 7 -- I think it's 753. Just a minute.

PROFESSOR EDGAR: All right. The appeal, though, from the JP court does not currently require that notice be given to the prevailing party. So, the prevailing party, then, not having notice, is not aware that the appeal has been taken. And since he didn't have to file anything in writing in the JP court, the

plaintiff, then, upon appeal, takes a default judgment against him in the county court at law because he didn't have a pleading on file.

And I think part of this is intended to require that a notice of appeal be given the prevailing defendant so that he can then file an answer and protect himself from the default judgment.

CHAIRMAN SOULES: That's right. And they gave an example --

PROFESSOR EDGAR: And I don't know that that's set out here, but --

CHAIRMAN SOULES: They gave an example and I saw that example.

PROFESSOR EDGAR: Here it is on page 214.

CHAIRMAN SOULES: Plaintiff won -- I mean, the defendant won -- no, the plaintiff won -- the defendant on oral pleadings.

PROFESSOR EDGAR: Well, it can happen either way. The one that was sent to Kronzer, though, was just the other way around. It can happen either way. And this is in the letter to you, Luke, from Ken Coffman dated July 9, 1985.

PROFESSOR DORSANEO: Second the

motion.

CHAIRMAN SOULES: Just do this.

PROFESSOR EDGAR: Yes. And the only thing I'd suggest is that on page 214 rather than having this say "without first showing that this rule has been substantially complied with," I would say "without first showing a substantial compliance with the rule." I just hate to end sentences with prepositions.

CHAIRMAN SOULES: "Without showing substantial compliance with this rule."

PROFESSOR EDGAR: Yes. That's the purpose of that.

CHAIRMAN SOULES: Okay. Unanimous approval on that; no dissent.

PROFESSOR EDGAR: Then --

CHAIRMAN SOULES: Where's this grand swell of interest in the justice courtroom?

PROFESSOR EDGAR: All right. Then page 216 simply is an additional built-in mechanism, apparently, to require that the clerk in docketing the trial de novo -- let's see, this is to pro se defendants. This requires the county clerk to notify the parties. And then, also, the necessity for the defendant to file a written

answer.

CHAIRMAN SOULES: Okay. Any objection to that, Rule 751? Okay. That's unanimously okayed. He wants to change five days to eight days, which gets into one of my pet peeves. I think we always ought to make them a week so that anything not on a weekday comes back on a weekday. I don't care whether it's 7 or 14, but I would like to make it one or the other.

PROFESSOR EDGAR: All right. Now, this -- just a minute. I've just picked up on this this morning so this is really the first time I've had a chance to read this. Give me just a minute.

CHAIRMAN SOULES: Here is where he writes us. He was a defendant in an FE & D and won. The landlord appealed and he didn't know it. And since his pleadings in justice court were oral, he had no pleadings on file in the justice court. For a pleading in a justice court to constitute an appearance in a county court, it has to be in writing. So, without notice that the landlord had appealed and having no -- nothing but oral pleadings on file in a justice court, he's defaulted, then, in a county court and that

judgment goes final. So, instead of winning, as he had done in the justice court where he appeared, he has now lost by default in the county court for lack of pleadings.

PROFESSOR EDGAR: But we've already taken care of that.

CHAIRMAN SOULES: We've taken care of that, but that obviously needed cured.

PROFESSOR EDGAR: That will take care of that. Now, the second problem -- are you looking down here at the letter from Ken Coffman?

CHAIRMAN SOULES: Right.

PROFESSOR EDGAR: All right. He points out that -- no, there was one, though, where because of the time requirements -- and I think that's what this is dealing with -- he was cut off from his right to appeal before he knew that the appeal had been perfected, and there's a letter in here that deals with that.

PROFESSOR DORSANEO: Well, if you're going to get five days notice -- if they give five days to give you notice that they perfected the appeal, then you've got to have a little bit more time. It does seem to fit together. If we go back over here and say that within five days --

"over here" being 749 -- "Within five days following the filing of such bond, the party appealing should give notice as provided in Rule 21(a)."

Then you've got to have, "Said cause shall be subject to trial any time after expiration of," something more than five days in this other place. But I think eight is kind of a peculiar number to pick. I mean, why not say 10 or --

PROFESSOR EDGAR: All right. Here it is.

CHAIRMAN SOULES: We just change the TRO's to 14 so they would all come up on a weekday.

PROFESSOR EDGAR: It's a letter dated December 13, 1983 from Judge Wallace to you, Luke.

CHAIRMAN SOULES: Okay. Let's see where that is.

PROFESSOR EDGAR: It's the second page of that letter from him to you.

CHAIRMAN SOULES: Judge, do you remember all of these letters?

JUSTICE WALLACE: Instant recall.

PROFESSOR EDGAR: Okay. Have you found it yet?

CHAIRMAN SOULES: What page is that on?

PROFESSOR EDGAR: It's on page 2 of a letter from Judge Wallace to you dated December 13, 1983. It was in the material you sent me of the Kronzer letter.

CHAIRMAN SOULES: I don't have it here but read it. Oh, okay, I've got it.

PROFESSOR EDGAR: Now, the second page, Rule 749 requires -- and we've just approved that one back here on page 213 --

CHAIRMAN SOULES: Right.

PROFESSOR EDGAR: -- requires that within five days after the judgment is signed, the bond has to be filed. Okay. Within five days.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: Then he points out that Rule 569 provides five days for the filing of a motion for new trial in the justice court. And 567 provides that the justice court has 10 days to act on the motion for new trial. And a recent motion for leave to file a petition for writ of mandamus, we were presented with a situation where the defendant filed a motion for new trial five days after the judgment, which the rule provided

him to do. The next day the justice of the peace overruled the motion but it was too late to file his appeal bond under Rule 749.

PROFESSOR DORSANEO: What's that got to do with this over here?

PROFESSOR EDGAR: Well, but it all ties in together, though, because in looking at Rule 749, it -- you can actually be denied the right to appeal because the way that these rules have not been related one to the other. And that's why it's important to consider that because we're talking about 749 which has that five-day period in it.

JUSTICE WALLACE: The only way you can -- well, if you wait until your judgment becomes final before you file your appeal bond and --

PROFESSOR EDGAR: It's too late.

JUSTICE WALLACE: It's too late.

PROFESSOR EDGAR: And you're really in a Catch-22.

PROFESSOR DORSANEO: But this 753 is about a default in the county court, right? This is about the appeal.

PROFESSOR EDGAR: Well, yeah, that's right.

PROFESSOR DORSANEO: This has to be -- this has to be related to this other five-day thing.

PROFESSOR EDGAR: Well, I think it does but it seems to me that this creates a problem right here. And I just happen to remember it because I read this this morning and into any sense of perpetuating a problem. If this five days right here is a problem, then we ought to correct it now.

JUSTICE WALLACE: Five days final judgment as opposed to five days overruling the motion for new trial.

PROFESSOR EDGAR: Within five days after the overruling of the motion for new trial or something like that. That seems like that would solve the problem.

PROFESSOR DORSANEO: Up here judgment is signed or -- in the event a motion for new trial is filed and then five days after the motion for new trial is overruled.

JUSTICE WALLACE: Lefty, you're a justice court expert. Get up here and help us.

MR. MORRIS: You don't want me. I appreciate these people laboring over it, though.

CHAIRMAN SOULES: How do we solve that, Hadley?

PROFESSOR EDGAR: Well --

CHAIRMAN SOULES: We don't even have 749 in these materials. I realize they wrote us about it, but what does he suggest we can do?

PROFESSOR EDGAR: Well, he didn't. He just said -- Judge Wallace, the question presented is whether forcible retainer actions should be an expressed exception to the rules of practice in justice courts so as to clarify the procedural steps such as occurred in the above case.

PROFESSOR DORSANEO: Well, you know, the thing is, I think you ought to be smart enough to read Rule 749 where it says -- it says that you do perfect this appeal within five days after the judgment is signed. I mean, it says that right there on the face of it. Why would anybody think that the dependency of a motion for new trial would alter that if they read it?

Now, maybe they would -- maybe they would remember the old practice where bonds were keyed into overruling motions for new trial, but I don't see that as a problem.

PROFESSOR EDGAR: But in the normal

course of events, though, you would file a motion for new trial. And until the motion for new trial is acted upon, you wouldn't think that there would be any finality to that judgment. But there is if you fail to file your appeal bond within five days after it was signed.

PROFESSOR DORSANEO: Here is what I think.

PROFESSOR EDGAR: I mean, that was the problem the Court was confronted with in this case.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: How long do you have to file a motion for new trial? What is the total length of time?

PROFESSOR EDGAR: In Rule 749, the bond has to be filed within five days.

PROFESSOR DORSANEO: And the motion for new trial is back in the five hundreds.

PROFESSOR EDGAR: Yes. That's Rule 567.

PROFESSOR DORSANEO: And when is an appeal perfectable in a not FE & D case.

CHAIRMAN SOULES: Okay. He's only got 10 days to grant a new trial. That means 13,

because it winds up on Saturday and that's a legal -- that's a Saturday and a Sunday, and Monday is a legal holiday and so it could be as far as 13 days -- 10 days here. So, if we give 14 days to perfect the appeal, they ought to know from the judgment.

PROFESSOR DORSANEO: But this is supposed to be a speedy remedy. This five-day time period for perfecting the appeal in 749 is a shorter time period than the time period for de novo appeals of county courts generally in JP court under 571, which does key from -- within 10 days after a judgment or order overruling a motion for new trial is signed.

See, there's a -- the old non FE & D rules in the JP court are like our old perfection of appeal rules, in that you file the bond within a period of time after the motion for new trial is overruled. But the FE & D part of that is entirely different suggesting that, you know, somebody made a conscious choice that the FE & D is supposed to be speedy and this trial de novo extending time periods business ought to be as short as possible given the possessory nature of the writ.

CHAIRMAN SOULES: Well, I guess with that, then, we just have to try to make some assumptions about what these practitioners want as a matter of policy. Do they want to be at risk? I don't know why a five-day cutoff -- they can file it in five and be in safe harbor for 14.

I would think they would want to have 14 days of jurisdiction rather than have the problems that are raised -- that were raised in this mandamus that the Supreme Court dealt with back in 1982 or '83 that Justice Wallace wrote us about. How do we guess, if we're guessing? Do we want to give these guys 14 to keep them out of kind of trouble, or leave it at five and try to force them --

PROFESSOR DORSANEO: The safest thing to do would be to not have two appellate time tables in the JP court.

CHAIRMAN SOULES: We don't have time to do that. Or make them both 10.

PROFESSOR EDGAR: Maybe we shouldn't do anything with that right now. I just wanted to call it to your attention.

CHAIRMAN SOULES: Well, it's been around since December of '83. Let's do something with it. Either decide to do nothing because

that's the right thing to do or make it 10 or -- because that's what the other justice court rules are or make it something else. Why don't we make it 10?

PROFESSOR DORSANEO: I see two alternatives. I say we change 749 to say -- in the first sentence say, "No motion for new trial shall be permitted in an FE & D case," and then maybe change five to 10. All right. Or we make the time for perfecting the appeal like Rule 571 for ordinary FE & d cases which would --

CHAIRMAN SOULES: 10 days.

PROFESSOR DORSANEO: -- Which would be 10 days for overruling motion for new trial if one is filed. My preference to preserve speed would be to not allow a motion for new trial in an FE & D case in the JP court because I think that's probably a waste of energy anyway.

JUSTICE WALLACE: You've got -- with a trial de novo as opposed to a regular appellate review -- and you're not competent to hold out probably by your motion for new trial.

PROFESSOR DORSANEO: That is a motion for new trial different -- perhaps more congenial environment.

CHAIRMAN SOULES: So, what we would do is --

JUSTICE WALLACE: Eliminate the motion for new trial in FE & D cases.

CHAIRMAN SOULES: Rule 749 --

JUSTICE WALLACE: If this guy hadn't come up with the bright idea of filing a motion for new trial he wouldn't have gotten into trouble in the first place.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: Rule 749 we're going to say, "no motion for new trial" --

PROFESSOR EDGAR: "Shall be permitted."

PROFESSOR DORSANEO: We've got a rule like that for accelerated appeals.

CHAIRMAN SOULES: -- "shall be permitted," period. And then the balance is no change, or do we want to change it to 10 days?

JUSTICE WALLACE: You've got a quick appeal there to get that guy out of possession that doesn't belong in there and they're all accustomed. These JP's -- old boys are trying to -- the school for JP's is pretty much on -- well, they've got their desk books all up and here's

what you do in this case and down the line and go through all the trouble of changing that. Those that bother to learn it -- changing their learning, then I'd say leave the timetable the way it is.

PROFESSOR DORSANEO: In the TRAP Rule 42, the sentence reads, "In appeals from interlocutory orders, no motion for new trial shall be filed." So, we have that kind of language for a different type of comparable situation.

CHAIRMAN SOULES: Appeals in forcible detainer cases, no motion for new trial shall be filed.

PROFESSOR EDGAR: Rule 749 pertains only to forcible entry, doesn't it?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: I remember from my younger days working in some of these, that somebody did get screwed up because they got the 5 day, 10 day trial moved and went down the tubes.

CHAIRMAN SOULES: Okay. Let's look at this 753, then. Does that time period --

PROFESSOR EDGAR: Don't run off,

Dorsaneo.

CHAIRMAN SOULES: Bill, we need you. I don't want to leave this loose-ended here. The next one was 753 on page 218. Does that -- do those time periods need to be changed?

PROFESSOR DORSANEO: I think so. I would say 10. Subject to trial at any time after expiration of -- five full days after the day the transcript is filed. I guess -- when does a transcript get filed? The appeal is perfected and then the JP is meant to package this up and send it to the --

PROFESSOR EDGAR: To the clerk.

PROFESSOR DORSANEO: -- clerk. If we're giving -- if somebody gets notice of this appeal by getting notice that the bond has been filed within five days following the filing of the bond, then they could be --

PROFESSOR EDGAR: Well, the purpose of this change --

PROFESSOR DORSANEO: -- defaulted in the county court before they -- almost simultaneously with receiving the notice, as I read it.

PROFESSOR EDGAR: It says the

extension from eight to five -- from five to eight is required for due process considerations in order to give the pro se defendant the opportunity to receive notice and follow written answer where he or she has pleaded orally in the justice court.

PROFESSOR DORSANEO: That doesn't seem like a lot of due process there, about 10 more minutes.

CHAIRMAN SOULES: Why don't we say 14? Is that a problem? What kind of problem -- are we talking about -- this is not an FE&D case. This is an everyday case and that's accelerated --

PROFESSOR DORSANEO: No, I think it's an FE&D case. It's another fast track item.

CHAIRMAN SOULES: It sure is.

PROFESSOR EDGAR: In Rule 751, we've just required the clerk to notify the parties, too, and that's going to take a day or two in the mail. And if that's to make sure that they get notice, then if you give them five days from that point, between then and trial, then that's going to be a total of about eight days because you've got some mailing time in there and maybe a weekend, too.

CHAIRMAN SOULES: Okay. How many

days?

PROFESSOR EDGAR: So, eight days might be a reasonable compromise. That might be what they had in mind.

CHAIRMAN SOULES: I guess give them what they ask for.

PROFESSOR EDGAR: I've made mistakes like that before in my life, too, getting exactly what I asked for.

PROFESSOR DORSANEO: If they knew they had a chance to get 10, they wouldn't have written eight there, you know it?

PROFESSOR EDGAR: Does that take care of that then?

CHAIRMAN SOULES: I think it does. And I think that takes care of Ken Coffman's complaints.

PROFESSOR EDGAR: Now, while we're going through some other material, Luke, look on page 223. There's an old letter there to Mike Hatchell back in '83. And I, frankly, think that involves a policy problem on filing the abstract within 30 days, because part of that problem is manifested in the next letter on page 225.

PROFESSOR DORSANEO: This is the Hunt

versus Heaton problem, basically.

PROFESSOR EDGAR: Yes, and 227.

PROFESSOR DORSANEO: I move the repeal of the trespass to try title rules top to bottom, and I'm serious.

CHAIRMAN SOULES: We can put that on next year's agenda. There's a problem with that.

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: And these rules --

JUSTICE WALLACE: I'm going to direct all those old land lawyers across the state to communicate with you not to me, because you talk about some irrational, set in their ways, nothing-should-ever-be-changed-people. It's unbelievabe. You know what I'm talking about.

PROFESSOR EDGAR: I know exactly what you're talking about, Judge Wallace. Exactly. They are set in their ways.

PROFESSOR DORSANEO: Well, maybe we can do it by providing everything that can be done and give them credit for whatever you like.

PROFESSOR EDGAR: Grandfather them out.

PROFESSOR DORSANEO: You don't have to use these rules if you don't want to.

CHAIRMAN SOULES: What Williamson is saying here is that failure to file this abstract defaults --

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: -- you in a trespass to try title case.

PROFESSOR DORSANEO: It does unless you ask --

JUSTICE WALLACE: It prevents you from putting on any evidence.

PROFESSOR EDGAR: That's a pretty effective deterrent right there.

CHAIRMAN SOULES: Yes. The Williamson wants that not be automatic like failure -- failure to answer requests to admit. He wants you to have to be a --

PROFESSOR DORSANEO: He wants to overrule Hunt versus Heaton is what he wants.

CHAIRMAN SOULES: Yes. And so let's just pass on that. How do we want to --

PROFESSOR EDGAR: Well, I think it is certainly harsh where you can't leave it to the discretion of the trial judge whether or not there are certain circumstances under which the abstract should be permitted to be tardily filed or not.

That's just my view. I don't know why.

JUSTICE WALLACE: When I first got started back in law, I got caught up. I dismissed my lawsuit and turned around and filed another one, the way I got around it.

CHAIRMAN SOULES: I guess you didn't have a limitation problem.

PROFESSOR EDGAR: If you had a limitation problem, that would have certainly hurt you badly.

CHAIRMAN SOULES: He's got a rule drafted here on page 226 that we can act on and it it does meet his problems. And probably if we're going to keep these rules it is fairly well stated. I guess it's either vote that up or down, really, isn't it?

PROFESSOR EDGAR: Yeah. If we're going to do it -- if we're going to vote it, though, I would suggest that the addition be after the word, "The Court may," comma, "after notice and hearing prior to the beginning of trial," comma, "order that no evidence of the claim," so and so. Do you see what I'm saying?

CHAIRMAN SOULES: Yeah. "And in default thereof," comma, "the Court may, after

notice of hearing prior to beginning of trial order" --

PROFESSOR EDGAR: Well, just "in default thereof, the Court." I think you need a comma after that.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: "The Court may," comma, "after notice and hearing prior to the beginning of trial," comma, "order that no evidence of the claim," and so and so, "be given on trial."

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: Does that really solve his problem?

CHAIRMAN SOULES: Solves his problem.

PROFESSOR DORSANEO: It just offers a separate hearing.

PROFESSOR EDGAR: But at least it's discretionary, though. It's not automatic.

CHAIRMAN SOULES: The Court can't permit.

PROFESSOR EDGAR: See, now the Court doesn't have any option.

CHAIRMAN SOULES: Under Hunt versus Heaton you're dead.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: All in favor of this as restated by Hadley, otherwise the way it is on 226, show by hands. Opposed? That's unanimously --

PROFESSOR DORSANEO: I'm going to vote against it.

CHAIRMAN SOULES: Okay. Let's see that's a vote of -- everybody else to one.

PROFESSOR DORSANEO: My reason for voting against it is that I don't think that this practice can be repaired to the point where it is a useful practice in modern Texas.

CHAIRMAN SOULES: Okay. 92, the same thing over here. This is Karl Hoppess talking about the same problem.

PROFESSOR EDGAR: You're on page 233?

CHAIRMAN SOULES: I'm on 229 now.

PROFESSOR EDGAR: 233 is, again, the same 749 problem with which we have just dealt.

CHAIRMAN SOULES: So, we've done that.

PROFESSOR EDGAR: So, we've taken care of that.

CHAIRMAN SOULES: And then the next stuff is Jeremy Wicker's --

PROFESSOR EDGAR: There might be one other thing here.

CHAIRMAN SOULES: I'm sorry.

PROFESSOR EDGAR: Just let me check. Yes. Rule 758 refers to Rules 114, 15 and 16. Now, haven't we done something to those rules? Haven't we deleted -- I just want to make sure, because if we're not careful, we're going to be referring to some rules that are no longer in existence.

CHAIRMAN SOULES: See if Jeremy --

PROFESSOR EDGAR: Okay, we haven't.

CHAIRMAN SOULES: See if Jeremy Wicker on page 235 identifies the problem you're thinking about there, Hadley. He says Rule 109 was amended to delete the proviso that 758 refers to.

PROFESSOR DORSANEO: Oh, yeah. That's good. That was that proviso about somebody being outside of the United States but not being in the Army.

CHAIRMAN SOULES: I see. What about the Air Force, Marines, Navy? Is that what you were thinking about, Hadley?

PROFESSOR EDGAR: I guess so.

JUSTICE WALLACE: State guard on duty

in Nicaragua.

CHAIRMAN SOULES: Any objection to deleting Rule 758, the reference to Rule 109?

PROFESSOR EDGAR: Rule 758 doesn't say that, does it?

CHAIRMAN SOULES: I'm trying to find it.

PROFESSOR EDGAR: I'm looking at Rule 758 on page 252. I don't see any reference to the proviso on 109. That's already been done.

PROFESSOR DORSANEO: Changed by the amendment effective April 1, 1985.

PROFESSOR EDGAR: We did that last year.

PROFESSOR DORSANEO: It was just such a good idea last year we'll do it again this year.

CHAIRMAN SOULES: Okay, done last year.

PROFESSOR EDGAR: I think that may be what those check marks mean.

CHAIRMAN SOULES: Okay. Then here's some January 2, 1986 changes in the rules proposed by -- that are proposed by him, by Wicker, where he's using possession instead of restitution in several places.

PROFESSOR EDGAR: Now, I notice that in some other material we've got here, the committee on the Administration of Justice disagreed with that. Somebody did. This is the material you sent me, Luke.

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: And I'm looking back here where somebody -- this says "recommended by COAJ 2/8/86 except last clause."

CHAIRMAN SOULES: Right. I went to the meeting. That's my writing. And his letter starts on 238. And the only -- no, let's see. Well, that's a part of it. Isn't that all a part of the same thing? Anyway -- oh, it is exactly the same thing. Okay. So, we've just looked at 242, page 242.

PROFESSOR EDGAR: Yes.

PROFESSOR DORSANEO: Is this that one where it was recommended to delete the "unless" because somebody doesn't like what Section 24.0061 of the Property Code says?

Well, Mr. Chairman, I recommend that we change the word "restitution" to "possession" if that's what the Property Code does on this "unless" part. In the absence of somebody

establishing to me that that is what the Property Code requires, I would think it would be okay for us to leave it out. Even if the Property Code requires it and we leave it out, we haven't done any damage to what the Property Code requires.

CHAIRMAN SOULES: Okay. Are we, then, in unanimous approval of Rule 748 deleting the last clause as the COAJ recommended? No dissent on that, so that's unanimously approved.

And then 755, I do remember the discussion on that because even multi-family -- he used milti-family apartments -- he used for residential purposes and that's not really what this was directed to. So, something used as a principle residence of a party is what everybody thought was intended by this "for residential purposes only" and that that did meet the statute. Any problem with amending Rule 755 as shown here?

PROFESSOR EDGAR: As recommended by the COAJ.

CHAIRMAN SOULES: As the COAJ recommended. Then we've got housekeeping rules of Jeremy Wicker. And that's it; we're through with justice court rules, too.

PROFESSOR EDGAR: I move that all of

the housekeeping changes reflected on agenda pages 246, 247 and 248 be adopted.

MR. BRANSON: Second.

CHAIRMAN SOULES: Second. That's Branson.

MR. BRANSON: Yes.

CHAIRMAN SOULES: Okay. Do you do much practice in justice court, Branson?

MR. BRANSON: Occasionally the juries inform me that's where I ought to be, but I don't start out there.

CHAIRMAN SOULES: Okay. Any dissent on that? That's unanimous then. Now, we've got a controversial one coming up, unless somebody wants to volunteer for something not controversial.

Well, let me -- Bill, will you, or somebody, look at these problems that have been raised by Frank Baker on how to try to get the court reporters of the courts responsible for getting the records up, as opposed to parties filing motions and all that. It's on page 249. I don't know if you've ever had a chance to look at it.

PROFESSOR DORSANEO: I didn't look at that. That is a major modification from the way we now do business. I assumed that that was the

kind of item that would be put on the table.

CHAIRMAN SOULES: It would be to table for next time?

PROFESSOR DORSANEO: Yeah. I don't think we can make those changes without giving them a lot of careful thought before a larger group.

CHAIRMAN SOULES: Okay. We're going to table that, then, to the next session. But Frank has been -- Frank is a very distinguished member of the State Bar. You-all may know him. He's a fine trial practitioner and fellow practitioner from San Antonio. He's been concerned about this for a long time, and not without justification. So, if we can -- that will go to the proper subcommittee for work in the interim.

MR. BRANSON: Didn't a case just come down -- I haven't seen it but I've heard about it -- holding the court reporters now to no longer require the posting of some advanced payment before they start the record, or did I just dream that?

PROFESSOR DORSANEO: The rule has said that for a while. They can't require advanced

payment, but you have to make -- for them to start preparing it, you have to make arrangements to pay them before you can get it.

MR. BRANSON: I don't know about the rest of you but -- and I'm not sure I know where we address it in the rules -- but I have literally, on occasion, been held hostage by court reporters, during trial and after the judgment, trying to get documents out of them, particularly when you want some transcript typed up during trial or some testimony typed up during trial.

The court reporter's fees are not really based on anything relative to any other method of determining the price of court reporting duties. If you get trial transcripts, you really pay -- I tried one a few years ago, and when I got through I had 20 grand or so in that type of testimony. And it really was a long trial, about a six-week trial.

But there was no -- the court reporter was very friendly with the trial judge and there was no way to complain about it at the time. And there ought to be some relief for the trial practitioner who is asking for additional -- who feels the need for the testimony.

PROFESSOR DORSANEO: You're wanting daily cqpy and they're just charging you what they can get by with.

MR. BRANSON: Well, sometimes -- in that particular incidence I was wanting daily copy. And what I finally had to do was bring in an outside court reporter. But I had been there where the trial practitioner is really at the mercy of the court reporter, both in terms of fees that are charged and in terms of everything else.

I tried one one time where the court reporter would stop the lawyer in the middle of the questioning of a witness. And, generally, he would wait until you were just about to lower the boom on somebody and say, "How do you spell that?"

CHAIRMAN SOULES: Okay. Well, we'll put that in the hopper with the study we're going to make and see what can be done. Let's see. On page 257, have we taken care of that now? And the letter is on 258, a letter from Judge Schattman, conflict between Rule 267 of Civil Procedure and 613.

PROFESSOR DORSANEO: I don't think we have taken care of that, have we? And the two do conflict because the Rule of Evidence -- do you

want to take a fast look at it?

CHAIRMAN SOULES: Yeah. We're not going to change the Rules of Evidence, though, Judge.

PROFESSOR DORSANEO: Rule 613 says, "At the request of a party" -- we're talking about the rule. "At the request of the party, the Court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."

The first sentence conflicts with Rule 267 because that Rule 267 is not mandatory. It says, "At the request of either party, the witnesses on both sides may be sworn and removed out of the courtroom to some other place." In other words, what Rule 613 requires, Rule 267 leaves to the Court's discretion.

CHAIRMAN SOULES: Should we not --

PROFESSOR DORSANEO: And there are other things, too.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: The second part of Rule 613 of the Rules of Evidence speaks about a class-3 person who is not authorized to be excluded under the subnumber 3. "A person whose presence is shown by a party to be essential to

the presentation of his case," and 267 isn't that strict. It, again, is more discretionary in character.

If we're -- to resolve the conflict and not to change Rule 613 of the Rules of Evidence, if that's the plan, then Rule 267 has to go.

CHAIRMAN SOULES: You mean that be completely repealed?

PROFESSOR DORSANEO: Well, no, at least the part up through "witnesses."

CHAIRMAN SOULES: Does 613 speak to corporations?

PROFESSOR DORSANEO: Not -- well, "an officer or an employee of a defendant which is not a natural person."

CHAIRMAN SOULES: So, up through represent -- let me see, down to "if any party be absent," or is that covered, too?

PROFESSOR DORSANEO: That's covered, too, by 613. The part that says, "Witnesses, when placed under the rule, shall be instructed," the information about how they are instructed is not in 613.

CHAIRMAN SOULES: So, we would repeal down to the word "witnesses." Are we going to

just let 613 control?

PROFESSOR EDGAR: I remember when Judge Pope -- this question has arisen before. And Newell pointed this out to us one time in a meeting, and we questioned whether or not we should have this general subject matter both in the Rules of Civil Procedure and in the Rules of Evidence.

And I remember somebody commenting -- and it might have been Judge Pope, but I thought it was a member of the judiciary -- stated that the reason that they left it in here is because it was a rule of evidence but it was also kind of a trial practice rule. And as a matter of policy, they thought it best to have it in both places, which it really doesn't hurt anything, I don't suppose.

PROFESSOR DORSANEO: But it ought not to be inconsistent.

PROFESSOR EDGAR: But certainly, in keeping with that, if we want to continue that policy, I would move that we take the language that is now contained in Rule 613 and substitute it for the first five or six sentences in what is now Rule 267 down to beginning with "witnesses when placed under this rule."

CHAIRMAN SOULES: What if we just said, "Witnesses when placed under Texas Rule of Evidence 613 shall be instructed by the Court," instead of doing the whole rewrite there? And that will take them there. And change the caption --

PROFESSOR EDGAR: Presuming they know what Rule 613 is.

CHAIRMAN SOULES: Well, put the caption, "Witnesses Placed Under Texas Rules of Evidence 613," in the caption of 267.

PROFESSOR EDGAR: That would be the caption then. Oh, okay. Yeah.

CHAIRMAN SOULES: And then strike all the language down to the word "witnesses," and then say, "Witnesses when placed under Texas Rule of Evidence 613," and then we would have at least consistent language. Would that take care of it, Bill?

PROFESSOR DORSANEO: I think so. But I don't think that -- I think that everybody is going to learn in law school what the rule is, what it was in common law and will still use the term "placing witnesses under the rule" in just conventional language. I would imagine that there

are a lot of people that don't know that the rule is 267, for example.

So, I would suggest, perhaps, retaining the title "Witnesses Placed Under the Rule" and maybe beginning that "witnesses" sentence like this: "Witnesses who are placed under Rule 613 of the Texas Rules of Evidence," or, you know, something like that.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: "Witnesses when placed under Rule 613 of the Texas Rules of Evidence."

CHAIRMAN SOULES: "Shall be instructed." Okay. How many feel -- and let's not vote on the caption right now -- but that the substantive change that we've talked about should be recommended to the Supreme Court for adoption? Show by hands. Opposed? Okay. That's unanimous. How many feel that the caption should have a reference to Texas Rule of Evidence 613? Show by hands.

MR. BECK: The caption?

CHAIRMAN SOULES: Right. Okay. There are no hands up on that, so nobody is for that. That takes care of that. Now, we've got a --

let's see, where is 166(b)? I guess that got in here.

PROFESSOR DORSANEO: That's in here too, isn't it?

CHAIRMAN SOULES: It couldn't be finished with, not what I'm talking about, because it just came out. Supreme Court wants to us drop the investigative privilege. At least their sentiment is that it should be abolished. 166(b).

JUSTICE WALLACE: On that, we've got about three or four applications now pending before us that the Court hadn't come down any way at all on.

CHAIRMAN SOULES: Bill, on page 133, this is Turbodyne. There's a couple of new mandamus cases on it.

JUSTICE WALLACE: Stringer and Turbodyne.

CHAIRMAN SOULES: Stringer and Turbodyne, yeah. 133, is that where it is?

PROFESSOR DORSANEO: Stringer, Turbodyne, and then there is another.

JUSTICE WALLACE: Harkness. Motion for rehearing has been overruled in Harkness.

Turbodyne and Stringer is still alive.

PROFESSOR DORSANEO: The history on this is really interesting if anybody -- and it's helpful to understand the history, too, as to where these things came from.

CHAIRMAN SOULES: Why don't you give us a rundown on it?

PROFESSOR DORSANEO: Initially, in Rule 167, which was the first rule in the new rules of 1941, copied from the Federal Rules of Civil Procedure. Roy McDonald, at the request of the Court, added a work product proviso that didn't use the term "work product" for four or five years before Hickman versus Taylor at this time. And that proviso is basically like the proviso that was put in Rule 186(a) in 1957 when it was adopted, except in 1957, somewhat perniciously, that information obtained in the course of an investigation by a person employed to make the investigation was added to the 186 proviso.

Then in -- so, we had two provisos in 1957. One, the original proviso in 167; the other, a broadened proviso exempting investigative information in addition to communications in

186(a). Ultimately in 1981 we eliminated the proviso from 167 and cross-referred to 186(a). Then in 1984 we took the proviso from 186(a) that was repealed and put it in as an exemption to 166(b) and eliminated the investigative information business.

The only other thing that's somewhat interesting is that in either 1971 or 1973 the words "work product" were added to Rule 186(a) for the first time, and work product was never defined, see. So, it boils down to this: This proviso that we asked Roy McDonald to draft before work product principles were well-developed has carried through in our rules of procedure, even after the time when a work product exemption, in so many words, denominated as such, was added into the procedural rules.

So, we have a general work product exemption plus a specific tailored Texas-developed work product proviso that antedates the development of work-product law. And it is possible to read these exemptions as having different scopes, leaving us with somewhat of a weird situation where it's possible that the party communication privilege would be broader than work product or

vice versa. It's just kind of really messy.

Now, the reason why the proviso was -- why the Supreme Court, as I understand it, in 1940 wanted a specific work product proviso is that they didn't want a loose and unknown, unspecified work product doctrine as a loose cannon on deck. They wanted a specific thing that could be interpreted by trial judges word by word rather than some policy-based exemption that would require Supreme Court authority to flesh out.

I think that's really the history of it. It started out as a work product proviso homemade in Texas before work product law developed. And since that time, we kind of forgot that and added work product in too, and now we have both of them.

JUSTICE WALLACE: Also, that 1984 amendment provided for an exemption for the investigation of the incident out of which the claim arose. Now, that was new in 1984, and yet, surprisingly, the Court decisions have not recognized it.

PROFESSOR DORSANEO: Well, that is a separate problem. When I attempted to reword, as reporter, the provisions of 186(a), I,

inadvertently, did not focus on the way it had been interpreted in Allen versus Humphries and wrote it more broadly than the Supreme Court had construed the prior proviso in 167, and that was just my mistake.

We weren't meaning to change anything, but nobody noticed it. I do remember now that Richard Clarkson said, "What about Allen versus Humphries?" But I didn't hear him.

CHAIRMAN SOULES: Jim Kronzer, who regretfully has resigned from our committee here just in recent days, calls this one the Texas kicker. It's unique in Texas that these -- there's this breadth of investigative privilege material. I mean, it cuts both ways. It doesn't help either side. It does open up the communications made in the connection with an investigation which have been pretty much protected in Texas, not as broadly as this, but the Court -- as you can see, Justice Wallace's letter to me dated October the 16th.

PROFESSOR DORSANEO: What page is that on?

CHAIRMAN SOULES: It's on page 134. This was just a couple weeks ago. It says, "The

Court's problem is that a majority of the Court seems to disapprove of the above quoted portion of the rule and prefer that it be changed as soon as possible." That is the language which says -- it's in 166b(3)(d). With exception of discoverable material from experts, any communication may pass between agents or representatives, employees to the action or communication between any party and its agents -- employees, where made subsequent to the occurence or transaction upon which the suit is based and made in connection with the prosecution, investigation or defense of the claim or the investigation of the occurence or transaction out of which the claim has arisen.

PROFESSOR DORSANEO: Mr. Chairman, the problem with that, that's so-called lack of clarity in my draft. Some Courts of Appeals have said that this language could be read very, very broadly. It wasn't meant to be read very, very broadly. It was meant to be read in view of an anticipation of litigation concept. All right. That post occurence communications made in anticipation of litigation ought to be within the exemption.

Now, there's a second level of refinement to that which these recent Supreme Court opinions have pointed out and which is evidenced in Allen versus Humphries. Does the person who made the communication have to be anticipating the lawsuit in which the claim is subsequently asserted? That is to say, Mrs. Allen's lawsuit, as opposed to lawsuits coming about as the result of cutting polyvinyl chloride with a hot wire, you see.

Allen versus Humphries said the particular circumstances, all right, is what we're talking about, the particular lawsuit, as I understand it. So, the exemption would only cover a communication made in anticipation of a particular lawsuit rather than just any old lawsuit that might subsequently be brought by someone at some point in the future against a product manufacturer, for example.

PROFESSOR EDGAR: May I give you an example? Let's assume that the railroad decides that it's going to make an investigation to determine whether this particular crossing is extra hazardous and should have further types of guards. And it does make an investigation and it makes a report. Subsequently, an accident

happens. Now, the question is, is that investigation exempt from discovery under this proviso?

PROFESSOR DORSANEO: Well, it depends on how you would define "occurrence" in that hypothetical.

PROFESSOR EDGAR: I understand that, but that is part of the problem, it seems to me.

CHAIRMAN SOULES: Isn't what the Court wants to substitute for this language is "and in anticipation of the pending litigation"? They're not even talking about different litigation.

PROFESSOR DORSANEO: That would be what these recent opinions say.

CHAIRMAN SOULES: That's what the recent opinions start telling us. And I think that's what we really need to nail down and give the Court our feelings about, isn't it?

PROFESSOR EDGAR: I think that's a good rule because, for example, in my example, I do not think that that investigation should be imune from discovery.

PROFESSOR DORSANEO: Now --

MR. BECK: Let me raise kind of a lone voice of dissent.

CHAIRMAN SOULES: No, you're not the lone voice.

PROFESSOR DORSANEO: I'm going do dissent with you.

MR. BECK: Looking at these two opinions, if all we're talking about is a matter of proof, that's one thing. You know, if the railroad failed to introduce sufficient proof to show that there was good cause to believe that a claim would be made, and in the other case, if they simply failed to state in an affidavit virtually the same thing, that's one thing. That can be handled. The lawyer, you know, can make sure the next time the requisite proof is submitted. But the way these two -- three opinions -- there's another opinion by the Court -- are being interpreted, is that there's no such thing as anticipation of litigation immunity -- investigation immunity at all.

So, what that means is that Frank Branson, who does medical malpractice work, has somebody walk into his office who believes they have a medical malpractice claim, and Frank, the careful lawyer that he is, is going to conduct an investigation to determine whether or not he's

even got a cause of action; I can get that. That's what -- that's the way I read these opinions. I can file a motion to produce and get his file, and I don't think that's right.

PROFESSOR DORSANEO: I think the three opinions are having trouble figuring out what they mean to say, and Allen versus Humphries had that problem. And I think that if you read the three opinions carefully, they end up saying not -- not more than this. That if a communication is made in anticipation of a particular lawsuit, then that communication is within the exemption. They could be read if you read certain sentences in them as narrowing the exemption more than that.

MR. BECK: Yes. For example, there's a statement in each of these opinions about how -- where is it -- the mere fact that --

PROFESSOR DORSANEO: That same statement, yeah.

MR. BECK: Nobody quarrels with that.

PROFESSOR DORSANEO: The mere fact that an accident has happened does not close all --

MR. BECK: Correct. Nobody quarrels with that. But I think these opinions -- these

three opinions are being read much -- as going much further than that. And the result is that I think that it's really almost emasculating the work product immunity.

PROFESSOR DORSANEO: Well, this is a separate thing. Work product, you see, we don't know what work product is. That's the -- as I see it, the main historical problem we have, is that work product was added into these rules, I believe, for the first time in 1973. Those words, "work product," added in and made a nondiscoverable item. Until then, this was work product, what we're talking about, this proviso. Now, if we're going to have a work product exemption and a separate proviso here, we're going to have to think about both of them because even if this doesn't cover it, if work product does, then what's the point, you see?

CHAIRMAN SOULES: Work product is -- this is talking about communications between the party and his agents or agents of parties. It's really not talking about talking to the lawyer.

PROFESSOR DORSANEO: It used to be, though. It would include the lawyer.

CHAIRMAN SOULES: It might include

that. But it's much broader. Work product of a lawyer is --

MR. BECK: I understand.

CHAIRMAN SOULES: -- not here.

MR. BECK: As broad as this is, it will include what the lawyer does.

MR. BRANSON: They are going to have to make you haul my ass down to jail if some judge makes those rulings -- report from my nurse or doctor or whatever.

PROFESSOR DORSANEO: See, I don't know why these investigative reports talk about these cases, why they're not work product -- why aren't there work product arguments made in these cases?

CHAIRMAN SOULES: Well --

PROFESSOR DORSANEO: I mean, these are investigators. I mean, why -- I mean, in some of these cases --

MR. BECK: Well, then, what you're going to -- All right. Let's assume you make a distinction about -- between whether the attorney does it or --

PROFESSOR DORSANEO: Or his paralegal or an investigator employed by the attorney.

MR. BECK: That's right.

PROFESSOR DORSANEO: Or by the insurance company.

CHAIRMAN SOULES: Well, what it looks to me -- like --

MR. BRANSON: That's different in the federal rule. Every time I get over there I -- I forgot what the federal rule is on this, but it is broader than ours.

PROFESSOR DORSANEO: It's one concept of anticipation of litigation that replaces the words "work product" and replaces all of this crap and tries to codify Hickman versus Taylor. And it would exempt, I think, all of these things that our cases would not exempt -- these recent cases wouldn't exempt. I think it would, but it wouldn't be a blanket exemption.

MR. BECK: Except when there's exceptional need.

MR. TINDALL: Rule 26.

MR. BRANSON: I know you can get to a lot things in the federal court you have not historically been able to get to --

CHAIRMAN SOULES: You can get to any work product in federal court by showing exceptional need. No work product, not anything

in your file, is protected under the federal rule and I don't want to go there. Some may want to, but I don't want to.

PROFESSOR DORSANEO: At the federal level, the key is whether this thing is made in anticipation of litigation --

CHAIRMAN SOULES: Right.

PROFESSOR DORSANEO: -- not a question of who makes it. And whether it's -- and the dichotomy is between something made in anticipation of litigation and something that's made in the ordinary course of business.

CHAIRMAN SOULES: That's right.

PROFESSOR DORSANEO: And when you start saying "anticipation of litigation" and refine it even further and say "anticipation of what litigation," then you're getting beyond where, I think, the federal courts have gone and you're getting into just Texas thinking.

MR. BRANSON: Well, let's take it one step -- where you historically run into in the malpractice area is the incident report. You've got by foul (phonetic) on the hospital that says any time negligence occurs on the premises where a patient is injured by an accident, a report must

be filed with the hospital. Now, that's not really done in anticipation of litigation.

PROFESSOR DORSANEO: Right. Nor is it done in investigation of the occurrence. It's done in the ordinary course of business.

MR. BRANSON: But it has historically been nondiscoverable.

PROFESSOR DORSANEO: Well, it was meant to be discoverable under this redrafted 166(b). And the way it was meant to be discoverable is to say that that ordinary course of business incident report is not an investigative report. It's not an investigation of the occurrence. Investigation --

MR. BRANSON: For lawsuit purposes.

PROFESSOR DORSANEO: Yeah, right. But the word "investigation" was meant to be a word of art that incorporated anticipation of litigation concepts like in Federal Rule 26(b). The difficulty is that that never seemed to be how the Courts of Appeals read it.

MR. BRANSON: No, I --

CHAIRMAN SOULES: There's a recent case where there was a worker's comp case and then there was another case that arose that related to

it. I can't remember exactly.

JUSTICE WALLACE: That was the Harkness case. The husband filed a comp case which the railroad detective had investigated, and later on the wife filed a personal injury suit alleging that the husband was driving the truck and not her. The husband then disappeared. She remembered nothing from the accident, had a total blank, and the husband ran off and couldn't be found.

So, the only way she could prove that he was the driver was his statement to this railroad detective in connection with his comp claim that he was driving the truck, and the question was whether that was discoverable.

MR. BRANSON: And was the comp case still open?

JUSTICE WALLACE: The comp case had long been settled.

CHAIRMAN SOULES: So -- and that was held to be discoverable --

MR. BRANSON: Now, let me ask you a question.

CHAIRMAN SOULES: -- because that was different.

MR. BRANSON: Had the comp case still been open --

JUSTICE WALLACE: Again, it would be in what context, I suppose, that detective was taking that statement from him. Strictly as far as his comp case was concerned, then you've got one question. If he was just investigating the accident because he knew -- or maybe her case had already been filed and could have been both of them.

PROFESSOR EDGAR: Wouldn't that answer depend upon whether or not it was discoverable at that particular point in time in the comp case?

PROFESSOR DORSANEO: Yes.

PROFESSOR EDGAR: I mean, if it was discoverable in the comp case then it would be subject to discovery by her. If for one reason or another it was not discoverable in the comp case, then it would retain its cloak of immunity.

CHAIRMAN SOULES: We hope.

PROFESSOR EDGAR: Well, but I think that's the way that the cases have kind of developed.

But, Bill, coming back to the question you raised, I think there are some federal cases that

would hold that Frank's incident report is a business record and subject to discovery under the federal rules.

PROFESSOR DORSANEO: I think it is. That's what I think. I think it's not in anticipation of litigation. Now, of course, somebody is going to try to say that everything that they do is in anticipation of litigation and the courts are just going to have to pierce that when it's baloney.

CHAIRMAN SOULES: That's why we've got a problem.

JUSTICE WALLACE: Well, that's the Stringer case. As I said, a railroad accident of this magnitude, we know there's going to be a lawsuit. So, everything we do is in anticipation of litigation. And on that Turbodyne case, this is a subrogation claim and you've got another fact situation.

MR. BRANSON: Judge --

CHAIRMAN SOULES: Let me try this language out.

MR. BRANSON: Would you tell me specifically what prompted your letter to Luke and what you feel the majority of the Court would like

for us to address?

JUSTICE WALLACE: Well, this investigation of the claim or incident out of which the suit arose, if you look at that literal meaning, that means almost down to your incident report in the hospital. And I think it's obvious from the opinions the Courts' have been writing, that's not the way they look at it. But, yes, that's in our rule. And we're faced with a problem, we've got a rule that we've promulgated which the Court doesn't seem to want to follow.

CHAIRMAN SOULES: Let me try some specific language here. Instead of that that we see as being narrowed down, saying that the test is not that communications occur when the investigation of occurrence or transaction out of which the claim has arisen, but that those communications occur in anticipation of the prosecution or defense of the claims made a part of the pending litigation. Is that too many words to pick up? That's broader than just "investigating for the pending litigation." That's "investigating the prosecution or defense of the claims that are made a party."

MR. BRANSON: In other words, an

incident report would not fit in there.

CHAIRMAN SOULES: No, it would not. What I'm trying to do is write something that's broad enough to take care of a catastrophe where there's a lot of lawsuits. You can't say I was looking to Jane Doe's lawsuit. You were looking at the possibility of 100 lawsuits.

PROFESSOR DORSANEO: You want the exemption to cover that, right?

CHAIRMAN SOULES: Yes, I guess I am. Where you know you're prepared for litigation -- this litigation. You know, not the subrogation claim.

PROFESSOR DORSANEO: If you take this back and say this is "work product," that this is really what this is, that's work product problems -- the policy behind work product as I see it -- there are several policies behind it. One is that we don't want people to start altering their behavior because they anticipate litigation when they're working on a problem that really needs to be solved. That's one policy. We don't want the tricking up their incident reports and engaging in bad medical behavior because they're afraid that the report is going to come back to bite them

later.

JUSTICE WALLACE: And another problem we've got in the -- federal hardship rule would take care of it, although the feds say they have more problem with that than any other part of the rule -- is -- take the Houston ship channel, for instance. An accident occurs in one of those plants and the plaintiff is not going to get in there and find anything. They won't even let him in the plant. So, how are you going to find out what happened unless you do get the investigation report of the defendant?

MR. BRANSON: But, Your Honor, you're really confronted with that every time you have an incident on the operating table. The plaintiff is unconscious and everybody at the table has masks on and they cut the wrong leg off or leave a sponge in, and there's no way, unless you can get what they said at that time, if they lie to you, to prove what happened, and that occurs frequently.

PROFESSOR DORSANEO: What I would recommend is to go back and redraft, using the federal model, a work product -- do what Roy McDonald did in 1941 with the benefit of what has

happened since then and what's in the federal rule book with the anticipation of litigation concept and the escape valve on necessity. The reason why that's a hard problem is it is a hard problem, not because it's a bad concept.

MR. TINDALL: Luke, in the refinery case, the Court in its discretion --

MR. BRANSON: I know that necessity really cuts both ways and can cut deep, but there really are times on both sides of these cases where there needs to be an exception to get to documents that you know are there and you know will tell you what actually occurred, and that's the only way you can get to them, is to get to the documents.

PROFESSOR DORSANEO: Including -- I would even go so far as to say including witness statements. Witness statements are the communication in anticipation of litigation. Hickman versus Taylor was about witness statements. And I think our Texas work product approach ought now to be abandoned and we ought to take the approach that other courts are taking.

The anticipation of litigation, have that be the basic thing and let the courts decide what's

in anticipation of litigation and what isn't, rather than crossing this out and saying "work product" without even defining what "work product" is.

MR. BRANSON: Luke, would you be willing to let Dorsaneo and Hadley and I work on that problem and report back to you?

CHAIRMAN SOULES: Sure. No question about it.

PROFESSOR DORSANEO: Now, if we're wanting to make a quick fix, I would suggest striking this "or the investigation of the occurrence or transaction out of which the claim has arisen" and just put "or in anticipation of litigation."

MR. TINDALL: Bill, that would have the unintended effect, would it not, of broadening D? As I read D the "and" on the last line there, qualifies all those communications passing between agents for the defendant or between the defendant or the party and his agents. If they're made then "and" should be "if made." That's not the way that's --

PROFESSOR EDGAR: I'm sorry, the last "and" --

MR. TINDALL: The last "and," it says "made in connection with prosecution investigation," et cetera. That is a qualifier on the exemption for communications.

PROFESSOR DORSANEO: Right.

MR. TINDALL: If you delete the qualifier, then the exemption is broadened more. That's not what you're wanting.

PROFESSOR DORSANEO: No, I don't think it does broaden it. See, we have to look at the whole thing. See, there's three requirements. It has to be between the right people, all right? It has to be post occurrence or transaction, whatever you define that as being. And it has to be, as I see it, in anticipation of litigation.

CHAIRMAN SOULES: Of the pending litigation.

PROFESSOR DORSANEO: Of the litigation in which the claim is asserted subsequently.

MR. BRANSON: Yeah, that's what --

CHAIRMAN SOULES: That's what I wrote here.

MR. BRANSON: That's what bothers me on Bill's proposed amendment. Let's say you have a problem out here that causes an injury. It is

investigated as soon as filed. It is settled or tried to conclusion. The problem continues and a subsequent lawsuit arises.

Now, as I understood your proposed amendment, since the investigation of the prior claim was done in anticipation of litigation, it would be arguably excludable. I don't think that's the intention of the Court or these rulings. At that point, I think it becomes free game. So, when that lawsuit is concluded, all that investigation, I have been assuming, is discoverable.

JUSTICE WALLACE: Or being held that attorney/client privilege being discoverable in that situation.

CHAIRMAN SOULES: See, if you've got a work product, you're consulting experts are discoverable, too, and that's -- you know, that's tender.

PROFESSOR DORSANEO: Now, I would leave the experts alone.

CHAIRMAN SOULES: Well, you reach that by going to -- in federal courts you reach consulting experts.

MR. BRANSON: You sure do.

CHAIRMAN SOULES: If we say -- if we

limit good cause to penetrate a privilege to 166(b)(3)(d) investigations and we also narrow substantially what investigations are privileged, then I think we get to maybe what the Supreme Court's concern is. First of all, we're saying only narrow types of investigations are privileged, and you can get those if you show good cause. But let's don't open up one product in that --

PROFESSOR DORSANEO: Well, I firmly now believe that we end up -- we end up with -- and we didn't see it until we segmented the rule in 1984. We didn't see that we have a series of overlapping exemptions with possibly different reaches covering the same thing. A work product might not cover all the same things that are -- but would cover some of them, okay, as this party communication. It's just a mess, really. It needs to be worked on and unified.

There shouldn't be a greater -- why should there be a blanket, if there is, exemption for discovering witness statements from prior case and not -- and not from party communications or whatever. It's all work product.

CHAIRMAN SOULES: Look at B and D on

your exemptions, written statements of witnesses and so forth, and then D is the investigation. I can understand why you ought to be able to get those for good cause. But when you talk about work product of attorney, other than that, what are you talking about, his briefing? That's the whole work product of an attorney.

MR. TINDALL: The federal rule makes that pretty clear.

CHAIRMAN SOULES: And two, the consulting experts, which is under C, I think A and C should be absolutely private, and (b) should be accessible for good cause. D should be narrowed substantially. And what you have left of it after your narrowing should be available on good cause. And then we've got a rule which spells out what -- I think what the federal law is --

MR. BRANSON: Let me give you an example.

CHAIRMAN SOULES: -- except for consulting experts, which I think ought to be better protected.

MR. BRANSON: You've got an expert witness that you're preparing for trial and you

send him an outline of the deposition. Now is that A?

CHAIRMAN SOULES: That's discoverable under -- helped him prepare for deposition.

MR. BRANSON: I understand. Let's talk about strictly under work product.

CHAIRMAN SOULES: You've outlined depositions and highlighted your depositions and you want to talk to your witness about it.

MR. BRANSON: I mean, that's all you've given him to prepare for the deposition. You look at an outline as opposed to the deposition itself.

CHAIRMAN SOULES: It's privileged and you've waived it, so it's open.

PROFESSOR DORSANEO: Why?

CHAIRMAN SOULES: If you haven't shown it to him --

PROFESSOR DORSANEO: How do you know that?

CHAIRMAN SOULES: What?

PROFESSOR DORSANEO: How do you know that?

CHAIRMAN SOULES: Well --

PROFESSOR DORSANEO: What's privileged

and what's open?

CHAIRMAN SOULES: A deposition that I have highlighted is privileged because it's got my work product. I've gone through and identified things that are important to me. I don't have to show that to you in that form. But if I've shown it to my expert in that form, now I've got to show it to you in that form because I've waived the privilege that is attached to it when I've put my work product into it.

PROFESSOR DORSANEO: Maybe. See, the point is, I don't know what our work product doctrine is. I don't know what it covers; when it begins, when it ends, how I waive it or anything very much about it. We don't have any interpretation of it at all. It only -- it's only -- it's not an adult yet, right, in terms of the number of years it's been in existence? It's only 15 or 13.

And what I think we need to do is to -- we never needed to deal with it, probably because of the investigative information thing that we used to have in there, that you never got to having any of these arguments at all because of the information obtained in the course of an

investigation was not discoverable. That -- the defendants won there right away. The game was over before you got to play. But now it's opened up. Now, it's opened up and I think we need to deal with it.

MR. BRANSON: I'll tell you where we encounter a real problem with directing in expert depositions, is where one side or the other goes in with an expert and shows him a bunch of documents, pictures, drawings, reports, any number of things, and then takes them out of the expert's file before the expert is deposed and explains to the expert that these things really didn't happen because they were work product. That's not right and it's happening on a regular basis and I don't know if it needs to be addressed. I don't know where you address it. I'm sure when it's presented to the Court in the right manner, they will address it. But it is regularly being told to these experts witnesses by my adversaries that these documents really don't exist.

CHAIRMAN SCULES: You need to go to the district attorney about that, if you can prove it, and fast, because that's perjury and subordination of perjury and they ought to be

indicted.

PROFESSOR DORSANEO: See Luke, what we're going to get to, though, we're going to have to deal with what is work product at some point or another.

CHAIRMAN SOULES: There is a waiver.

MR. BRANSON: Now, wait a minute. Until this doctrine is defined, you're not going to get that prosecution in the D.A.'s office.

CHAIRMAN SOULES: It is defined.

PROFESSOR DORSANEO: And once we start working on work product, where are we going to look? Where is the most logical place to look? It's going to be -- it's going to go Hickman versus Taylor, but then right away we'll say, "Well, what did they do with Hickman versus Taylor after 1945?" They'll say, "Oh, they put it in Rule 26(b) of the Federal Rules of Civil Procedure." Once we start looking there, we're doing what Roy McDonald attempted to do in 1940 all over again and it takes us right back to this damned proviso.

CHAIRMAN SOULES: Well, but see, you and Frank are talking about two completely different things. And what Frank's talking about,

we don't need to weaken any rule about because that's waiver. And we're talking about a problem over here being a problem that is really not a problem with the rule. It's a problem with enforcing waiver.

MR. BRANSON: Well, when you don't have a definition of "work product" is what I'm saying.

CHAIRMAN SOULES: It doesn't make any difference because you waive it, whatever it is. You've waived it if you've shown it.

MR. BRANSON: Well, I understand, technically, yes. But I'm saying there's no real -- there's been a lot of problem, in our perspective, in enforcing these opinions when the truth on the matter is you've asked the witness the witness says, "Hey, it doesn't exist." And the reason he's saying it doesn't exist is he's been informed this is work product and therefore it doesn't exist, it's not defined.

And I don't -- it's very difficult, kind of like chasing the wind. It's kind of hard to catch, but you know it's there because you see it happening.

PROFESSOR DORSANEO: Even if he said,

"I did look at some things Counsel showed me, and Counsel instructed me not to talk about it because it's work product," then you're going to go down to the courthouse and say they waived this expert and the judge is going to say, "Well, how do you waive work product?" And say, "Well, you waive it by showing it to your experts." And I'm not so sure that that's -- that I know that that's Texas work product law.

CHAIRMAN SOULES: That's Texas waiver law.

MR. TINDALL: Even to an expert you're not going to call?

CHAIRMAN SOULES: That's -- well, you may --

MR. BRANSON: The defendant -- he never defines that.

CHAIRMAN SOULES: Preparation of testimony, that's what I'm talking about. That's when you waive it when he looks at it to prepare for testimony.

MR. TINDALL: I think Bill is right. I have a lot of cases where people shop for experts and they go to one real estate appraiser and they don't like what they find. They go to

expert two, three, four, five and finally bingo, and you suspected that. The federal rules would say that's an exceptional case, but we ought to be able to find out what those other experts told them they didn't want to hear. But that ought to be a discretionary matter with the judge and we don't deal with that in our rules.

CHAIRMAN SOULES: The Supreme Court dealt with it in 1984. They've done some changes since then. But in 1984 this committee recommended to the Supreme Court that we be able to discover the identity of consulting experts so that we can take their testimony and find out whether they talked to the testifying experts so that we could enforce what helped the testifier get ready. And the Supreme Court knocked that out when the rule was passed and made -- you can't even discover the identity of the nontestifying expert. They may have changed their minds by now, but they protected those people more than we wanted them protected at that time.

MR. BRANSON: The Court was right.

CHAIRMAN SOULES: They were right.

PROFESSOR DORSANEO: I will say two more things and then be quiet.

CHAIRMAN SOULES: Let's try to get really down to what we need to do and that is -- this is our last meeting. We're five hours from recess, and we will not meet again before these rules are promulgated. If we can speak to the last clause of 166(b)(3)(d), specifically on what we would suggest the Court do right now on the very problem that it has in focus, then we can look at this some more before we recommend changes again two years from now.

MR. BRANSON: Give me the wording you recommend.

CHAIRMAN SOULES: All right. Now, this as it -- it would start "Made in connection with" -- wait a minute. "Were made subsequent to the occurrence or transaction upon which the suit is based," and then I would add "and in anticipation of the prosecution or defense of the claims made a part of the pending litigation." Let's get that written down and then shoot at it.

I would also suggest that the Court adopt the federal approach to permit the discovery of 3a(b) and 3a(d) as limited on showing of good cause, but that not reach -- I'm sorry, 3(b) and 3(d), but not reach 3(a) and 3(c). But you could reach for

good cause 3(b) and 3(d) but not 3(a) and 3(c).

If we do that now, that's going to, I think, speak to the specific problem the Court's got now, whether I've said it right or not. That's what the Court's trying to deal with right now, I think. Is that right, Judge, as you see it?

JUSTICE WALLACE: Well, I see that last sentence that you're talking about there as a big obstacle for the Court -- what some people are probably going to call interpreting -- liberal interpretation of maybe other parts of the rules. But that last sentence down there just seems to the tired hands who typed it, you don't get anything under the circumstances. And I think this escape valve -- this hardship rule in the federal rules is certainly going to have to -- we're going to have to have some form of that sooner or later.

There are going to be situations where one party just follows up everything, and you might as well forget about it no matter how mangled the person is and how just a cause he has, you're not going to get any evidence.

PROFESSOR DORSANEO: The Boston Court of Appeals interpreted the Supreme Court's prior

opinion in ex parte Sheppard (phonetic) as developing by case law a -- an escape valve for good cause exception.

CHAIRMAN SOULES: Now, see, what this does is, whatever is evidence -- and now we're talking about witness statements and that sort of thing. We're talking about what's been produced in the investigation. That all may be evidence. You get all that. What you don't get is work product of consulting experts.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: That's not evidence. That's something else. So, 3(b) and (d) do protect evidence. 3(a) and (c) really protect work product.

MR. BRANSON: I understand that, but we get right back to where Bill was, until we know what work product is we don't know what's protected.

CHAIRMAN SOULES: Well, it won't be 3(b) and (d) --

MR. BRANSON: I understand that.

CHAIRMAN SOULES. -- because we know that that's now out in the open for good cause.

PROFESSOR DORSANEO: Well, I don't --

see, that's where I run into real difficulty. Because I think if this investigation is done by -- you know, by a law firm, all right, or by something amounting to that, that, by God, by definition it is in anticipation of litigation.

JUSTICE WALLACE: In other words, if --

CHAIRMAN SOULES: But you can get it for good cause under what I'm proposing, even so.

PROFESSOR DORSANEO: As work product? See, that will --

CHAIRMAN SOULES: You can't get work product of an attorney, but you can get the communications of --

JUSTICE WALLACE: What if -- let's say Stringer, for instance. That's one of them. If, whoever the law firm is representing -- I think it was Southern Pacific, I'm not sure -- said, "Okay. We'll transfer our railroad detectives over to your payroll," and, therefore, you've got attorney/client privilege on everything that guy does.

PROFESSOR DORSANEO: That's the other thing: The attorney/client privilege is going to get into this, too. Three layers. You have this

party communication, one line of defense, the next line of defense is work product, and the other line of defense is attorney/client privilege.

JUSTICE WALLACE: And we had one case -- I don't remember the style offhand -- but the company said, "Okay. We're going to make our lawyer our safety engineer," this company did. So, everything that's done after investigation as far as safety matters are concerned, it's under the supervision of our lawyer. Therefore, it's work product. Now, that actually came to court.

PROFESSOR DORSANEO: Now, none of these doctrines are meant to protect the information anymore, just the product, the communication, all right. The product --

JUSTICE WALLACE: The only thing there, though, is that report that has been made, that's a communication. And it's mighty conveniently -- as far as memories when you're asking what is in it.

MR. BRANSON: What the Court did then to me in the Nowell versus Wadley Hotwell (phonetic) case on admittance of hospital records, they said, yes, that the section of public health code, the actual minutes are privileged, but what

we said in the meeting is not. Well, I go back to depose everyone's meetings and a lot of them had no memory and some of them had memory that I knew was different than what occurred. So, you really -- you've got to get at the heart of the coconut as well as the shell.

JUSTICE WALLACE: Lefty has been trying to say something for a long time.

MR. MORRIS: I would like to ask you a question, Judge. Is it the Court's desire for us to just delete the wording after -- beginning with "and made in connection"?

JUSTICE WALLACE: Well, that is a big obstacle. What the Court would like to have is some -- is some input from the committee on this whole rule, this whole area.

PROFESSOR DORSANEO: The anticipation of litigation concept, I think, if we want -- is a good one, if we want any kind of work product protection. If it makes sense to say that we don't want people to be worrying about whether this is going to come back to bite them when they're trying to solve this problem, then they also get into litigation, you know, in the ordinary course of business.

PROFESSOR EDGAR: Let me ask a question.

PROFESSOR DORSANEO: Then we want to have an exemption.

PROFESSOR EDGAR: You represent -- you have a car-truck collision and you represent the passenger and the driver. You send the investigator out to investigate. You then settle the driver's claim and now you're representing just the passenger. The trucking company wants the investigative file as it pertains to the settled driver's claim. Now, should he be entitled to it?

MR. BRANSON: No, I did the investigation of what was left.

PROFESSOR EDGAR: But that's part of the problem. I mean, this -- the point I'm trying to make is this really cuts both ways.

MR. BRANSON: I understand that. And probably in our office it cuts probably deeper than it does in a lot of plaintiff's offices, investigative staff. And we get around a lot of problems that a lot of lawyers are able to that way, but I don't have to deal with it and I know the courts are confronted, obviously, because of

those requests with some major areas. The reason I suggested that maybe we spend some more time and get back -- but the time constraints may not allow that.

JUSTICE WALLACE: We would like input as soon as we can get it.

MR. BRANSON: Since we're not going to have a regularly scheduled committee meeting, would it be possible to appoint a subcommittee and let the subcommittee make some recommendations for the Court?

JUSTICE WALLACE: Well, I know we would appreciate it. The posture we're in, we've got these two cases on motion for rehearing and --

MR. BRANSON: I know there's some time constraints.

JUSTICE WALLACE: -- and the Court feels the need that things need to be jelled on this and we need to come to a decision of what are we going to allow and not going to allow. And you sit up there around that table so long a time, you get out of touch with a whole lot that's going on in the courtroom. And we need to hear from you on it.

MR. BRANSON: I would be more than

happy to take the time, and I know some other members of the committee would, to sit down and wrestle with the problem rather than trying to give the Court a just off-the-cuff response. So many of our members, really, are not here today.

PROFESSOR EDGAR: Of course, if the Court is sitting on two motions for rehearing, though, I'm sure they're anxious to dispose of them, too, as the litigants in those cases. And I don't know whether they really have the luxury of additional time, Frank, from what I'm sensing Judge Wallace is saying.

PROFESSOR DORSANEO: There's hardly anybody here, though. In terms of the language of the rule as it currently is drafted, what the committee people had in mind, at least some of them, was that the word "investigation" would be a really significant word, that that wouldn't be just any kind of a review by anyone, that it would be an anticipation of litigation idea, that that would be a word of art that would mean investigating the occurrence or transaction in anticipation of litigation.

Now, whether the Court would want to read in as a gloss not only that idea, but investigation

of the particular occurrence or particular transaction, and that's supportable by some of the language in Allen versus Humphries, that would be, in terms of the wording of the current rule, a way to read it narrowly. But it is, I agree, worded in a way that it could be interpreted much more broadly than anybody expected.

MR. MORRIS: You know, I think an example is where you have some kind of a negligence lawsuit, let's say, and for one reason or another the insurance company decides they're not going to defend it and they have a reservation of rights. You end up, then, with a subsequent lawsuit against the insurance carrier; bad faith.

It seems to me like, clearly, that anything regarding their investigation of the wreck would be discoverable in the bad faith lawsuit. But I'm not sure, under this reading, as I read this, that you would be able to get to it. Do you know what I'm saying? It seems to me like what you're saying -- the specific claim that you're dealing with, those communications are not discoverable.

PROFESSOR DORSANEO: The problem that I'm having difficulty expressing is that my idea, policywise, is this: When somebody makes this

communication, we don't want them to make it differently than they would otherwise make it for fear of this litigation. We don't want the -- from looking at it from the standpoint of a regular employee, we don't want them falsifying a report because they're afraid of it's going to be discoverable later.

MR. BRANSON: We run into it in hospital environments.

PROFESSOR EDGAR: Or they know it's going to be discoverable so they deliberately falsify it.

PROFESSOR DORSANEO: And we don't want lawyers or their legal assistants, who go out to investigate particular occurrences, to do a poor job or to not write things down or to somehow lie or whatever words you want to use --

PROFESSOR EDGAR: Be less than truthful.

PROFESSOR DORSANEO: -- be less than truthful, because that is not something that is going to be exempt under work product principles, et cetera. So, the focus ought to be on encouraging people to do the right thing at the time they make these communications, rather than

to do something else because of discoverability problems.

The only reason they have the exemption is to encourage behavior that we like better than discovery.

JUSTICE WALLACE: We don't want the insurance companies handling two investigators like they have two sets of books.

MR. BRANSON: But then, Bill, you you've left right where Judge Wallace says they are, and, that is, you're going to have to have some good cause or unusual exception to the general rule because there are going to be instances where you work a hardship if you don't allow it to be discovered.

PROFESSOR DORSANEO: Oh, I think that's right. I think we do need an exception and I've been saying for years that the Supreme Court created one, an ex parte Sheppard (phonetic), and it really is there, even though some professors say otherwise, not Professor Edgar.

MR. TINDALL: The federal rule sure does seem to bridge this problem somewhat effectively by saying that a party may obtain discovery of documents. Let's say it's a

communication between the railroad detective and the --

PROFESSOR DORSANEO: Or a witness statement.

MR. TINDALL: -- or witness statement. Well, witness statements are treated separately. Okay. A witness statement, prepared in anticipation of litigation of the trial by or for another party, or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insuror agent only -- but, see, they put a kicker -- only upon showing that the party seeking the discovery has substantial need in the materials in preparation of his case. So, we can't get it anywhere else. And that he is unable, without undue hardship, to obtain the substantial equivalent of materials by other means.

So, that sort of gives the judge a balancing to do it, but then they back out. At the end they say in ordering the discovery of such materials when the required showing has been made, the Court shall protect against disclosure, mental impressions, conclusions, opinions or legal theories of an attorney or other representative of

a party concerning the litigation.

PROFESSOR DORSANEO: So, the other kind of work product that involves your thoughts is safer than the information you took down.

MR. TINDALL: That's right.

PROFESSOR DORSANEO: Or the picture you took, I guess, which was even a communication. It's a nice question as to whether it's work product.

JUSTICE WALLACE: We know it's not communication.

PROFESSOR DORSANEO: I think the federal rule has been interpreted different ways, and it's arguably more conservative than this Court wants to be. But --

MR. TINDALL: Well, work product, the way the rule is written now, can be anything, right? It's a freight train that emasculates the rule, it seems to me. We're back to 372; are we not?

MR. MCMAINS: Until recently we had problems with photographs.

MR. TINDALL: Yeah, work product.

PROFESSOR DORSANEO: See, the words "work product" were not -- there were massive

changes in 1971 and 1973. And "work product" was added in then as an additional barrier. It didn't appear in the Rules of Procedure as an exemption before that. But because of the investigative information thing, I don't think it ever particularly received interpretation as a separate concept, separate from these provisos we're talking about.

MR. BRANSON: What if you just put "except for good cause shown"? Would that get give the Court --

MR. TINDALL: Where?

MR. BRANSON: 4(d).

PROFESSOR EDGAR: If you're going to do it, though, it seems to me that the federal concept of substantial need and manifest hardship still leaves you a safety valve whether there's a more stringent requirement than for good cause. I mean, to me, those are more identified -- you have a greater burden of showing, it seems to me, that you're going to be able to discover it if you have to show substantial need and hardship than just good cause.

MR. BRANSON: What's wrong with doing it for just good cause?

PROFESSOR EDGAR: Well, it kind of comes back to what Bill was saying earlier. I guess I just have a feeling that discovery should be just a little more restrictive.

PROFESSOR DORSANEO: You shouldn't be able to get it just because you want it. You should have to get it because you need it, because you can't get the substantial equivalent elsewhere, like the case you're describing.

MR. BRANSON: But for good cause, though, really is more than I wanted. I mean, good cause, generally, is required more than just coming in and saying I want it and, say, ignore the existence of it.

MR. TINDALL: Well, good cause may be "It will help settle the case, Judge, if we got this," and I think you want more than that.

PROFESSOR EDGAR: That's good cause all right.

MR. TINDALL: So, I'm saying that wouldn't apply.

JUSTICE WALLACE: Well, the Stringer case, for instance, the question of whether the plaintiff is going to go to Sweetwater and depose 92 witnesses or get -- and that's sort of middle

of the road; you can call that either way. Take the ship channel case, for instance, and I don't think there is any question, because it's the only way you're going to get it is under the --

PROFESSOR EDGAR: That would fit the criteria certainly. But substantial need and undue hardship, to me, still retains a policy behind nondiscoverability and at the same time gives the litigant an opportunity, if he can show those things, to obtain it.

MR. BRANSON: Well, would you let that apply for A through E, Hadley, or would you say the following matters are not -- with except for manifest hardship? Or would you limit -- would you take out A and take out C?

PROFESSOR EDGAR: Well, the only thing the Court is apparently concerned with now is D.

JUSTICE WALLACE: That's the big concern. Now, what the Court would like to do is to try to settle this question of what is going to be discoverable and what is not going to be discoverable and entitle it to the rest, so that lawyers and judges out there will know what to do.

PROFESSOR EDGAR: Corral this wild

horse.

MR. BRANSON: And certainly adding an exception to it is not going to do that.

JUSTICE WALLACE: No.

PROFESSOR DORSANEO: Luke's suggested language comes pretty close to the most reasonable reading of these three recent opinions. Defining "reasonable reading" as the reading that I'm placing on them.

CHAIRMAN SOULES: That's where I was coming from.

PROFESSOR DORSANEO: But it doesn't solve the bigger problem. And the next problem you're going to have is, "How about work product, if that didn't work?"

JUSTICE WALLACE: We really need a description or definition of work product. Are we talking about attorney/client privilege? That's a very narrow description of work product, and just how much of an investigator's work or how much of an investigator's product is included in work product.

PROFESSOR DORSANEO: I think we need a definition of "witness statement," too, quite frankly. You'd be in the -- everybody thinks they

know what a witness statement is until they start thinking about it. What about a witness statement from a long time ago? There could have been some other case before this occurrence even if it ever occurred, and say, well, what could that witness statement be about? It might be about something. It had something to do with this case. You can tell it's a witness statement because it says it is statement of witness.

CHAIRMAN SOULES: Well, there's another -- you know, we've got E here, too, which is not discoverable, some by statute, of attorney/client privilege. That's where that comes in.

MR. BRANSON: Judge, would Luke's, recommended verbage assist the Court?

JUSTICE WALLACE: It would.

MR. BRANSON: Read it one more time.

CHAIRMAN SOULES: Well, it would say -- reading 3(d) after the language, "subsequent to the occurrence or transaction upon which the suit is based," and then insert this, which would be all the remaining language: "And in anticipation of the prosecution or defense of the claims made a part of the pending litigation."

PROFESSOR DORSANEO: Let me see.

JUSTICE WALLACE: And have the federal provision 3(b) and (d) on it.

CHAIRMAN SOULES: And not to 3(a), (c) or (e).

MR. BRANSON: Then you would add in the exception that we talked about.

CHAIRMAN SOULES: That for good cause -- you can get --

MR. BRANSON: Not for good cause.

PROFESSOR EDGAR: It seems to me that the concept of substantial need and hardship -- the language out of the federal rule is more restrictive, I think, than good cause.

CHAIRMAN SOULES: And it should be that way, should be hardship.

PROFESSOR EDGAR: And, to me -- because as Harry mentioned a minute ago, good cause could be that this would help me settle this lawsuit, Judge.

CHAIRMAN SOULES: Substantial need and hardship should be the test, and I really meant the federal test. I'm sorry, I wasn't giving that feeling.

MR. BRANSON: I will move that we

adopt that language, and also, if it will assist the Court, ask the Chair to appoint a committee to further investigate this prior to the next meeting.

PROFESSOR DORSANEO: There's other ways you can say it.

CHAIRMAN SOULES: And this will be referred to -- Tony Sadberry has agreed to chair the interim standing subcommittee on discovery rules. And I would like to, of course, have you, Frank, and anybody, Bill, Hadley, participate in it.

PROFESSOR DORSANEO: Now, Luke, let me ask you this: Luke, I think it's clear from your language, but your language would not mean, would it, that there would have to be a claim made before the communication -- it's still a post occurrence communication rather than a post claim communication, right?

CHAIRMAN SOULES: It does not mean that there is a claim already made. But it's in anticipation that a claim will be made. It says, "in anticipation of the prosecution or defense of the claims."

PROFESSOR DORSANEO. So, in other

words, in anticipation of litigation in which the privilege is asserted.

CHAIRMAN SOULES: That's right.

PROFESSOR DORSANEO: Anticipation of a litigation --

CHAIRMAN SOULES: That's right. Anticipation that these very claims are going to be made.

PROFESSOR DORSANEO: Each one is a slightly different thing.

MR. MCMAINS: Reread your first -- your predicate entry, the first preparatory words.

CHAIRMAN SOULES: Okay. Have you got 3(d) in front of you?

MR. MCMAINS: Yeah.

CHAIRMAN SOULES: Okay. It's all the language in the rule down to "made subsequent to the appearance or transaction upon which suit is based." Do you want to read that for a minute?

MR. MCMAINS: Yeah.

CHAIRMAN SOULES: "Where made subsequent to the occurrence or transaction upon which the suit is based," and this would be all the remaining language: "And in anticipation of the prosecution or defense of the claims made a

part of the pending litigation."

PROFESSOR EDGAR: "Made a part of the pending litigation"?

CHAIRMAN SOULES: Right. So, if the pending litigation is broader in scope, if these claims -- that they're a part of it, the anticipation of those claims, you don't waive it just because they're not all there is in the pending litigation. I believe this language goes as far as the current cases go.

CHAIRMAN SOULES: See, the current cases don't get down to the question, though; they start trying to draw distinctions. Obviously, you're going to be talking -- you want to limit it and say, not any possible thing that could occur, but it's almost like negligent misrepresentation. We want to limit it to a limited group of claims that are going to occur in the future, almost the claims or claims like these claims. I don't think we want -- do you want to require the party involved to anticipate who the exact litigants are going to be?

CHAIRMAN SOULES: No.

PROFESSOR DORSANEO: That's too far.

CHAIRMAN SOULES: That's too far, but

this is -- well, I don't know how to say it any better. It doesn't say "claims made by the parties in this lawsuit." It doesn't say "similar claims," either. I think the courts are going to have to massage where it draws the line of when claims are made in anticipation of the pending litigation.

MR. TINDALL: But, you see, that gets back to the federal rule Bill was advocating. The determined defendant can always meet the exception in discovery, unless you give the trial courts discretion and make him cough it up in the worst case possible, which is getting back to hardship and substantial need.

CHAIRMAN SOULES: And that's where the trial court really gets -- escapes potential mandamus. He's got two safety valves. One, he can say that he doesn't think that this material meets the privilege test, but even if it does, he thinks that hardships have been shown and he's going to open it up. So, in those close issues, in the gray area, he's got some room to make --

MR. TINDALL: The way I read the last way you've proposed change in D here, you can still always claim that you fit within that

exception.

CHAIRMAN SOULES: Right. You could claim --

MR. TINDALL. You could draw your circle tight enough that you're going to get all your protective material --

CHAIRMAN SOULES. You didn't even have to be expecting claims or litigation under the rules -- the rule the way it's written now. All you have to have been doing was investigating the transaction or the occurrence, period, later, not anticipated, not if we think --

PROFESSOR DORSANEO: But that's not how it was meant to be read, you see. At least in my mind, "investigation" meant you weren't just out there looking around.

MR. TINDALL: Any defendant -- well, the lawyers are going to say, of course, they were anticipating possible litigation. So, you haven't cured anything unless you give the judge, ultimately, the right to make them give you the material.

CHAIRMAN SOULES. Harry, remarkably, the recent cases don't bear you out. There are cases -- the cases -- for example, the worker's

comp and then subsequently suit by the wife. The investigation of the insurance carrier of the worker's comp claim clearly was not in anticipation that the wife was going to file a lawsuit for personal injuries against her husband. They admitted it, and that opened up that investigation. The worker's comp investigation got opened up, because it was not in anticipation of the claims that were made in the wife's pending litigation. It does, in fact, open investigation.

PROFESSOR DORSANEO: The thing I have trouble with is, why if it's -- if what we're concerned about is somebody writing down the information in some sort of an inappropriate, inaccurate manner, then why should they have to -- I guess, if they're anticipating this type of lawsuit, then they would do a different type of changing the information than if they are anticipating that kind of lawsuit.

But the problem I have is that I don't want them to be worrying when they're doing their job about the fact that this information is going to come back to haunt me later. So, why should they have to anticipate it that much? That bothers

me. I think --

PROFESSOR EDGAR: Luke, is the one -- the case involving the railroad investigator, was that Stringer?

JUSTICE WALLACE: Stringer and Harkness were both railroads.

PROFESSOR EDGAR: I'm talking about the one where the wreck occurred and the investigator went out and investigated but no lawsuit had, at that point in time, been filed.

JUSTICE WALLACE: Right.

PROFESSOR EDGAR: All right. Now, under your wording, that would not be subject to discovery, would it?

CHAIRMAN SOULES: It would be. It would be subject to discovery because the courts are holding that this anticipation of litigation, that that means -- I want to exaggerate just a little bit when I say this, but it's not a lot -- but that means solely in anticipation of litigation. In other words, if you prove that railroads typically investigate their accidents the way this one was investigated, you get that report because it's not purely for -- in anticipation of this litigation.

There is some case law that -- so, if you prove that whenever there is this kind of wing failure on an airplane, they always do this big series of tests because they want to find out what happened, you know, metal fatigue, you know, just scientific investigation made of the problem. You get that even though somebody got killed in that plane crash.

MR. BRANSON: It's not in the ordinary course of business in addition to being for --

CHAIRMAN SOULES: You don't have to prove ordinary course of business. What you've got to prove to get your privilege established is solely in anticipation of the claims that are made part of the litigation. That's a lot of words, but you've got to -- if you've done it for any other purpose -- for example, "I went to the doctor because I wanted to consult with him and I also got some treatment," and there's a case on that, you see. And they say this patient went and got treated as well as had a consultation. If there is anything else besides anticipation of litigation or consultation in terms of an expert -- if there is anything pertaining in any way, it's discoverable.

PROFESSOR DORSANEO: I hope that's not the law.

CHAIRMAN SOULES: That's the way it reads to me. At least the Court of Appeals and now the Supreme Court is writing about it. So, the anticipation of litigation is exclusive as well as --

MR. BRANSON: How about just putting in the rules, "solely for anticipation of litigation"?

CHAIRMAN SOULES: Well, I said I lied a little bit. I can't tell you just how much, but it's not much. There is a gray area, I guess, of when something was tainted or when it's almost tainted.

MR. BRANSON: Would that help or hinder the court if we added Luke's recommendation, "solely for the anticipation of litigation"?

JUSTICE WALLACE: Well, it's hard to say because -- I'll tell you again what we want out of you. I think probably every member of the Court has some inkling, well, here's my idea on how it should be treated. And as I said before, we sat around that table up there for two, three,

four, eight, ten years, and you lose touch. And that's why this committee's recommendations are so critically important to us on these rules in the opinions we write interpreting the rule after we promulgate them. So, I can't give you really --

MR. MCMAINS: The problem in the railroad accidents you're talking about, hell, they're required to investigate the railroad by federal statute. They're also, you know -- I mean, so you could never make a "solely" argument anyway. The same thing is true with regards to air crashes. The same thing is probably true under the Magnison law (phonetic) with regard to warning on problems.

MR. BRANSON: The same thing would also be true for the hospital --

MR. MCMAINS: Various reports in regards to any kind of consumer product.

CHAIRMAN SOULES: There's already a Texas case on that that gives you a right to those reports. You're getting -- I just don't know whether -- I don't know whether the case law has drawn the line as "solely" yet. And I'm more inclined to listen to the cases that come up a little bit and be sure that we're -- you know,

that we're seeing a line of D-1 -- Frank, that's my only resistance to that.

MR. BRANSON: Well, if Justice Wallace indicates that it would help them to have the language, and it's my understanding of the Court, then I move we adopt the language of Luke's proposal and adopt the wording of the federal exception.

CHAIRMAN SOULES: As to 3(c) and --

MR. BRANSON: As to 3(b) and (d).

CHAIRMAN SOULES: (b) and (d). Second?

MR. MORRIS: In your motion, is the word "solely" in there, Frank?

MR. BRANSON: No. It's broader than what you've got now, but if you look at it --

MR. MORRIS: The thing I like about the word "solely" is that the direction where we're going, it makes it real plain what the line is.

MR. BRANSON: As I perceive Justice Wallace, though, there seems to be a difference pending on the Court as to whether that --

MR. MORRIS: Well, they're asking us for our ideas. They're not asking us to try to

figure out what the hell they want.

CHAIRMAN SOULES. Why don't we vote on it this way, and then vote on whether or not to put "solely" in? I'm not -- this vote does not exclude the inclusion of "solely."

MR. MCMAINS: One last question about the (b), what are you talking about putting putting in (b)?

CHAIRMAN SOULES: That (b) and (d) would be subject to discovery if the Court, as in the federal system, finds hardship and substantial need. But you would not be able to get (a), (c) on that.

MR. MCMAINS: I have a visceral reaction to the concept of being able to pull a party's statement from the attorney's file.

CHAIRMAN SOULES: Well, but that's evidence. Okay. How many want to --

MR. MCMAINS: Well, I mean, has there been any discussion, I mean, that you ought to be able to do that? You take notes on what your client tells you, that ought to be --

PROFESSOR DORSANEO. That's different. That's not the witness statement.

MR. MCMAINS: Well, the witness, as a

matter of course, and they do it in a lot of offices, writes down his description of the attorney.

CHAIRMAN SOULES: That would be a witness statement.

MR. BRANSON: That would be attorney/client privilege.

MR. MCMAINS: It's done in connection with your taking the lawsuit. You're going to tell me that everything I've got in my file that is a communication from him, that could be classified as a statement of what happened?

PROFESSOR DORSANEO: I think we need a definition of "witness statement," as, again, it's a problem. Hickman versus Taylor is about attorney's notes and about witness statements.

MR. BRANSON: Why doesn't the attorney/client privilege protect us? If he gives a statement to you or your agent --

MR. MORRIS: Because we changed the wording in (b). If we change (b) and we put it --

CHAIRMAN SOULES: All we're doing is saying that --

MR. BRANSON: You're leaving (a).

CHAIRMAN SOULES: All we're saying is

that (b) cases -- (b) and (d), that on a showing of hardship and substantial need, as under the federal rules, those areas of protected material could be penetrated. But otherwise, attorney work product, attorney/client privilege, and consulting experts could not be reached, even for hardship and substantial need. We talked about that quite a bit here, Rusty. Okay. Let's vote.

MR. BRANSON: You could handle Rusty's problem by putting in there a provision that this does not affect the statements made by client to an attorney.

PROFESSOR EDGAR: You can just say "the written statements of potential witnesses and parties, other than those given to their attorneys," comma, "except," so on and so forth.

PROFESSOR DORSANEO: If you put "attorneys," you better put "agents of attorneys," too.

MR. BRANSON: "To their attorneys and attorneys' agents."

CHAIRMAN SOULES: Well, let's let the lawyers argue that that's attorney/client privileged as protected under (e) and you can't get that under (a).

PROFESSOR DORSANEO: It's protected under (a). It's work product.

CHAIRMAN SOULES: And (a).

PROFESSOR DORSANEO: You get back to go again.

MR. BRANSON: So, let me ask you a question. Every time -- under the standard area of admissions policy, an insured is required to to report to the company what it occurs, where do you see that fits?

CHAIRMAN SOULES: Well, you can -- it depends on whether that -- it just depends on where the line is drawn on how much that's in anticipation of things, how it fits in anticipation of the claims and how to approach the -- fits the litigation rules. That's where I draw that line.

MR. BRANSON: So, when the insured reports to its carrier what occurred under this, conceivably, that's discovery.

CHAIRMAN SOULES: It's either absolutely discoverable or it's discoverable on showing of extreme hardship and substantial need.

PROFESSOR DORSANEO: Now, what's that going to cause? Is that the kind of thing we want

to promote? When that's reported, that now the -- there's either uncertainty or clear discoverability for people going out and investigating or taking -- engaging in behavior.

CHAIRMAN SOULES. They've got that. That's the worker's comp case. That's already the Texas law.

PROFESSOR DORSANEO: I don't care what the decided cases are.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: I mean, I care what they are, but just for the sake of discussing this, is that -- what kind of behavior is that going to promote? Is that going to be good behavior or bad behavior?

CHAIRMAN SOULES: I think -- well, you mean, they're going to fudge on their statements?

PROFESSOR DORSANEO: Are they going to fudge? Are they not even going to take statements? Are they going to not tell you they took statements when they took statements?

MR. BRANSON: Well, the other side of that, I've seen cases, in fact, I've had them, where for some reason the defendant, the insurance carrier, mailed me that very statement by accident

and then all discovery they mailed me was the original statements from the doctor of what happened. And it happened to be diametrically different from what he testified at trial. Now, that's what's occurring now in many instances. They're saying to their carrier one thing and then they're saying it at the courthouse differently. So, it might promote the truth at the courthouse, is what it might do.

PROFESSOR DORSANEO: Or would it do -- in the language of Hickman versus Taylor, incur sharp practices and poor investigation and bad case preparation?

MR. BRANSON: I would urge, perhaps, making it discoverable is encouraging sharp practice -- I mean, making it not discoverable. It may be that the counter balance --

PROFESSOR DORSANEO: It's contrary to me that something is reported to an entity that exists for the purpose of defending claims, then it would seem that the communications that they generate, the reports they make are, by definition, in anticipation of litigation. And then you start playing games and you say "Aah, but did they anticipate this exact lawsuit that

ultimately developed"?

And I think at that point you start to get outside of what this privilege -- this exemption was meant to be about at the threshold, and all you're saying is it's not fair that the plaintiff can't get this because it contains good stuff. And --

MR. BRANSON: I think if you limited to --

PROFESSOR DORSANEO: -- that goes too far.

MR. BRANSON: If you put the exception Rusty suggested in and, that is, still make privileged statements to the attorney or the attorney's assistants, you are okay, but if you protect it as much as you can --

PROFESSOR DORSANEO: Well, maybe the federal approach isn't the best approach, but cases have nothing to do -- these ones we have. Is the problem that we don't have an escape valve? Is that really the problem, or is the problem that -- I mean, do we have to read the exemption really thoroughly because of the fact that it is very -- all right -- when the information is not otherwise attainable.

JUSTICE WALLACE: I think the problem is not that -- so much not having an escape valve. The problem is that nobody is really certain the correct approach to take on these things. That's the real problem. And we've got the problem same as the members of the committee have discussed around here. You can't get a consensus on the best approach.

PROFESSOR DORSANEO: Probably the thing is from industry to industry some people are different -- you know, probably, maybe for hospitals, they do one thing. They may be accurate anyway because of their training. And another kind of business might go about it differently. I don't guess bus drivers may be particularly smart enough to falsify their reports in anticipation of litigation if it happens later, unless they have their lawyers with them at the time.

CHAIRMAN SOULES: Incident reports wouldn't be protected at all.

MR. BRANSON: Well, but incident reports -- there's an awfully good argument that incident reports shouldn't have been protected.

CHAIRMAN SOULES: That's right. The

motion is on the floor that we -- let's just take it a step at a time.

MR. BRANSON: I would accept an amendment to the motion that would add into (b) and (d) -- or into (b) "except for statements made to the attorney or its agent" -- to the party's attorney or its agent."

CHAIRMAN SOULES: Who is the attorney's agent? How far does that go? Does that go to the investigator that the attorney sends out, gets a statement from the eyewitness?

MR. MCMAINS: It's not the eyewitness he's talking about.

MR. BRANSON: I'm talking about the party.

MR. MCMAINS: He's talking about the statement of the party to the lawyer.

PROFESSOR EDGAR: The party comes up and gives a statement to the attorney at the time the employment is initiated.

MR. BRANSON: It certainly would not include the supervisor at the hospital that took the incident report. That's not --

CHAIRMAN SOULES: Who is the employer? Who is the client, the hospital? Who

is the hospital? Is nobody in the corporation the party, or is everybody the party?

MR. BRANSON: Well, it's only statements made to his lawyer or his agent, and innerhospital memorandums certainly don't fit in that category.

CHAIRMAN SOULES: Doesn't (e), which is attorney/client privilege, and (a), which is attorney work product -- don't those give us all the room we need to argue that those communications are otherwise privileged and not discoverable because of the other privileges that drown down?

MR. BRANSON: Well, my understanding is what Justice Wallace is attempting to do is get some additional delineation from the rules. If you leave it any other privilege without making that communication, you haven't helped.

CHAIRMAN SOULES: Well, you have to -- you leave (e) there, you mean?

MR. BRANSON: Leave (e) and try to protect the attorney/client privilege, as Rusty is suggesting, I'm not sure you're given much direction.

CHAIRMAN SOULES: Then we've got to

get into the writing of the whole body of law about who is the client when the attorney's representing the corporation. I mean, that's that's a law review article.

MR. BRANSON: It probably needs to be written.

CHAIRMAN SOULES: If that's what the committee wants to do, that's fine. I don't know what --

MR. TINDALL: Luke, could we -- I'm very reluctant to vote on this. I know the Court wants our help, and I think we ought to give it.

CHAIRMAN SOULES: We're going to make a consensus. If you please to vote with them -- I've been asked by Justice Wallace --

MR. TINDALL: Could we have it written up and Xeroxed so we could see it? Because it's a serious issue --

CHAIRMAN SOULES: Yes. This book is going to be sent to every member, as soon as I can get it out, based on everything we do. And this is -- we're going to go over this tomorrow and revise it and everything we do here. But tell me something to write. Let's get a consensus on how it's to be written and I'll write it. And if we

want to put it in there, Frank -- I'm not trying to be argumentative. I don't really care, as long as we know what we're doing.

MR. MCMAINS: Luke, my only concern -- concern is the way we truncated the exceptions. I mean, we have basically said everything is discoverable except -- and then we've got A, (b), C, D. When you have a specific rule dealing with written statements by the parties, and then you've got a general rule on attorney/client and work product, I can easily see an argument to be made. Well, obviously to the extent you're talking being anything written statements and parties ain't in these other two because it's right there.

Now, you can say that's a stupid argument. I guarantee it will be made.

CHAIRMAN SOULES: I know. I see that. I don't think it's a stupid argument.

MR. MCMAINS: Much dumber arguments than that are made every day at the courthouse. And all I'm trying to do is say that when you say statements -- you know, written statements by a party are going to be discoverable under this, without apparent limitation, you've treated these as being independent entities and with no

reference to the other -- to either A or E. I'm just concerned, somebody is going to say it's either E or it's nowhere. You don't have an exclusion. Maybe everybody thinks, you know, statements by parties ought to be just outright discoverable but --

PROFESSOR EDGAR: It seems to me that if this is a sufficient concern, if we just stated 3(b) to say "Excluding statements made to their attorneys," comma, "the written statements of potential witnesses and parties except," so and so.

Now, we can talk about agents and we can talk about how many people dance on the head of a pin, but the Court can then determine whether or not the statement made by -- to an agent of an attorney is a statement to an attorney. We can't solve every problem that can conceivably arise.

MR. BRANSON: I will accept that amendment to the motion.

PROFESSOR DORSANEO: Well, if we're going to do this, and if we had more time and wanted to be faithful to Allen versus Humphries, which is what the Supreme Court said wasn't changed by this, what we would do is take (b) and

D and recombine them such that we define what a witness statement is, in the same way we define what kind of party communication is not subject to discovery. That is to say, a statement made after the occurrence or transaction --

MR. BRANSON: Isn't that the type of thing we could do in the committee appointed to work on it, due to time constraints of our meeting today?

CHAIRMAN SOULES: Okay. Let's say if we put in "except for written statements made to their attorney's," comma, we put that in as a preface to be --

PROFESSOR EDGAR: I say "excluding" because you've already said "except" in the next --

CHAIRMAN SOULES: Okay. "Excluding written statements," okay. And then, otherwise the motion would be as stated. Is there a second?

PROFESSOR EDGAR: I second it.

CHAIRMAN SOULES: Made and seconded. Those in favor show by hands. Four. Those opposed? One.

PROFESSOR DORSANEO: I'm going to vote

against that. And I really wanted to vote almost --

CHAIRMAN SOULES: Four to two.

PROFESSOR DORSANEO: -- against anything other than sitting down and redrafting this. I mean, you know --

PROFESSOR EDGAR: Well, I'm trying to get us off the pot right now. And then I think it does need to be redrafted.

CHAIRMAN SOULES: Our scheduling is this: We're going to meet tomorrow, and then we're going to send -- I'll get all these rules drafted and back to you on a short fuse. There won't be a lot of time for you to give me your comments. You can call Tina or me. It will be at least two weeks. Maybe I'll have 30 days, depending on what the Court wants to do, and then we're done. This goes to the Court.

I'm going to write the Court a letter and suggest that -- well, I think probably there are so many things in here that we've done that the Court is going to want to go ahead and pass on that they'll probably go to work on them. As soon as they're done, they will probably promulgate these rules, unless in the interim the legislature

has really messed something up and they want us to get one set of rules in and do everything at one time, after which point we would have a May or June meeting.

Before we leave here I want to schedule a May meeting for late May or early June so that we've got a date fixed -- a date set to fix anything the legislature messes up. We may not need to have that meeting, but at least we'll have a date.

MR. BRANSON: They're not going to be through until August, are they?

CHAIRMAN SOULES: They've got 140 days from January.

PROFESSOR EDGAR: There's something else, back about two meetings ago --

CHAIRMAN SOULES: But after that, we won't -- the Court is not going to be inclined to promulgate any more rules until rules that would have an effective date of something like January 1 of 1989.

JUSTICE WALLACE: 1990.

CHAIRMAN SOULES: 1990. That's right 1990. So, that's why we've got to press and got to have time. But let's read the cases in the interim and work on these rules and we'll look at

them.

PROFESSOR DORSANEO: I'll tell you why I feel a little bit -- I think this exemption rule -- and I played a large part in organizing it along with several other people. I think it is very badly drafted from top to bottom and was not well thought out. I feel partly responsible for that, not being smart enough at the time to see what I see now.

So, I'm kind of involved with this on a different basis. And I really think we could -- if we need to do it now, we could do it now. We can just sit down and just fix it and not just fix two lines of it or perpetuate the problem by more tinkering.

CHAIRMAN SOULES: This is only the problem the Court is going to struggle with. You know, we've got Peeples, but that talks about things that are not -- I mean, this rule has worked except for the Texas kicker. It's been working now for three years.

PROFESSOR DORSANEO: Well, as I see it, though, we're just starting to get into what the arguments are going to be. This is the first round.

Now, if you wanted to just fix the Texas kicker, just fix it the way you fixed it. But don't go messing around with the -- if we're going to do more than make a minor fix, where do you draw the line? I agree with that.

CHAIRMAN SOULES: Let's go to page 145 and try to finish the discovery rules today.

PROFESSOR EDGAR: I want to make sure what we've done, though.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: A couple of meetings ago -- and if you will look at this page right here, on Rule 166(b).

CHAIRMAN SOULES: I've got that.

PROFESSOR EDGAR: We've added something in the last paragraph, and I want to make sure that's there because I was the one that suggested it.

PROFESSOR DORSENEO: It's in there, Hadley.

PROFESSOR EDGAR: I want to make sure, though, that the change we have made today is a change made in light of the changes that are in here. That's the only point I'm making.

CHAIRMAN SOULES: These would stand.

PROFESSOR EDGAR: All right. I just wanted to make sure.

CHAIRMAN SOULES: Okay. Oh, yes.

PROFESSOR EDGAR: Now, how are you going to add, though, the federal exception to (b) and (d)?

CHAIRMAN SOULES: Probably by an (f) that refers back up there. You know, I'll get the drafting done and you-all can shoot at it all you want.

PROFESSOR EDGAR: May I just make a suggestion?

CHAIRMAN SOULES: Make a suggestion. I'd love it.

PROFESSOR EDGAR: You might try and incorporate (b) and (c) into one subheading and then have that proviso apply only to it in that same paragraph rather than have a subparagraph (f).

CHAIRMAN SOULES: Put (b) and (d) together?

PROFESSOR EDGAR: No -- yes, yes.

CHAIRMAN SOULES: (b) and (d) together.

PROFESSOR EDGAR: Put (b) and (d)

together, at least in order, and then have a paragraph --

CHAIRMAN SOULES: And add the federal --

PROFESSOR EDGAR: Just -- as it pertains to that particular thing. That's just a suggestion, Luke.

CHAIRMAN SOULES: That's great. That's a good one.

PROFESSOR DORSANEO: Yes. And that's what Allen versus Humphries does.

CHAIRMAN SOULES: And I'll do it that way. I probably won't do it well, but --

Okay. Now, we're going to go to page 145 or we can quit. What's the pleasure? It's 5:30.

MR. BRANSON: It's lock-up time, isn't it?

CHAIRMAN SOULES: At 6:00 they lock us up. See if there is anything we can do here for 15 minutes before we take off. I think when we serve requests --

PROFESSOR DORSANEO: What page now?

CHAIRMAN SOULES: We need to look at, probably, when any of the discovery can be commenced. That really wasn't the focus of the

'84 changes.

PROFESSOR EDGAR: What page are you on?

CHAIRMAN SOULES: I'm on page 145. Windle Turley wants to start service of 167 and 168 as soon as the commencement of the action has taken place. And I don't have any problem with that. I think it's the way it ought to be if you want to, without leave of Court. But we say with leave of the Court you can do it that way now. But let's table this until our next meeting.

PROFESSOR DORSANEO: In fact, we have it going in the opposite direction on that for the written depositions, you know, in this book.

CHAIRMAN SOULES: I think -- I would love to be able to serve requests to admit with a petition on dead beat debtors. Then I wouldn't have any proof problems. I prove it when I serve them.

MR. TINDALL: Yeah, but the old rule was when you got served you got 95 interrogatories served with a petition. Do you want to go back to that practice?

CHAIRMAN SOULES: Well, there's a limitation on that. It can only be 30.

MR. TINDALL: I understand that. But that was the reason they put that in. When you got served a petition, stapled to it was --

CHAIRMAN SOULES: Anyway, let's table that.

PROFESSOR DORSANEO: It's like a bill in equity.

MR. TINDALL: Exactly.

MR. MORRIS: Luke, are we going to go back to that discussion on "solely"? I thought you said that we would.

CHAIRMAN SOULES: Okay. How many feel that the word "solely" should be put into that language "in anticipation of litigation"?

MR. MORRIS: I do.

CHAIRMAN SOULES: Two. How many feel that it should not be there? Raise your hands. Okay. That's three to two. "Solely" is rejected three to two.

MR. MCMAINS: What about a middle course?

CHAIRMAN SOULES: We've got to go on. You-all can shoot at what I write, but let's go on. Timothy Sulak, 169. This is on page 148. The problem here is that Sulak thinks that in

order to withdraw admissions, a party should have to carry these burdens. Of course, withdrawing admissions is a little different. That comes -- you have to show why you're late in modifying interrogatories, but you don't have to show that outside of 30 days. 169, like interrogatories, has to be amended outside of 30 days, if at all. Does anybody have any strong feelings about Sulak's suggestion? Seems to me like --

PROFESSOR EDGAR: Well, the only problem I have with it is that you're imposing the burden on someone to show -- to prove a negative.

MR. MORRIS: Yeah, but they're the ones that's fixing to falsify it.

PROFESSOR EDGAR: No, no, I'm just talking about conceptually that the -- it's extremely difficult for someone to show a negative. That is, it's a whole lot easier for the party who is seeking to amend the admission -- the party that's seeking to rely upon the admission to show that he is going to be prejudiced than it is the other party to show that he's not not being prejudiced.

MR. RAGLAND: I don't agree with that.

MR. MCMAINS: Of course, the problem is you've always been prejudiced because you've got to prove something that you shouldn't have to prove.

PROFESSOR EDGAR: Well, that's not the kind of prejudice I'm talking about.

CHAIRMAN SOULES: Right now a party who wants to amend or withdraw a 169 admission has a heavier burden than a party who wants to supplement an interrogatory. Because the party who wants to supplement an interrogatory, if he's earlier than 30 days prior to trial and within a reasonable period -- that can be more than 30 days -- all he does is zing it. He does it. It's over.

But in order to amend or withdraw a 169 admission, a party, even a reasonable time before trial and more than 30 days before trial, has to show the Court that the presentation of the merits of the action will be subserved thereby. He's got to do that. That's the heaviest burden on any such admission of discovery already.

PROFESSOR DORSANEO: What's the practice, though? I don't know what the practice is in your neck of the woods. But if somebody

goes in there and says, oh, you know, sore toe--

CHAIRMAN SOULES: In Neonazi Kendall County (phonetic) you don't get any help.

MR. TINDALL: I don't think we ought to amend that.

CHAIRMAN SOULES: Okay. How many are in agreement? Those in agreement to leave this alone please show by hands. Those who think it should be amended show.

MR. RAGLAND: I think it ought to be amended.

CHAIRMAN SOULES: Amended Sulak's way?

MR. RAGLAND: Yeah. Well, he didn't propose any language here, but I just think it's unfair to place the burden on someone who has relied on the admission different from interrogatory. The interrogatory is not binding on anyone except the person that makes it anyway. It can't be used against that person. But admission may affect a lot of other parties and may be relying on that.

CHAIRMAN SOULES: Let me see the hands again. Those who feel this proposal should be rejected show your hands. Four.

MR. BRANSON: Let me ask you this: Could there be a way to require that if an admission is going to be withdrawn, it will be withdrawn far enough in advance of trial --

CHAIRMAN SOULES: It's already there. 166(b)(5).

MR. BRANSON: What is that?

CHAIRMAN SOULES: It says you have to supplement discovery reasonable time not less than 30 days prior to trial. Judge Onion in San Antonio has already held that expert witnesses designated earlier than 30 days prior to trial cannot testify.

MR. BRANSON: What Lefty is saying, though, in the incidents where Sulak got combined, the admission wasn't withdrawn until the courthouse.

CHAIRMAN SOULES: Well, you missed the rule because he had the benefit of yelling out if he had argued it.

MR. MORRIS: Well, he did. He -- I'm staying out of this because Tim is my partner, but he really felt like he got a rook. You know, he wrote this in good faith.

MR. BRANSON: Luke, you really

shouldn't be able -- and I've seen trial judges in Dallas -- it happens in comp cases more than anything else, because plaintiff goes in and proves up a lot of unnecessary crap with requests for admissions in a comp case.

MR. MCMAINS: This does not say that it is subject to 166(b) tantalant (phonetic). 169(2) says "Subject to the provisions of Rule 166 governing amendment of a pretrial, the Court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the Court that withdrawal or amendment will prejudice him in maintaining his action." It depends on the practice. No time limit reference in that rule, on the amendment of 169.

MR. BRANSON: I think if they're going to withdraw admissions under any set of circumstances, it needs to be done at least subject to 166 time limit. Because you get down there and you've busted your behind getting the lawsuit ready and you've relied on the admissions, and all of a sudden the trial court, who feels sorry for the defense lawyer, who didn't read his

file when he made the requests for admissions, let's him out of the box and the plaintiff doesn't have a way to get there or vice versa.

CHAIRMAN SOULES: 166(b)(5) covers requests to admit, duty to supplement. That's in the history of that rule from the beginning -- from '84 forward.

PROFESSOR DORSANEO: It wouldn't hurt to say that.

CHAIRMAN SOULES: What?

PROFESSOR DORSANEO: It wouldn't hurt to say it.

CHAIRMAN SOULES: What are you going to say "interrogatory"? It says a party who has responded to a request for discovery, and request for discovery was held to be any kind of request for discovery; documents, depositions, interrogatories, requests to admit, requests for examination. It was every request, and that's why is we didn't go into listing them all.

PROFESSOR DORSANEO: I think that's right.

CHAIRMAN SOULES: That's absolutely right.

MR. BRANSON: We've obviously got one

trial lawyer who was aware of the cases, cited them to the judge and the judge ignored them. Why not put it in this rule? Why not put subject to 166 time limit?

PROFESSOR DORSANEO: I'll tell you why that probably is unnecessary to put that. I agree with Luke because of 166(b)(1) and (5). Requests for admission are identified as a form of discovery in paragraph one, the duty to supplement to paragraph five.

MR. MCMAINS: This talks about withdrawal, Goddamn it. And I'm telling you the courts don't treat withdrawal and supplementation as the same thing. I don't disagree with you that it probably should be.

PROFESSOR DORSANEO: But I was going to say I wouldn't see why we couldn't substitute the reference to the pretrial rule with a reference to one that's in there now, copied from the federal rules, with reference to 166(b) for the sake of clarity.

And I don't see any big problem of changing the language of 169, which was copied verbatim in 1984 from the federal rule, to say "Subject to provisions of paragraph 5 of Rule 166(b)," rather

than "subject to provisions of Rule 166 governing any amendment of the pretrial order," which is just kind of interesting language but probably of no real importance in Texas practice, at least in my county.

MR. MCMAINS: Well, it is in Corpus. We have discovery deadlines that are imposed.

MR. BRANSON: We don't have a bunch of young Republican judges.

MR. MCMAINS: We've got a bunch of dumb Democrats. We will have if any of them resign.

CHAIRMAN SOULES: Subject to provisions of Rule 166(b).

PROFESSOR EDGAR: It's not apparent. It's just 166(b), period, five period.

MR. TINDALL: I wouldn't eliminate the pretrial. It may be the Judge --

CHAIRMAN SOULES: Oh, no, we're not going to.

PROFESSOR DORSANEO: No, do both.

CHAIRMAN SOULES: Subject to provisions of Rule 166 and governing amendment of pretrial order and Rule 166(b)(5) governing --

PROFESSOR EDGAR: Why don't you say in

the time limits provided in 166b(5)?

CHAIRMAN SOULES: Well, but the time limits are --

MR. MCMAINS: That's not all that's dealt with.

CHAIRMAN SOULES: -- seasonably governing duty to supplement discovery responses.

MR. BRANSON: That's not likely to be interpreted, I take it, by the trial courts that you can ignore requests for admissions if you do it 30 days before trial.

MR. MORRIS: That's what I'm afraid of with this reference that a court may say, well, at any time up to 30 days before trial you can change your response to the requests for admissions. As you know, we've been relying on that, and this cuts on both sides of the docket. I mean, this is just a real problem. But if you're relying on someone's admission, then you don't go out and start trying to prove up all that line. If you get down to 30 days before trial and they feel like it was matter of right, they can change their response for request. For admission, or if the Court interprets it that way, then we've done as much damage as what we've cleared up.

CHAIRMAN SOULES: Well, the duty to seasonably supplement is not governed by the 30-day rule. That's just the last day that you can seasonably supplement.

MR. MCMAINS: That's right. I mean, you can say, theoretically, provisions of 166b(5), in general, apply. You can take the position, well, he knew this 10 weeks ago and hadn't done a damned thing.

CHAIRMAN SOULES: Don't let him withdraw. His supplement should not be permitted. Judge' Onion, district judge in San Antonio, appointed defense --

MR. MORRIS: Well, he got in the situation where they changed attorneys real late in the game.

MR. MCMAINS: The fact of the matter is the only time I've ever been faced with withdrawal of requests for admissions have been parties who didn't realize they hadn't answered admissions, and they had them the week before trial.

CHAIRMAN SOULES: Okay. Well, let's do -- well these Wicker -- is the rest of it housekeeping?

MR. RAGLAND: Did we finish with that rule?

CHAIRMAN SOULES: Yes. Let's go get our cars and see you in the morning. What time, 8:30?

MR. BRANSON: What happened to that rule? Did we do anything to it?

CHAIRMAN SOULES: Nothing. The vote was to do nothing. Do we want to do anything? Oh, no, to -- I'm sorry. I'm tired; I'll admit it.

Do you want to put in that -- into 169 the language suggested by Hadley where we say "subject to" -- in paragraph two, number two, second sentence, "Subject to the provisions of Rule 166(b) governing the amendment of pretrial order," and then insert "166(b)(5) governing duty to supplement discovery responses," comma, "the Court may permit." How many are in favor of that?

MR. RAGLAND: I don't have any problem with that, but I've got some problems with the burden of proof part here.

CHAIRMAN SOULES: How many are opposed?

MR. RAGLAND: We can talk about it

tomorrow.

CHAIRMAN SOULES: Yes, I guess so. 8:30?

(Recess until 8:30
(in the morning.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS X
COUNTY OF TRAVIS X

I, Chavela V. Bates, 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 directed by counsel to be included in the statement of facts were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that my charge for preparation of the statement of facts is $ 950.00.

WITNESS MY HAND AND SEAL OF OFFICE this, the 19th day of November, 1986.

Chavela V. Bates

Chavela V. Bates, Court Reporter
316 W. 12th Street, Suite 315
Austin, Texas 78701 512-474-5427

Notary Public expires 09-30-89
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