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(Morning Session)

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June 26, 1987

(Morning Session)

CHAIRMAN SOULES: Why don't we go ahead and go into session. I want to particularly welcome Ken Fuller and Elaine Carlson, our new members. We also have Diane Marshall and Judge Raul Rivera; I think they will be here later on joining us as new members. Orville Walker has resigned, and we certainly wish him well and thank him for all the work he has done.

We are now getting together a list of all of the former members of this committee, and we're going to work up some sort of a certificate to present to them for their service. And I know that the committee is unanimous that they should be commended for their service, and we're working on that project and will keep you informed about that.

We have Ray Judice here who has brought this morning this Court Administration Act which he can -- part of what he will be telling you is the shocking way in which it came through the legislature and the closing moments without much notice to anybody, and without much notice from

anybody or much reading by anybody, apparently. But it's here, before we start the regular business on our agenda, since Ray is here as a favor to us, I would like to get him maybe to report on this so that we can become informed about it. Ray Judice.

MR. JUDICE: Thank you. You have two documents, the Conference Committee Report and a Summary of the Provisions. And the Summary of the Provisions is just our attempt to go through this bill after it was a fait accompli and try to determine what was in the bill itself.

Now, to prevent any confusion as you go through the bill, you will see the first portion of the bill does a lot of amending to 200a-1. 200a-1 is the same article as the old 200a from the last session. You may recall during the last -- not this immediate past session, but the session before last -- the same thing happened on the last day of the session. A Court Administration Act was drafted upon a bill that would have created a Court of Appeals in Edinburg, and passed out of both the House and the Senate at the same time. And that became the amendments to 200a.

In the meantime, the legislative counsel has been codifying the rules in this particular area and moving it into the government code. So the first portion of this document makes amendments to 200a-1; the second portion of the document repeats the same amendments making the amendments to the provisions that are in the government code. In other words, it is in the process of being moved from a Statute 200a-1 and putting it into the government code. So don't get too confused when it appears that it's duplicative; many of the provisions, it is in fact duplicative. They are just amending the two areas.

There was a fairly simple bill that was passing through the legislature to make some amendments -- clean up amendments to what the legislature had done to 200a-1 in the last session. It passed the House, went to the Senate. The Senate made some amendments and sent it back to the House. The House refused to concur. It was sent to a conference committee. On Sunday, the conference committee put together this bill that you see which really bears very little relationship to the bill that was pending before, or that had been considered by both Houses. What

it is is just a whole series of amendments that were tacked on. They used the bill number 687.

Now you will recall that during the last session -- when I say the last session I'm talking about the prior session -- the legislature posed a constitutional amendment which was adopted which removed the caption provision. In other words, no longer is the legislature required, except by its own rules, to provide notice to the general public as to the subject matter of a bill by the caption. They do have a rule that says the subject matter of the bill must be described in the caption, but then it goes further -- the constitutional amendment goes further and says you cannot question the validity of a bill on that particular aspect, other than in either of the two Houses of the legislature. So this is one of the reasons why this bill is quite extensive.

Now what does it do? Generally speaking, it removes the directives to the Supreme Court to adopt the rules of that administration as a mandatory directive and makes it a "may." In other words, it removes it from a "shall" to a "may." It then puts in before each one of the elements the word "nonbinding." So when the

Supreme Court may promulgate rules dealing with time standards then the word "nonbinding" is included at the very beginning of that phrase, so it's nonbinding rules -- I mean rules relating to time standards, things of that nature.

It deleted all provisions recommending the Supreme Court consider rules for a monthly statewide information reporting system. I never could understand why they put it in 200a in the first place because that's embodied in the bill that creates the Texas Judicial Council, and since 1929 the council has been -- has had that responsibility and it's still in that particular aspect of the state rules.

It specifically provides that any rule adopted by the Supreme Court may be disapproved by the legislature. In other words, it statutorily gives the legislature a veto over any rules adopted by the Supreme Court. Now, you will recall in the provision in Article 5 of the Texas Constitution, it provides that the Supreme Court may adopt rules of administration as well as rules of procedure provided that they conform to law. So the legislature had always had that authority embodied in the Constitution but hadn't used it --

as far as I know, has never used it. But now it is working it into this particular statute.

It provides that before the Supreme Court may promulgate any rules, a copy of any new rule or amendment to any rule must be mailed to each member of the bar, and they must be -- I think 120 days before they go into effect -- and they must be given 60 days for comments. We did a calculation to judge that if you mailed it -- use U.S. Postage and mailed it at 22 cents -- it would cost approximately $15 to $18,000 on each mailing.

It also provides that the Clerk of the Supreme Court is to submit to each member of the bar a copy of any proposed rule or any rule that was adopted as a matter of fact or any amendment thereto to each member of the legislature by December the 1st of the year preceding any regular session. The other matters deal with primarily administrative matters such as education programs. The one change there was that there was some difference in the requirements that the retired judges had to fulfill as far as requirement as opposed to the acting judges, and they now require the same type of continuing legal education.

They made some changes relating to the

salaries of the presiding judges. A presiding judge who is an active judge now recieves a stipend of $5,000 in addition to his regular salary. This increases the salary -- that particular salary to $10,000. Now, this does not do anything to the salary received as a presiding judge by a retired judge. That is still either 15, 25 or $30,000 per year based on the number of courts within his administrative region.

This is one thing that you might want to consider. It is apparent in reading the statute that a presiding judge may now assign a judge serving on a county court at law to a district court bench within the county in which he serves. Now it's kind of backwards because what it says -- what the law now says is that the presiding judge may not assign a judge of a county court at law to a district court outside of the county of his residence. So it would appear to give the authority for the first time to the presiding judge to assign a county court at law to serve on -- as a visiting judge, that is -- to serve on a district bench within, but solely within, the county in which he serves.

I think the other things are pretty well

inclined to -- there's a whole series on masters that is fairly new law that you may want to review. I'm not too familiar with that particular aspect. I frankly did not go into it and review it for this particular purpose, but there is some extensive language relating to the appointment of masters and the use of masters by district -- in district courts or trial courts.

The reason why I was talking about the county courts at law serving on the district bench, the previous law had a provision in it that said that a judge -- a visiting judge assigned to another court, or assigned to a court, could not hear matters which his court did not have jurisdiction over. I hope I've said that correctly. In other words, if Judge Jones was assigned to go from this county to another county, then he could hear only those matters over which his particular court had jurisdiction. This new law removes or deletes that provision so that if a judge is now assigned by a presiding judge to a court, he can hear and preside over any matter over which that particular court -- the court to which he is assigned -- has jurisdiction.

It establishes the State Board of Regional

Judges. This is a new entity. We've previously had the Council of Presiding Judges and that is still in operation under another provision. But now there is a new entity that says its the State Board of Regional Judges is created to administer the newly created District Court Support Fund. So the District Court Support Fund is embodied as a concept in the law, but they have provided zero money for that particular provision. And, you know, so the legislature, of course, did help the trial courts by providing the -- I mean, assigned the District Court Support Fund but there is no money in it.

CHAIRMAN SOULES: Not much of a fund, it it?

MR. JUDICE: No fund whatsoever. That's generally, I think, one of the major provisions of this particular bill. I would be happy to try to answer any particular questions if you have any questions that you may want to ask about it.

CHAIRMAN SOULES: The notice requirements for rules and the rules that are contemplated by this bill are administrative rules; is that correct?

MR. JUDICE: Yes.

CHAIRMAN SOULES: And not rules of civil procedure?

MR. JUDICE: No, administrative rules.

CHAIRMAN SOULES: Okay.

MR. JUDICE: Administrative rules are what they are referring to here.

CHAIRMAN SOULES: How much attention do you understand this bill got from the legislature? Tell me again how it was that this logistically got done?

MR. JUDICE: Well, there was one bill. It was very, very -- it would have provided some of these, but very few of the provisions that are included in this bill that had passed the House and gone to the Senate. The Senate had made some amendments, the House refused the Senate amendments and asked for a conference committee.

At that time -- now, there were about five or six different bills that had been -- that were in various stages of consideration by the legislature. Most of them were still in committee, had never been voted out of committee -- most of which had never been actually debated by committee. Those bills were pulled out and

drafted onto the bill that was pending, in addition to which there were a number of other aspects that I had not been able to find that were in any bill that had been considered that were placed in this particular bill.

So it was just a series of amendments that were developed by the conference committee and reported back, and they were -- the bill was then adopted without debate in both Houses. They just concurred in the -- and that's usually -- of course, that's not that unusual on the last day of the session because if you have ever sat down in the hour of the last day of the session, you will find that they will do 500 bills on the last day of the session. I'm exaggerating a little, obviously, but they will do a tremendous amount of bills with never any debate, it's just vote -- I mean, I move to concur the -- in the conference committee and they'll just pass it pro forma.

CHAIRMAN SOULES: Where did the impetus for these provisions come from? Was this something the Supreme Court was seeking to have the legislature do, Judge?

JUSTICE WALLACE: This was sponsored by Representative Betty Denton in Waco. Frankly,

I think it was an anti-Chief Justice move on her part and in response to those administrative rules that the Chief was -- you know, we fought over for about a year and a half. And I think that -- wasn't that the main impetus behind these -- most of these changes, Ray?

MR. JUDICE: Well, one aspect, Judge, there's a lot of other aspects in there, and she's -- Betty has certainly got her provisions written into this bill. Primarily her major -- the major provision in this bill is the deal where there is a statement that the legislature did not intend to mandate additional funding by the local county governments to fund any aspect of the Court Administration Act. There were a number of other representatives that had bills that were drafted onto this, also.

CHAIRMAN SOULES: Well, the administrative rules that became effective by order of the Court of February 4, 1987 were recommended to the Supreme Court without dissent from the task force. But was Ms. Denton not aware that -- I realize there was a great deal of controversy over a 2-year period before February 4th -- before the February 4th order was signed.

But at the last task force, the wrinkles were all ironed out, as it were -- the disagreements were ironed out -- the time standards became standards. In other words, there were a lot of -- a lot of the controversy that had come up was addressed in those rules and the sensitivities of the task force and the Court to those are shown on the face of those rules, and not one person on the task force dissented from that final work product. But we still have this controversy in the legislature; is that right?

JUSTICE WALLACE: I think an awful lot of those people are not even aware of the rules that were finally promulgated. And it's just a matter of the idea that, you know, there was a movement to do it and they were heading off any future movement was the impression I got out of it.

CHAIRMAN SOULES: And since February 4th -- although I hear some agonizing over how do we get to compliance with the time standards, and that's agonizing -- but I do not hear controversy, as such, over those rules. Some jurisdictions have problems and some districts are going to have problems getting there or getting even close for a

while. But do you and your office hear a lot of controversy about the February 4th work product that the Supreme Court finally promulgated?

MR. JUDICE: No, because remember that what was finally promulgated had, in effect, been in operation for over 2 years. Those rules had been promulgated by the Supreme Court, what, about 2 years previous, wasn't it, Judge?

JUSTICE WALLACE: December of '84.

CHAIRMAN SOULES: In December of '84 there was a very close set of rules, but the February 4th '87 rules were a little bit more explicit, and had a few more items in there. But essentially, they did derive from the December '84 start at administrative rules; is that right?

MR. JUDICE: Uh-huh.

CHAIRMAN SOULES: What are we going to have to do to -- if anything -- I realize you've just got this on your plate, Ray. What does the Supreme Court Advisory Committee and the task force, and ultimately the Supreme Court, need to do to these rules, if you have had a chance to determine, to bring them into conformity with this bill? Do we have to make any changes in them?

MR. JUDICE: As far as I see, the

rules fit right into the pattern that they require now except for the fact, of course, that when they say nonbinding and -- but the rules, if I remember correctly -- and I have not checked this specifically, and I will just as soon as I get to the office -- the rules that were adopted that went through this committee then made it a directive rather than mandatory. I mean, made it a "should" instead of "shall" even on the time standards. So the time standards, if I remember correctly -- Judge, do you remember correctly as I do -- that time standards were not made absolutely mandatory on any particular session.

JUSTICE WALLACE: Right. And maybe there is something along the end of this bill, but this is all prospective the way it starts out at the first. Is there anything on the back repealing any administrative rules that you found?

MR. JUDICE: No, sir.

JUSTICE WALLACE: So this has to do with the administrative rules that are going to be promulgated in the future. And I know of none in the making, so I don't think there is any immediate concern about them.

MR. JUDICE: I may report to you, Mr.

Chairman, and the other members of the committee, that since those rules have been adopted, my office has been working on developing the software for caseful management systems. And we're making it available to any and all trial courts throughout the state, if they want, which would save them tremendous amounts of money, that would help them keep abreast of their dockets at any one time so that it would fit in with the rules. The only expense to the trial court would be the purchase of a personal computer.

And we've checked out and we've worked with many of the courts, and in every aspect it was well under $5,000. We are talking about between 3,500 and about $4,500 for the hardware. We'll provide them with the software and the what little training is needed to place this in operation.

We've had over 700 trial judges, clerks, coordinators, court reporters, judge's secretaries, whoever the local courts wanted to bring, to come in, sit in in this room in a one day session -- we bring them in about 30 at a time -- and go over this software that we're developing. And we're making the adjustments so that it will fit each individual situation. And

that's why we bring them in and have a full day's development.

Judge Wallace has addressed several of these -- of the caseful management seminars that we have had in this area. And those who are using it seem to feel that it meets the needs as required both by the -- by this statute in the rules of administration. So the mechanic part of following the rules is out there for those who want to use it.

Now in the much larger counties that are using mainframes, we have not been able to address that because we just don't have the personnel to go into the larger counties that are using mainframes. But we do have available the Dallas -- some of the Dallas judges have gone out on their own and bought personal computers and are using our system, even though the Dallas County provides them with a mainframe capability.

CHAIRMAN SOULES: Any questions for Ray? Ray, thank you very much for bringing us that information. Good luck to you.

Okay. Now as I hear that, then, there is no need to be concerned on our part that we have to take any action on the administrative rules, no

mandate that anything be changed. We'll go forward based on the February 4th order, Judge, of '87?

JUSTICE WALLACE: Yes, sir.

CHAIRMAN SOULES: So any of the rules of civil procedure that we may address and will key to this case disposition and so forth, we can have in mind the February 4, '87 order is going to govern; is that right?

JUSTICE WALLACE: Yes.

CHAIRMAN SOULES: Thank you. Judge Raul Rivera is here now. I want to welcome him to our committee. Judge, welcome.

JUDGE RIVERA: Thank you. I'm glad to be here.

CHAIRMAN SOULES: Our local administrative judge in San Antonio, and of course I'm particularly pleased to have him join the committee and pleased that the Supreme Court saw fit to appoint him as well as Ken Fuller and Elaine Carlson and Diane Marshall. We have the -- the minutes of the last meeting are right inside the supplement. And they've been circulated before. They have not changed from the time they were circulated except that we did try to get

everyone's input. Does anyone have any recommendations that these minutes be changed any further? There being no recommendation for change, then they stand approved as noted here in the supplement.

You should have two booklets. One that I mailed out -- and if you didn't bring yours today there are some extras over here on that two-wheel dolly -- it's got a plastic cover. And then another one that's got a manilla cover -- it's a supplement -- and there are some of those over there too. If you have these two books then you have the agenda that the Chairman provided. In addition to that, we have the proposed Rule 47 which is going to be Item No. 1. It's on legal-sized paper. Does everyone have this? Steve McConnico is the special subcommittee chair of that and he's got some copies.

In conjunction with this legal-size handout, on Page 1, which is a bunch of series of 0's and then finally a 1 in the supplement, you see it starts with a letter from Scott, Douglas and Luton, that's Steve's firm and signed by him. Second is the act of the -- or the resolution of the legislature that they are going to get into

the supersedeas business if we don't, I guess, is the essence of it. They are going to study it for two years. Those materials may also bear on Steve's report and I just wanted to get them before you. And Steve, you have the floor, then, to report on your supersedeas committee's work and whatever recommendations you may have.

MR. McCONNICO: Well, because of the recent legislative activity, Luke appointed a subcommittee and asked us to look at supersedeas bonds. We did and we have come out with a proposal. I think we passed that out to each of you now. We're going to start with Rule 47 and and then go to Rule 49. There are some other rules that will be affected by this, but these are the two main rules. The other rules mainly, if we adopt anything, will be clerical. We can clear those up pretty quickly.

We had two purposes when we started to look at this. The subcommittee was Bill Dorsaneo, Elaine Carlson, myself, Pat Beard; the ones that worked on this felt that something should be done, and there were two purposes. First, we wanted to make sure that the judgment creditor was fully protected and he wasn't going to lose his

judgment. Second, we felt like there should be some discretion given to the trial court where they could protect the judgment debtor where the judgment debtor could have a meaningful appeal if he couldn't put up a supersedeas bond.

So the question, is how do we balance those two interests? I'm going to summarize this, but if you look at Rule 47, if you look at the part starting "Money Judgment," within this we have kept the general rule that when someone gets a money judgment they must put up a bond which is equal to that judgment and its interest and its cost.

Now, we have stated that the trial court can deviate from this general rule after he gives notice to all parties and has a hearing. The question is what are going to be the grounds for deviation. We came up with two alternatives. We didn't have -- the subcommittee wasn't unanimous. Alternative No. 1 was that simply the posting of the amount -- if he can show the judgment -- the debtor can show that posting the amount of the bond or deposit could cause him irreparable harm and also show that not posting such bond or deposit will cause no substantial harm to the

judgment creditor, then there could be some deviation from the general rule. That's Alternative 1.

Now under that alternative, if you take the fact situation that you have a judgment against, for example, Southern Pacific, Aetna, Texas Commerce Bank -- any deep pocket -- for $800,000, that particular deep pocket is not going to be able to show that it will cause me irreparable harm to come up with this bond. Consequently, he's got to conform with the general rule we have today and he's got to put up the money for the bond.

Now, the second alternative is a little bit different. Both of these alternatives were taken from the federal case laws. And the federal case laws come out in two different ways on this. In the second alternative, the judgment creditor, if he shows -- the judgment debtor shows that the judgment creditor will be adequately protected for any loss or damage occasioned by the delay on appeal by order of alternate security or alternative security then that covers it. Now there are federal cases that have this type of language. Under this hypothetical, for example if

Ford loses a case for $160,000, Ford says, "I've got plenty of assets." They're always going to be able to get $160,000 from me; there's no reason for me to put up a bond. Under that alternative, that might punt. Under the first alternative, that wouldn't punt. Now that's really the basis and the guts of Rule 47.

You then get to the problem which Rule 49 addresses: Well, how are you going to appeal this? Suppose we adopt this and all of a sudden you're going to go to the Court of Appeals. You're the judgment creditor and you're going to say to the Court of Appeals, "Look, we don't like what the trial court did." The problem we had is we didn't want the appeal -- and this was Bill Dorsaneo's idea to begin with -- with all the baggage of a mandamus hearing. We thought it would take too long so consequently what we put in is that the trial court's order could be reviewed on a special motion to the Court of Appeals. We file a motion to the Court of Appeals.

Now we might have to change the Rule of Appellate Procedure 43 to state that such motion is not an interlocutory appeal. Bill doesn't think it is an interlocutory appeal anyway. But

if people here feel that it is, we might have to change Rule 43. I do not think it is after reviewing the case law.

Then we also state well, if you go up to the Court of Appeals, you don't want it to sit there and then have your judgment in limbo, so we put in the language that such motion shall be heard at the earliest practical time. Then we also put that the appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties. That language is taken out of Rule 43.

Basically, those are the two big changes in these rules that we are proposing. There are a lot of smaller changes. We've always substituted appellate. We've used the word judgment debtor; we think that clarifies it, clears it up. We think using -- instead of appellee, using judgment creditor is a better word. These are small changes. Rule 615 of the Rules of Appellate Procedure would have to be changed for post judgment discovery, but those are minor changes. These are the two big changes. I leave it open.

CHAIRMAN SOULES: Comments?

MR. TINDALL: Which one is your

committee recommending? Alternate 1 or Alternate 2?

MR. McCONNICO: I personally support Alternate 1. Elaine Carlson felt that Alternate 2 was better and she can give her reasons for that. I'll just say that she felt that Alternate 2 came more under the Open Courts ~~Division~~ Doc. of the Texas Constitution. It wouldn't be any problem with Alternate 2 violating it. And I didn't mean to get into your bailiwick.

PROFESSOR CARLSON: No. I think that succinctly states it.

MR. LOW: What is the standard of review?

MR. McCONNICO: Well, that's something that we also -- because at first we were discussing whether it should be abuse of discretion. But we did put abuse of discretion because under the present rule, if you look at present Rule 47 --

PROFESSOR DORSANEO: 49.

MR. McCONNICO: Yeah, 49. I'm sorry. It just says it will be reviewed and it doesn't give the standard. So we kept the standard that is in the present rule.

MR. LOW: But the problem is in determining whether it's proper or improper. You have to have some standard to go by or the judge could just say, "Okay. I find he won't be protected." When it's just -- that's just not the way it is, and what are you going to do about it? I mean I don't know what standards you would follow, but I'm concerned about the fact that there is no particular standard.

MR. McCONNICO: Well, I think in the rule -- if we go with Alternate 1, we've got the standard in the rule that it must be that it was going to cause irreparable harm to the judgment debtor and not posting such bond would cause no substantial harm to the judgment creditor.

MR. LOW: Well, the judge makes that finding but then what do you say? I mean, if he makes that finding does the Court of Appeals, do they say, "Okay, we'll review that under this standard"? Or do we just take it to you and say, "well then, you make the determination"? Is it a new determination? Is it like a trial de novo? What is the standard?

MR. McCONNICO: Well, we've also put in there it could be a trial de novo -- well, it's

not going to be a trial de novo, obviously, at the Court of Appeals because we have said that the Court of Appeals may remand to the trial court for findings of fact or the taking of evidence. And they might need more facts and they might need more evidence.

But we felt like with these rules, and especially Rule 49, it was better not to say and not to give them a standard as we have done in Rule 49 now. We have given the Court of Appeals a standard to review any of these matters on appeal because we thought the only alternative was abuse of discretion and I thought that was too strict -- could be too strict.

MR. TINDALL: The federal courts are going in both ways around the country. Is that what you're --

MR. McCONNICO: No. The Federal courts -- the Federal rule is silent to this. There is nothing -- if you look at the rule, it doesn't address this. So then you've got to look at the Federal case law. There seems -- more of the Federal courts state that to get a reduction in the supersedeas bond -- and it appears they are pretty stingy in allowing people to do it -- most

of the courts to me -- and the folks that have been involved in the Texaco-Pennzoil litigation will know this better because they have probably briefed it a lot closer -- but from my review of the cases it appears that most of the Federal courts state the only time you can reduce the supersedeas bond is if you show it's going to ~~cost~~ cause the judgment debtor irreparable harm, and it's not going to cause any harm to the judgment creditor if it's reduced. And they may add the language on "it serves the end of justice."

But there are some Federal courts which in actuality what they've done is said, "Okay. Ford Motor Company, they might be able to make this bond, making this bond is not going to hurt them but they've always had the assets so why do we make them? Why is it important that they make the bond?" And that's Alternative 2.

MR. LOW: So your Federal court also -- I mean, you don't -- their rules are a little bit different in that you have moved your peril if you require them to put it up because if you're wrong then you have to end up paying for it. But we don't have a provision like that so when you're applying Federal law to this you've got a

different foundation than the foundation that we're placing this on because people don't, in big judgments, unless you're pretty sure -- you don't ask them to put up one because you don't want to end up having to pay for it.

MR. McMAINS: That's right. A supersedeas bond is the cost of appeal to be taxed in the Court of Appeals in the Fifth Circuit. So if you've got somebody paying a $200,000 premium, you had better be certain that you're going to be able to get it affirmed.

MR. SPARKS (EL PASO): Well actually the district that they remand the case take back to, the district court decides whether the premium is to be paid or not. But most of the time they say yes, and they are substantial.

MR. LOW: That's right.

CHAIRMAN SOULES: Most of the time they do tax the premium as cost?

MR. McMAINS: Yes. If it's been lost.

CHAIRMAN SOULES: Elaine, what do we hear from you on your alternative view? What is are your reasons for supporting the other alternative?

PROFESSOR CARLSON: I would just like

to say that in deference to our fine subcommittee, I think Alternate 1 is more desirable from an administrative point of view. My concern was whether or not the first alternate would be sufficient to comply with the Open Courts Provision of the Constitution.

And my concern emanates particulary from two cases, one of which is Evets (phonetic) vs. Luce (phonetic) which was a U.S. Supreme Court case which went so far as to suggest that a defendant's right to an appeal as guaranteed by a state had been denied when his privately retained lawyer failed to file a statement of facts. In my mind, that is a very, very broad reading of the guarantee of appeal if a state's Open Courts -- Constitution has an Open Courts Provision which Texas does.

My second concern is out of the Texas Supreme Court case of LeCroy (phonetic) vs. Hanlon (phonetic) -- and perhaps Judge Wallace and Professor Dorsaneo could give us their insight as well -- wherein our Supreme Court held that the denial of access to the trial court level to open court was accomplished when a litigant was required to file a filing fee at the district

court level which went to the general revenue part. And it was not a question, as I read the opinion, of the litigant being able to pay the filing fee, just that it was an unreasonable denial of access to the Court.

So I'm reading the case law to suggest that if a state goes beyond the U.S. Supreme Court and the Constitutional guarantee and guarantees its citizens the open court access, then the state cannot through rules or other case law deny unreasonable access. And I'm afraid if our standard is -- if you can only waive the posting, the mandatory posting, and the supersedeas bond by irreparable harm showing, that that could still be a denial of access to the litigant and show it's unreasonable and that he should have been allowed to post some alternate security.

MR. LOW: But doesn't that go to the appellate --

CHAIRMAN SOULES: Rusty, why don't we hear from you? I know you've got some feelings about any changes.

MR. McMAINS: Well, one of the problems I have with Alternate 2 is that it assumes that the only thing that you would

evaluate a bond or its desirability to be posted is for the delay. And that's just not true particularly in Texas which is pretty much of a haven for debtors -- much more so than most other states, in fact -- such that, you know, quite frankly I think the banks and a lot of the regular credit folks would be very upset if the only thing they thought they were concerned about on a bond was whether or not there was a -- you know, how much time it was going to take. There's an awful lot of default judgments, and then sometimes they get involved in appeal practices.

If that would just result in delay, I think it would just clog up the courts. A lot of times it's cheaper to pay a lawyer to appeal a case than it is to pay the numbers. And in fact, I think that's going on right now in a lot of cases. It bothers me that -- you know, that at least Alternative 1 looks to me to have a rational basis. That is, it is suggested that there is an exceptional circumstance that the trial judge should have the ability to determine. And much like -- it looks to me like the standard of irreparable harm is very much like an injunction standard.

So I'm not sure that the courts won't choose a discretionary review standard anyway whether we do it or not simply because the question of irreparable harm is kind of akin to this injunction issue. So I guess the only real question is whether or not we're doing something indirectly that we don't know that we're doing from the standpoint of what the appellate court should want to treat this as.

The second thing is -- which you didn't talk about, I think -- Scott is the continuing trial court jurisdiction aspect of it which is also strange to me. It's a different issue, but I would support Alternative 1 from the first part of his standpoint as distinguished from Alternate 2 because I think that for one thing Alternate 2 is just going to be filed in every case. Alternate 1, at least, you don't clog the motion practice as much as we keep doing with various hearings.

CHAIRMAN SOULES: Philosophically -- of course, this is just some background on this rule, anyway, that goes back some -- I sense a problem with the very first insert at the bottom of A because it does not address the issue that the COAJ has always wanted addressed and that this

committee has always emphasized and that is the preservation of the effectiveness of the judgment, whatever it is. If you've got a billion dollar judgment against a $10,000 corporation, the effectiveness of that judgment is $10,000; it's not a billion dollars. I mean I don't know what the effectiveness of it is, but the effectiveness of the judgment is what the plaintiff is entitled to have protected by dollars or by other security. And this just talks about delay damage on appeal.

One argument, folks, is that that just means the interest that would run on appeal, not the judgment itself. And I believe that in the first insertion we need to put -- read with me here, if you will -- "The trial court may enter such orders which adequately" -- insert this -- "preserve the effectiveness of the judgment and" -- and then run the rest of the sentence.

MR. McCONNICO: Luke, I don't understand where you want us to put it down.

CHAIRMAN SOULES: Okay. Start in (A) in the last sentence: "The trial court may enter such orders which adequately preserve the effectiveness of the judgment."

MR. BRANSON: So at your hearing you

would basically try the assets of the corporation?

CHAIRMAN SOULES: You could. Preserve the effectiveness of the judgment and then protect the judgment creditor -- I think that's against any loss rather than for any loss, but that's --

MR. BRANSON: Aren't you really asking for more trouble than you're curing there? You're going to end up with some hearings on bonds that are going to last for months.

CHAIRMAN SOULES: That's right. And there's no doubt about it, but we're there in the practice.

MR. JONES: Mr. Chairmann --

CHAIRMAN SOULES: Yes, sir. Franklin Jones.

MR. JONES: I need a little enlightenment. Of course my philosphy is that if it ain't broke, don't fix it. But I understand that the legislature has mandated or suggested to us that we have messed with this rule.

CHAIRMAN SOULES: The legislature has set up a study committee to change the -- to study and recommend statutory changes in the supersedeas practice in Texas. And if we don't do something, presumably they will. That --

MR. JONES: Is that the result of the Texaco litigation?

CHAIRMAN SOULES: It was.

MR. JONES: So what we're pondering here today is changing our rules to satisfy the legislature and Texaco.

CHAIRMAN SOULES: No.

MR. McMAINS: No.

MR. BRANSON: Just Texaco.

CHAIRMAN SOULES: No.

MR. BRANSON: The legislature hasn't spoken yet.

CHAIRMAN SOULES: If you go back historically what we're still talking about is a request that the committee on Administration of Justice put to this committee two years ago.

MR. JONES: Well, I remember that and of course we had to vote two years ago to -- so strong we didn't even consider it.

MR. BEARD: It wasn't like this, though, Franklin.

CHAIRMAN SOULES: Well, I don't think the record will bear that out, Franklin. It will not bear that out, the record.

MR. BRANSON: It certainly will, Mr.

Chairman, because I made the motion and it carried, not in one meeting but two meetings.

CHAIRMAN SOULES: No, that's not true, Frank. One meeting was to table and the next meeting was different. And --

MR. BRANSON: Well what did Franklin just say? Not to consider it, just table it. Isn't that what you do?

CHAIRMAN SOULES: Well, I thought he said defeated it.

MR. JONES: Well, that's not really -- I'm just bringing that up as a matter of inquiry. I think that the committee ought to consider why this is before us and, you know, we've had I don't know how many years of supersedeas practice that nobody has complained about until Texaco committed such a gross wrong that they got hung for $11 billion dollars.

MR. BEARD: Well, I disagree with Franklin's statement. There have been a number of defendants who have settled their cases when they have wanted to appeal because they could not post a supersedeas bond and couldn't take the catastrophe that occurred if they started executing it. So it has been a recurring

undercurrent all over the state and we are not giving them access to appeal, so I disagree with Franklin. That problem has always been there and we should have some way to provide that appeal.

At the same time, let me say, Luke, that I think that last sentence under (A) takes care of the problem you're talking about. It adequately protects the judgment creditor. If they only have $10,000 worth of assets, the court may enter an order that states that they stay in the same position. They use the word status quo in other drafts and -- but it's the same thing they do in bankruptcy court. They come in and they want to use cash collateral. They've just got to demonstrate if they use the bank's -- the cash that they are not going to get any worse off. And it's a lot of problems because, you know, a lot of times they spend the bank's money. But I think that language gives the court all sorts of leeway to face problems we can't even think of -- contingencies. So I don't think -- I think it ought to stay just like that.

CHAIRMAN SOULES: Well, Pat, let me ask you -- maybe I'm just not seeing a problem -- but you say protect the judgment creditor but you

stop there. This doesn't stop there. This says a limited protection. This is a very limited protection for the judgment creditor that's written in this last sentence. It's not much protection.

MR. BEARD: I disagree with you there. I think that it --

CHAIRMAN SOULES: It says --

MR. BEARD: If you look and see well, you know, there is no way the judgment creditor -- this corporation has only got $10,000. How is he going to pay it?

CHAIRMAN SOULES: Well that's not the issue that's here in this sentence that I'm seeing, and that's why I'm trying to get you and I to see the same issue.

MR. BEARD: Well that's what it means to me. It's just like a bankruptcy issue. It adequately protects the judgment creditor if that's all he's going to get.

CHAIRMAN SOULES: Against what?

MR. BEARD: Any loss or damage that he suffers by -- as long as his $10,000 is going to be there.

CHAIRMAN SOULES: But that's the

effectiveness of the judgment, not the interest on appeal. The only thing that this protects if you read it literally is the delay damage on appeal.

MR. McCONNICO: Luke, may I add something?

MR. BEARD: Well, the damage on appeal could be the loss of your whole principal.

MR. McMAINS: Luke, my personal reading of that, I think maybe that language may have started out possibly for that purpose. But if, in fact, you adopt Alternate 1 and leave the rest of the money judgment rule in there, you don't have a problem because the rule is you've got to secure the whole judgment "unless" -- and this is the only exception -- and then you deal with the unless. So, I mean, whether you amend (A) or not really doesn't make any difference as I see it.

MR. BEARD: Well, just strike the "occasioned by delay or appeal," just any loss or damage.

MR. McCONNICO: I agree with that, and I think if there's any confusion --

CHAIRMAN SOULES: That's fine.

MR. McCONNICO: -- takes care of it.

CHAIRMAN SOULES: Done. I mean if that's the sense, then I don't have any problem with it as long as we don't have a limitation of what we're protecting. Sam Sparks of El Paso.

MR. SPARKS (EL PASO): You know we're talking about the standard on irreparable harm. I don't -- I would favor Alternative 1 for some of the reasons stated, but we're also not looking at "not posting such bond or deposit would cause no substantial harm to the judgment creditor." To me, that's the phrase.

I don't know how you're going to generally convince anybody of that in most of the cases that we're thinking about. I think that is the harder of the two standards to obtain any relief from the trial court. And this gives some improvement over the existing system, but as a practical matter I don't see that it's going to do --

MR. McCONNICO: Do a whole lot?

MR. SPARKS (EL PASO): That's right.

MR. McCONNICO: I agree. And as the Federal courts have applied it, it really hasn't been that different than our practice. It's a very strict practice.

MR. BRANSON: Mr. Chairman, I'm going

to move again to table this matter, and I'm going to ask the lawyers in the room who are retained by either --

CHAIRMAN SOULES: I haven't recognized it for that purpose.

MR. BRANSON: -- by either side not to vote on the issue, and that this matter be tabled until the Court has decided the Texaco case. Thereafter, I think it's an appropriate matter of study for this committee. Until then, I think it's inappropriate and it offends my consideration of what the appropriate ethics of this committee are.

CHAIRMAN SOULES: Further debate?

MR. BEARD: Well, it's not supposed to be debatable but I oppose that. I think this is --

CHAIRMAN SOULES: Well I haven't recognized him for the motion.

MR. BEARD: -- a matter to be taken up. I think this is a matter we ought to act on --

CHAIRMAN SOULES: We will act on it.

MR. BEARD: -- and not wait for the committee from the legislature to come up with

something.

CHAIRMAN SOULES: One way or another, we'll act on it.

MR. BRANSON: In that the Chair is one of the attorneys retained by one of the parties in that litigation, I would ask that a temporary Chair be appointed.

CHAIRMAN SOULES: That issue is moot.

MR. BRANSON: Well since it's been adopted on at least one, and I believe two prior occasions by this committee, Mr. Chairman -- and incidently I would like for you to look up in the record those occasions because the last fellow that called me a liar was a little younger than you are and he got an opportunity to whip my ass when it was over with -- because I did make that motion and it was passed by this committee.

CHAIRMAN SOULES: I've read the motion and reviewed the motion, but we need to debate this. We've got -- the Supreme Court has taken a pounding in the legislature this last time. And if you -- we're going to see it again and again in these materials. We need to address issues before they get there. We will not have another opportunity to promulgate a rule change before the

legislature meets again.

MR. BRANSON: How do you know that?

MR. JONES: That was the point of my inquiry, Mr. Chairman. I don't know what the legislature did and I --

CHAIRMAN SOULES: Well this book is full of those materials.

MR. JONES: -- and I apologize for my ignorance but I'm -- you know, maybe it wouldn't be entirely unfair for you to tell me, would it?

CHAIRMAN SOULES: All right. If you will look at page 3 of the Supplement, there is the Senate resolution.

MR. BRANSON: While you're looking at that, Mr. Chairman, let me ask you a question. Do you think we're going to assist the Court in their current problems when the majority of this committee is retained by the litigants in that case if we make a recommendation to them? Do you think that is really going to enhance the Court's position when you --

CHAIRMAN SOULES: Let me make this announcement.

MR. BRANSON: -- have a group of lawyers who are on retainer make the

recommendation?

CHAIRMAN SOULES: The supersedeas issue in the Pennzoil-Texaco litigation is a dead issue. There is nobody -- no lawyer in that litigation is representing any party that has anything to do with supersedeas. It's over.

MR. BRANSON: And you're going to suggest that the actions of this committee will not be presented to the Court when arguments are made --

CHAIRMAN SOULES: Absolutely.

MR. BRANSON: -- as encouragement for the Court to act?

CHAIRMAN SOULES: Absolutely. Both sides say that. It's a dead issue.

MR. McMAINS: There isn't any issue, Frank.

CHAIRMAN SOULES: It's over.

MR. McMAINS: I'm just saying -- I mean there isn't anything. It's done, dead letter. There isn't anything we're going to do that would affect the litigation. That was not true the last time. But the U.S. Supreme Court has made that decision, and then the bankruptcy subsequent filing -- I mean basically that's it.

It's all moot from a standpoint of the merits.

MR. BRANSON: In that case I withdraw my motion to table.

MR. McMAINS: And there isn't any issue in the appeal anywhere -- I mean in the application for writ. And I assume that they are not going to raise it on response, so I --

CHAIRMAN SOULES: No.

MR. McMAINS: -- we don't -- all of that is immaterial, frankly, from a standpoint of the advisability. And I -- frankly, I feel very strongly along with Luke that I would prefer that this committee and the Court speak to this issue before the legislature gets a hold of it and rides off on a wild ride. That's all I'm --

MR. JONES: I agree with that. I think all of us in this room want the Court to preserve its rule-making authority. I mean I thought that's why we had -- that's why I got my Senator to vote against what I call the Texaco rule because to me its just repulsive for a goddamned litigant to go over to the legislature and get a law passed. And that's what they tried to do.

And, you know, I don't like for this

committee to be blackmailed by that litigant, and I kind of perceive that that's what's happening. Now maybe we ought -- maybe we've got to knuckle under; and if we do, I'm willing to knuckle under. But if that's what happening, I want to know about it.

CHAIRMAN SOULES: Well, it is. And we're going to see more of it if we get into the papers, Franklin. And the thing about it is, we do a better job when we address these because we understand the issues better. And here at this table, we can talk about the real problems and we can narrow it down if we can tell the Court what we feel. And in almost every case -- as a matter of fact, I think in every case where the Court considered our work product after the last sessions, they did what we asked -- what we suggested be done.

But if we leave that as something to happen over at the legislature --

MR. JONES: The only real problem with that -- Mr. Chairman, what I have a problem with is whether or not we are adopting a rule here under pressure from all of these idiots over here across the street.

CHAIRMAN SOULES: We are. And it's just like we changed the special issue practice because of that pressure. This committee has, at times, responded to legislative pressures.

MR. JONES: No, the legislative practice we changed because it was a goddamned inanity.

CHAIRMAN SOULES: Well there was a lot of pressure from the legislature too. Anyway, let's get to the text of this proposal 47. Is there a suggested amendment that we delete the words "occasioned by the delay on appeal" at the very end of (A)?

MR. McCONNICO: I so move.

MR. BEARD: Second.

CHAIRMAN SOULES: All right. Any discussion? In favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Okay. So that takes care of paragraph A. Should the word be protect the judgment creditor "for any loss" or "against any loss"?

MR. BEARD: "From," shouldn't it?

MR. McCONNICO: I'd say "against."

CHAIRMAN SOULES: And that -- we'll

make that textual change. Okay. That takes us to (B).

PROFESSOR BLAKELY: How will that sound to read again?

CHAIRMAN SOULES: The last sentence, then, of (A) will read, "The trial court may enter such orders which adequately protect the judgment creditor against any loss or damage."

MR. LOW: Luke, I still wonder why don't you protect him not just from any loss or damage but occasioned by the appeal, really. But I guess that's the same.

PROFESSOR EDGAR: In the context of the sentence, I don't think there is any problem there.

MR. FULLER: You want to protect him against loss as occasioned by the appeal not loss of business opportunities and everything else.

MR. LOW: That's right.

MR. FULLER: You know, if I had $100,000, I might tell you to invest in something that made a lot of money.

MR. LOW: But that might be a different loss, not what you're really protecting from a loss occasioned by the appeal. That's what

the whole thing is about and not just any loss of "they may suffer." What, from the judgment or what?

CHAIRMAN SOULES: Well, we could put back in "occasioned by the appeal" and leave "delay" out so that your just not talking about the delay aspect of it.

MR. FULLER: Yeah, leave out delay and leave in "occasioned by the appeal."

PROFESSOR EDGAR: Yeah, I think that makes better sense.

MR. LOW: And then that would make better sense and would tie it in with what you're talking about.

CHAIRMAN SOULES: I see. Ken, I thank you. That was Ken Fuller that made that suggestion.

MR. JONES: Is there a motion, Mr. Chairman, on the floor as to Alternative 1 or 2?

MR. SPARKS (EL PASO): Not yet.

MR. McCONNICO: Not yet.

CHAIRMAN SOULES: Let me see if I have this right now, and instead of "which" -- which I got hung up reading a moment ago -- I'm going to read "as will." "The trial court may enter such

orders as will adequately protect the judgment creditor against any loss or damage occasioned by the appeal." Any further discussion on that? Okay. All in favor of that change now say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Okay. Now we'll move to paragraph (B) and the discussion of whether to use Alternative 1 or 2 or something else.

MR. JONES: Mr. Chairman, I move the adoption of Alternative 1.

MR. SPARKS (EL PASO): I second.

MR. LOW: I second that.

CHAIRMAN SOULES: Moved and seconded that Alternative 1 be -- is there any further discussion on that?

MR. FULLER: I think that's ill advised.

CHAIRMAN SOULES: Ken Fuller.

MR. FULLER: I think this is a really big show, gang, and I think -- it may be that it should be adopted -- but I really feel that we ought to have more discussion. We're making a major change in the law. There's some strong feelings around this table and I don't -- I'm not

really knowledgeable in this area, but I'm smart enough to see a roman candle go off when I see it and I think we better talk about this some more. And it may be that that's what we want on this, hopefully.

CHAIRMAN SOULES: Well that's where we're about now is talking about which Alternative --

MR. FULLER: I don't want to vote on it but let's discuss it.

CHAIRMAN SOULES: Yeah. We want it fully discussed, no question. Okay. What discussion -- the motion has been made and seconded that we use Alternative 1. That simply gets it on the table for discussion. It's been discussed to some extent before, but just because you've said your peace once, you can say it again because we now have that issue squarely before us. Who would like to speak?

MR. TINDALL: Luke, I'm in the dark on these issues. I don't know how most states deal with these issues. I know all the press we had this Spring over the Texaco case, but our --

CHAIRMAN SOULES: Most states pretty much follow the Federal practice of Rule 62. And

many --

MR. TINDALL: But I'm told that's silent.

MR. McCONNICO: It is silent, but the Federal case law has set up these standards and they say the appellate court can change the supersedeas bond on appeal. Now that is pretty widespread in every circuit of the country.

What we did here -- and I'll talk a little bit more about Alternate 1 -- we first went back and looked at the Committee on the Administration of Justice and their proposal. They had a proposal that it was to keep the status quo. We didn't know what the status quo was or what it meant. Okay? That didn't make any sense to me and you always got into the problem of really what is the status quo.

We then looked at the Federal cases. This was the strictest standard that was in any of the Federal cases. And it's rarely used because you've got two things you've got to meet, and both of them are pretty high hurdles. And I think to protect the judgment creditor -- and that's something you've got to have right up at the front -- this is as strong a standard as I have seen in

any of the Federal cases. We have not gone and looked -- I know the people in the Pennzoil-Texaco litigation probably did -- I did not go look at what New York, California, Illinois and other states did.

I know there is a division in other states. A lot of states like Luke's states -- I've got the New York, California law here -- but their codes are silent to it, then the courts fill it in. Some states, their codes aren't silent to it. There are even some states that have the old Texas rule that the supersedeas bond has to be twice the judgment. But there is a division; there is no uniformity across the country that I saw.

And Rusty would know this better than I, but just going through this and trying to get a handle on it, I went back -- we went back and looked at the Federal law. This was as strict a standard as I could pull out of any of the Federal cases and I thought it would satisfy both of the policies that we wanted to protect. Make sure a judgment debtor -- and I didn't even think about Texaco -- but if it's the Mobil station across the street and if they get hit because a gas pump goes off for $80,000, they're not going to be able to put up

the bond. But they might have assets over there of 120, so I wanted those guys to be able to be protected.

And that's how we wrote this in because then a court could say: "You're not going to get rid of any of your assets. You're going to keep all of your assets in place so the judgment creditor can collect." But then the Mobil station could come in and say: "I'm never going to make this bond. There's no way." "The only way I'm going to make this bond is to go into bankruptcy or go out of business," and you protect the judgment debtor.

MR. BRANSON: Mr. Chairman, I've got a question before we --

CHAIRMAN SOULES: Yes, sir. Frank Branson.

MR. BRANSON: -- vote on Alternative 1 or 2. Sometimes the amount of the judgment interest of the cost is not adequate to protect the judgment debtor particularly where you've got cross appeals and matters that have been NOV'd.

MR. McCONNICO: Well, we pulled that right out of the language of the existing rule. That's the rule we have.

MR. BRANSON: Whether it was there or not, it is still not adequate if we're dealing with the law in the field. You could easily have some treble damage issues NOV'd by the trial court which could require substantially higher bonds for protection than your actual judgment. But couldn't you include cross appeals -- the amount of judgment and/or cross appeals?

CHAIRMAN SOULES: Frank, help me get to the language you're looking at so I'm not --

MR. BRANSON: (B) --

CHAIRMAN SOULES: (B), let's see.

MR. BRANSON: -- "The amount of deposit."

MR. McCONNICO: The first sentence. That language we underlined, that language should not be underlined because it's not a change. But you're right, that's -- if it's a problem, it's a problem with the existing rule.

CHAIRMAN SOULES: The first sentence should not be underlined?

MR. McCONNICO: It should not because that's the way the rule reads now.

MR. BRANSON: Well, if we're dealing with the rule anyway, why don't we go ahead and

address the problems that exist? If you're going to protect the judgment creditor and debtor you need to do it to the potential full judgment.

MR. BEARD: That would change all of our practice in Texas --

PROFESSOR EDGAR: Well then you don't have a judgment, Frank. See --

MR. BEARD: -- levee attachments before you even filed your lawsuit.

MR. BRANSON: You've got a cross appeal for definition.

PROFESSOR EDGAR: Pardon?

MR. BRANSON: You've got a cross appeal for -- a cross point for definition. If you can define the amount of the bond by looking at the cross points as well as the judgments.

PROFESSOR EDGAR: Well, you've got to look at the judgment, not the points that are raised on appeal. It's not what judgment you might ultimately obtain, you're trying to protect the judgment that's been entered by the trial court.

MR. BRANSON: Well, but aren't you really -- right now we are addressing the total rule as I understand it. Aren't you really trying

to ensure that whatever judgment is ultimately entered there are assets to --

PROFESSOR EDGAR: Only the judgment entered by the trial court.

MR. BRAMSON: Philosophically, why not protect the entire matter?

PROFESSOR EDGAR: Now that's another question entirely.

MR. BRANSON: We have a rule here that's broad enough to do that.

CHAIRMAN SOULES: Let's see. Sam Sparks of El Paso.

MR. SPARKS (EL PASO): I want to ask a question of the subcommittee and I'm -- I'm going to jump over Frank's thought for a minute. On Alternative 1, would it be within the spirit of Alternative 1 if you entered into -- or the judge entered an order "no requirement of the bond shall" -- but the judgment debtor each year would have to pay $50,000 on the judgment until the appeal was held. Now that's the kind of thing I'm looking at when you look at whether or not the judgment creditor will suffer substantial harm during that appeal.

MR. BEARD: Sam, what we're trying to

do is leave that to the court that has to devise that order.

MR. SPARKS (EL PASO): No, I understand that. I'm just asking is that something that the court could do under this rule?

MR. McCONNICO: Well, the last sentence might give them that much leeway because the last sentence of (B) states that in such case the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor for any loss or damage occasioned by -- and I think we need to take out "delay" again -- by the appeal. Now that gives a lot of leeway.

CHAIRMAN SOULES: It seems to me in the Alternatives -- in Alternative 1 you've got to find irreparable injury to the debtor and no harm to the creditor. The other case, the second really picks up what we did in (A) and says you must -- "The trial court must enter an order that will protect the judgment creditor from any loss occasioned by the appeal," and gives a trial court latitude to make the decision as to what is protective, without having to also find that whatever might be protective is required because

anything else would do irreparable harm to the creditor and so forth.

MR. JONES: Mr. Chairman, my motion is on the floor --

CHAIRMAN SOULES: Yes, sir.

MR. JONES: -- and I would like, I think, with the consensus of the committee to amend it to strike out the word "delay" in the last line of Paragraph (B).

MR. McCONNICO: I second.

MR. SPARKS (EL PASO): I second.

PROFESSOR EDGAR: Do you want to be consistent, though, and change the "which" preceding "adequately" to read "as will"? Mr. Chairman?

CHAIRMAN SOULES: I'm sorry. Hadley Edgar.

PROFESSOR EDGAR: Do you want to be consistent in that last sentence as we were in the last sentence in the first paragraph by saying "as will adequately" rather than "which adequately"?

CHAIRMAN SOULES: Yes. Where is that?

PROFESSOR EDGAR: It's the third line from the bottom.

MR. JONES: Is that your motion,

Hadley?

PROFESSOR EDGAR: Yes. If that's all right with you.

MR. JONES: That's fine.

MR. McCONNICO: And also we need to make it consistent to change "for any," to "against any."

CHAIRMAN SOULES: Let me see, I was writing and I didn't hear the last comment. What was it?

MR. McCONNICO: To make it consistent with our prior sentence at the end of (A), we need to change "for any loss to judgment creditor" -- "for any loss," to change the "for" to "against" -- "against any loss."

PROFESSOR EDGAR: And also change "protects" to "protect."

CHAIRMAN SOULES: Can we just get a consensus, sort of a show of hands, how many feel that -- mainly I'm trying to find out now the extent to which the discussion has now progressed to see if we're close -- ready for a vote. And there was some sensitivity to what Ken was saying here.

How many feel that the strict standards of 1

are preferable to the -- just providing that it must be adequately protected which is in 2?

(At this time the vote was (taken by a show of hands, (after which time the (meeting continued as (follows:

CHAIRMAN SOULES: Okay. It seems to be a fairly strong consensus that the stricter standards would apply. Is that why there's not much discussion on 2? Now I know that Elaine has discussed it but if we're there, well -- does anyone else want to discuss number 2? Or Elaine, do you want to speak your peace one more time before we vote?

PROFESSOR CARLSON: No, I just wanted to caution the committee on that possible problem down the road. I would like to respond a little bit further to Mr. Tindall's inquiry a little bit earlier and to some remarks Steve made about the Federal rule. And I'd like to also say I'm not retained in the Texaco-Pennzoil judgment. This is my independent judgment.

The Federal rule -- cases that I read interpreting the Federal rule are not saying it's

a matter of a court's inherent power of the trial court to provide for alternate security. The predecessor to the Federal rule expressly gave the Federal trial court the power to provide for the ultimate security. The Federal appellate rule continues to give the Federal appellate courts the review of the trial court's order of alternate security.

And so it's a matter of rule interpretation and not inherent power of the court. And that is why I think that we need a change in the Texas rule -- whatever it might be, Alternative 1 or 2 -- to Rule 47 to really fill the gap that's a part of our Open Courts Provision.

MR. TINDALL: What about the issue of the bond fee? In my one supersedeas, the only person who made any money was the insurance company that extracted a king's ransom. I mean I always thought that was offensive. I mean if we go with Alternate 1, do we need to also deal with the bond fee because Steve's example of a $120,000 judgment against Exxon, if you hold their feet to the fire, they've got to put it up. It's a ridiculous bond fee.

MR. McMAINS: But they don't have to

buy a surety bond. I mean one of the problems is that Exxon and a lot of the other big companies, they just get a sister company or somebody else to sign on as a surety --

MR. JONES: All they have to do is put a CD up.

MR. McMAINS: That's right.

MR. BEARD: Well we shouldn't try to cover any details of what -- just leave that to the trial courts.

MR. TINDALL: Well, but is cost an issue that we should -- I'm talking from a point of inquiry. This is so radical a change that if we go this route and you give the judge the discretion, then what about the bond fee? They say the Federal courts evidently have a rule on this, right?

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS (EL PASO): Let me just say that a lot of these decisions don't have any practical effect on where we practice. The Western District blanket will not give any orders, period. You either put up a supersedeas or not. I'm in some rather large cases that I sure have gotten funded in, have offered to put up CD's, and

of course it's not acceptable because of the negotiations between the parties at that point and the court won't enter an order on that type of thing.

And a lot of times it's because you can't get a bond. I mean it doesn't make any difference what it is, you just can't purchase one. And I also want the record to reflect I'm not in the Texaco case either. But Luke's statement of number 2, by inference, being not as restrictive as Alternate 1, in my judgment, is not correct because number 2 doesn't really go to the problem we're talking about. Number 2 just allows a judgment debtor that has the assets to avoid the payment of a bond in my judgment. So I really -- on 1 if we're talking about making any change for the "betterment" or to respond to the legislative pressure, we're looking at Alternative 1, I think.

CHAIRMAN SOULES: Well, let me read the (B) now with Alternative 1 in there as I understand it, and then we can get a vote.

"When the judgment is a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment interest and costs. The trial court may deviate from this general rule

if, after notice to all parties and a hearing, the trial court finds that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects" --

PROFESSOR EDGAR: "As will."

CHAIRMAN SOULES: Well, that doesn't fit there.

MR. McCONNICO: "Which" might be better.

CHAIRMAN SOULES: "Which" is better. We'll leave it -- "which adequately protects the judgment creditor against any loss or damage occasioned by the appeal."

MR. JONES: Are you going to change "for" to "against"?

CHAIRMAN SOULES: Yes. I've read it. Are we ready to vote?

MR. BRANSON: Mr. Chairman, before we do that, I didn't mind Sam jumping over my question but I'd like for the committee to address it, if we could, and that is the question of where

you have a verdict by a jury that is different from --

CHAIRMAN SOULES: Frank, please. Let's vote this first and then--

MR. BRANSON: Well, but we're voting on language and all you'd have to do is add "judgment", make that "potential judgment" or "verdict."

CHAIRMAN SOULES: Well, while we've got this much before us, I'd like to get a vote, and then if you want to look at that we'll go to it. But just as a matter of organization -- those in favor as read, please show by hands.

MR. JONES: This is Alternate 1, my motion?

CHAIRMAN SOULES: Yes, sir. Okay. Opposed? That's unanimously recommended, then.

MR. McMAINS: No, Elaine had her hand up.

CHAIRMAN SOULES: Oh, I'm sorry. I didn't see your hand. I looked for it but it must have been over there behind Tony somewhere. Elaine registered a dissent.

Now Frank, tell me what -- express your point.

MR. BRANSON: Well, my question is if we're attempting to protect the litigants in their various positions after the jury comes back and you have some NOV'd issue which if the appellate court finds were improperly NOV'd, they would reform the trial judgment. Then you need to protect the judgment creditor's ability to collect what the jury attempted to award them. And all you would have to do is change the word "judgment" in (B) to put "potential judgment based on the jury verdict."

CHAIRMAN SOULES: Let's take a consensus. Who's for discussing that and who's not? Who wants to discuss Frank's suggestion, hold up your hand?

MR. JONES: Well, I think we ought to discuss any suggestion.

MR. LOW: Yes, I think so too.

CHAIRMAN SOULES: All right. Let's discuss it. I don't mean to say --

MR. BEARD: Well, Frank, why don't you have summary judgment issues in there too?

MR. BRANSON: Well, if you're making them post a bond and the issues that were NOV'd are three times in some instances, and in some

instances more than that -- the original judgment that's entered -- and if you had a trial court that improperly NOV'd it, the judgment creditor has got no protection on appeal under the existing law. If we're addressing the rule, let's see if we can get them some protection too.

MR. McMAINS: Yes, but Frank the point is he's not a judgment creditor. He really doesn't have a judgment. I mean you're talking about him being a verdict creditor and --

MR. BRANSON: Well, I understand that.

MR. McMAINS: -- there is no such animal. But you don't have to post a supersedeas bond because what happens if you don't? Nobody is going to excute on a verdict when the judgment is --

MR. BRANSON: But heretofore you had to post supersedeas bonds in all cases. We've now changed that if the Court adopts our rule. I'm suggesting that we address the underlying potential problem along the way.

CHAIRMAN SOULES: Frank, put it in the form of a motion so we'll know --

MR. LOW: But if you did that, Luke --

CHAIRMAN SOULES: -- we can see what

we're talking about, know what we're discussing, if you wish.

MR. BRANSON: Okay. I would -- all right I would move that (B) be amended to read as follows: "When a judgment is a sum of money, the amount of bond or deposit shall be at least the amount of the judgment and/or the amount of the judgment sought on cross appeal, interest and cost."

CHAIRMAN SOULES: It's moved. Is there a second? Motion dies for lack of a second.

Now let's go on to (C) and carry through with the text of the proposed 47. And then I guess the next point, really, of discussion is going to be the review or continuing trial court jurisdiction, Rusty, that you raised. But we need to get through the textual changes anyway. Steve, explain what follows then in (C) and (D) and so forth.

MR. McCONNICO: Well, these changes are really just following through with land and property with the money judgment. What we need to change in each of these is they all repeat the language "by the delay on appeal." We need to say "by the appeal."

CHAIRMAN SOULES: So drop out "delay on" in each place?

MR. McCONNICO: Yes.

CHAIRMAN SOULES: And you're accepting that amendment, then, your committee is, to drop out the "delay on"? Bill?

PROFESSOR DORSANEO: That's fine with me.

PROFESSOR EDGAR: Well, where does that language appear at?

CHAIRMAN SOULES: In the top line of page 2 is the first time I see it.

PROFESSOR EDGAR: Yes, but he said it appeared in all of the rest of them.

PROFESSOR DORSANEO: Not many of them.

MR. McCONNICO: Well, it appeared in (C) --

MR. McMAINS: I think that's the only one it appears in.

MR. McCONNICO: That's the only one. I'm sorry. That was a misstatement.

Well, basically what we've done in each of these again, in (D) and (E), we've given the trial court the discretion to suspend enforcement of the money judgment with or without the appropriate

additional security. But that's just trying to make each of these consistent with (B). We've added that to each one.

Now we've also marked out language that -- because we had to do this so quickly -- well, not that -- we've done it in the last couple of weeks -- there are some provisions in Rule 47 that do not appear in this because they are no longer applicable to this. And we might need to go back and you might need to look at Rule 47. Well let me see if I could bring out some of that language. It's not so much in Rule 47, as we did leave out a lot of language in Rule 49. And when we get to Rule 49, there's been a lot of language in Rule 49 that no longer appears in the new rule.

Now I think the big problem is going to come up -- well, hopefully it's not going to be a big problem, but it's something we need to take notice of -- in (K) under the continuing trial court jurisdiction because this provision is not in Rule 47 as it's written now. This is an addition. And previously when we've discussed this rule, most of the changes have been proposed to occur in a new paragraph sub (K); in fact, that's where the Committee on Administration of Justice proposed

that the rule be changed to begin with. I will give you a minute to read paragraph (K). I think it's self-explanatory, but it is a new addition that doesn't appear in our existing rule.

What we came down to in paragraph (K) is that there could be a change in the judgment creditor's or the judgment debtor's situation. And if the judgment debtor's situation changed, we had to have some type of authority in the trial court to go back and redo the security that it can put up by the judgment debtor. That's why we put in paragraph (K), to give the trial court continuing jurisdiction to correct anything that might occur while the appeal is ongoing and after the trial court loses its plenary power.

MR. LOW: You kind of have a dual jurisdiction.

MR. McCONNICO: Sometimes you are going to have dual jurisdiction. And, in fact, we probably do right now just like Rusty said. That was our conclusion. But this makes it express.

MR. LOW: I don't see anything wrong with it.

CHAIRMAN SOULES: Rusty --

MR. McCONNICO: I mean it's stated

now.

CHAIRMAN SOULES: Rusty, you had some sensitivity to this earlier expressed. How do you see this (K)?

MR. McMAINS: The only real comment I have, I do think that based on case law that we have right now, there is a suggestion that you can make such a motion -- that is, any motion that relates to the right to supersedeas -- for instance, in nonmoney judgments -- even after appellate jurisdiction is attached to the court of appeals. So I'm not sure this is anything but a codification insofar as the recognition of plenary jurisdiction.

But the question I do have, it appears that it doesn't really give you any encouragement to do it early. And the only question I have is: Should there be -- I can understand why you want to give them jurisdiction with regards to changed circumstances, or someone contending that there are changed circumstances. My question is: Do you want to essentially encourage people just not to worry about it until the subject comes up. I mean under this rule, basically you don't have to initiate anything until six months into the appeal

if one so desires. I mean should you have any, you know, for good cause? I mean should there be any limitation on your ability to go to the trial court? I don't know.

MR. McCONNICO: I don't think so.

MR. LOW: Limitation is based on a change and you don't know when that would occur.

MR. McCONNICO: That's right.

MR. McMAINS: No. No, this is not limited. This gives the trial court jurisdiction to mess with that order or to entertain the request for the first time made after the case is pending on appeal.

CHAIRMAN SOULES: Well, the judgment creditor may not -- may be reluctant to delay and execute.

MR. McMAINS: Oh, I understand. I understand.

CHAIRMAN SOULES: And so as long as that's the status, the judgment debtor will be moving to get help.

MR. McMAINS: Don't get me wrong, I'm not urging --

CHAIRMAN SOULES: Nothing is changed really until somebody decides to execute --

MR. McMAINS: I'm not urging that there should be one, necessarily. All I'm saying is that there is no either restriction or even encouragement to have done it earlier.

CHAIRMAN SOULES: I'm not trying to argue that there should be. I'm simply trying to put that concept out there that maybe there is no need for anybody to seek until -- really nothing has changed as far as the relationship of the parties except somebody six months later decides that they've got the courage to start executing it.

MR. BEARD: Well, what we're doing is just eliminating a question as to the trial lawyer as to where does he go to try to modify that order.

CHAIRMAN SOULES: Sam Sparks. That's right.

MR. SPARKS (EL PASO): Well, we're doing something more, though, and I think it is a good -- and that is telling the trial judge, whoever or wherever the trial judge is, that they can do it. A lot of them -- you know, sometimes you can't get Rusty on the phone to tell the judge that he can do that, and I think it's a good

provision.

MR. LOW: No, you could end up though with -- you've got it on appeal. You could end up -- if it's not limited to how many motions you can file in a trial court, you can end up where you've got a hearing on this in the trial court at 9:00, court of appeals at 9:30 -- I mean I can see the dual jurisdiction thing. It could be some play, and I don't know how you would deal with it.

MR. McMAINS: One question that I have is whether or not we should be essentially encouraging them to go to the trial court first because our Rule 48 -- and maybe that's where we need to make the amendment is in the appellate rule -- is suggest that what you can do in the appellate rule is to review a trial court's determination under this rule because really and truly the appellate courts don't have really any fact-finding jurisdiction, and really has no business entertaining testimony or affidavits when the trial court hasn't had a chance to make a decision.

PROFESSOR CARLSON: Isn't that really what Rule 49 says?

MR. BEARD: Well, Rusty, you can have

a delayed appeal and this will supersede -- as long as it's not sufficient -- the court of appeals will simply raze it. That's just an administrative act, it doesn't require any hearing.

CHAIRMAN SOULES: Elaine Carlson says isn't that really what Rule 49 does is make the court of appeals a review court after the trial court has been addressed under (K).

MR. BEARD: I don't really think, though, in those instances where people have posted a supersedeas bond that the passage of time has caused the interest to exceed the amount of the supersedeas bond.

CHAIRMAN SOULES: As a matter of rules history that we're making here, is it the intent of the proposal from the committee to require a litigant to go first to the trial court for relief and then have the court of appeals be a review court for whatever the trial court has done? Moving first to 47(K) and the trial court, and then to 48. I mean, have I got the numbers right? Number 47(K) and the trial court, subject to 49 review.

MR. TINDALL: Luke, I think that's a

good approach. The dual jurisdiction is an issue we have in divorce cases a lot. And we got the legislature to overrule that Boniface (phonetic) case that said you couldn't enforce by contempt in the trial court when the case was on appeal. And that's the law we have now is you can still enforce the judgment in the trial court even though it's in the Supreme Court of Texas so -- because the appellate courts aren't equipped to have these evidentiary hearings.

CHAIRMAN SOULES: Let's see, as I'm reading 47(K) and 49, the way that they are on the table right now, we go first to the trial court under 47(K), and only after that then we go to the court of appeals under 49. If that's the intent of the committee, that's the way it seems to me to read.

PROFESSOR DORSANEO: Well really we go under 49(B), and then (K) would give jurisdiction to do (B) after plenary power, right?

CHAIRMAN SOULES: Right.

PROFESSOR DORSANEO: But it is a little bit -- it's not completely clear in 49(A) when it says "the trial court's order" that we're talking about what takes place after the first

sentence of 49(B).

CHAIRMAN SOULES: How can we make that clear?

PROFESSOR DORSANEO: I think we could change the second sentence of 47(B) to say that the trial court may make an order deviating from this general rule, or order a deviation from this general rule.

CHAIRMAN SOULES: Judge Raul Rivera, you had you hand up, please, sir?

JUDGE RIVERA: I had a comment. It might be a lot simpler and a lot more direct if we just say that the trial court will have power and continue jurisdiction to modify its orders under this rule during the pendency of the appeal, period. Then it wouldn't conflict or intervene or overlap with Rule 49. And I think that's consistent with other rules that we could modify our own orders.

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: My inclination is to discourage a requirement that somebody would go to the trial court in every case in order to preserve the right to go back later. And I like the idea of letting someone wait until a problem

comes up and then going to the court and seeking relief, rather then going at the threshhold, getting some kind of an order so they could come back later and seek a modification of that order.

CHAIRMAN SOULES: You see, Judge, what he's saying is, is that there's not any order.

JUDGE RIVERA: Well, we can say enter or modify. Entertain, enter and/or modify.

CHAIRMAN SOULES: Well I think that's what Bill was getting at. I'm sorry.

JUSTICE WALLACE: I think I can guarantee you every appellate judge in the State would "druther" the trail court take care of those matters.

MR. TINDALL: That's right.

JUDGE RIVERA: If it's going to be a hearing where evidence is going to be required to hear an appraisal or a financial statement or look at a CD or something, its got to be done in the trial court so I'm sure they would like that.

MR. SPARKS (EL PASO): Well, they have it in the proposed Rule 49.

MR. McCONNICO: Well, that's where we are. That's why we drafted it this way.

CHAIRMAN SOULES: Bill has a propose

to fix here. If we go back into 47(B) where we say the trial court may deviate from this order and we say the trial court may order a deviation from this general rule, now that is the order. Now we've called it an order instead of -- may order a deviation. And then it's that order that becomes reviewable under 49 and you're tracking something from 47(A) -- or 47(B) into 49; is that right, Bill? Explain that to the committee, if you will.

PROFESSOR DORSANEO: Well, as I see it, for money judgments which is what we're really addressing, you have first of all as the main rule an amount of supersedeas set by a rule not set by court order, but the trial court may make an order deviating from the amounts set by the rule subject to the standard in 49(B). The trial court may take that action pursuant to paragraph (K) of 47 -- I think I may be saying 49, I mean 47 -- after the period of plenary power under Rule 329(b) would ordinarily have expired. That's probably the law anyway. And all of that is subject -- that is to say the trial court's order either within the plenary power period or thereafter is subject to review in accordance with paragraph (A)

of 49 which speaks about reviewing the trial court's order.

CHAIRMAN SOULES: Pursuant to Rule 47.

PROFESSOR DORSANEO: Yeah, pursuant to Rule 47. So that would in effect require someone to go to the trial court first.

CHAIRMAN SOULES: Are you comfortable with that approach, Rusty?

MR. McMAINS: Yes. Except that do all of the other exceptions have an order in them with regards to the supersedeas? I mean these things talk about bonds and divisions.

CHAIRMAN SOULES: Does it say order or suspension like in (B), instead of suspend?

PROFESSOR DORSANEO: I think it says "determined." It could say "ordered" instead of "determined."

CHAIRMAN SOULES: Where is that?

PROFESSOR DORSANEO: Like you take (D). (D) uses the word "determined"; (E) uses the word "determined"; (F) uses the word "determined"; and all of those could say "ordered," I suppose.

CHAIRMAN SOULES: It says -- how about the trial court may, within its discretion, order a suspension instead of suspend? That's the

order, is it not? And then order a suspension? (F)?

MR. McCONNICO: Right.

CHAIRMAN SOULES: And then (G) has got "ordered" in it.

PROFESSOR DORSANEO: (H) has got "determined" again.

CHAIRMAN SOULES: Okay. We'll clean up the subparagraphs here to be sure that we're talking about orders in every one of the subparagraphs of 47 so that the word "order" in 49 will pick that up for review. Ken, you had your hand up. Thank you.

MR. FULLER: This may not be the appropriate time but any time you give a judge -- the court a lot of discretion, it worries me that it doesn't have any guidelines. We have to deal with that in our business all the time. I wonder about the practicality of in the event of a deviation from the form where they are just set out, you know -- you've got to have it in the amount of the judgment -- what is wrong with requiring that judge to state in specificity the reasons for the deviation to avoid these remands for more evidentiary hearings? In other words, if

you're going to deviate, you've got to say in there why you're deviating.

CHAIRMAN SOULES: Pat Beard.

MR. BEARD: The subcommittee predicted that this was an issue that would be coming up today. But I'll just say once again that I don't want the trial court doing anyting but saying "granted" or "denied" or "overruled." He hasn't got time to do all these things. The prevailing party drafts them all up in the first place, and I don't think we ought to have anything saying -- that says any findings of facts. It just has to be supported by the record going up.

CHAIRMAN SOULES: Well, and having gone for Alternative No. 1, we know he has got to make two very direct findings, irreparable injury and no harm.

JUDGE CASSEB: Are you talking about the trial judge that actually had the hearing or just any trial judge?

CHAIRMAN SOULES: Well, the trial judge that signs the order. The order has to be based on these findings, doesn't it, Judge? Maybe I'm not following your question, Judge Casseb.

JUDGE CASSEB: I'm talking about if

one trial judge said something and you go to another trial judge who says, "I want this reviewed. I want this reduced." Do you go to the same trial judge that said it originally or not?

CHAIRMAN SOULES: Well, you have to go back to the same court but it may not be the same judge sitting on the court, unfortunately.

JUDGE CASSEB: I'm afraid that's going to cause some confusion.

CHAIRMAN SOULES: Tony Sadberry.

MR. SADBERRY: Mr. Chairman, on that point I would like to address the subcommittee as to whether you could consider the right of the judgment creditor to request the findings of facts by the trial court on that issue as opposed to it being mandatory.

MR. BEARD: Well, we did not discuss it in the committee, but if you don't have any authority to get it out of the trial court, I don't know of any way you could make those findings of fact.

MR. SADBERRY: Well, would that be against the spirit of what you propose to have that provision written in? It can be the result of an appeal that the court of appeals remands it

for such a finding. I'm wondering if it would be advisable to allow for the request to maybe avoid one step in the appeal process.

MR. BEARD: Well, without findings of facts, if there is anything to support the trial court's order, they're going to affirm it. I would rather stay away from it.

MR. McCONNICO: I think the way it is now that the judgment debtor has got to have a record of the hearing. Obviously, he isn't going to have anything to appeal unless he makes a record. The record, I mean, just goes without saying. The record has to reflect evidence on each of those two standards that we have put in, that we have to show that it will irreparably harm the judgment debtor to put up the bond and it will not harm the judgment creditor if he gives some alternative method of security.

I think that's the simplest way to do it, is to let it go up like our discovery hearings are going up now just based upon the record in front of the trial court. I think if we add any more baggage to -- we were concerned about adding any baggage to the appeal that would make the appeal any more difficult. And we wanted to keep it as

simple as possible, but make the standards strict.

MR. BEARD: If you have to have findings of facts, how long is it going to take to get those drafted up? This appeal should be able --

MR. McCONNICO: Quick.

MR. BEARD: -- to hit that Appellate Court just like that and -- for relief.

MR. McCONNICO: We didn't want to slow --

MR. BEARD: One way or another.

MR. McCONNICO: We didn't want to slow down the appeal where the judgment debtor could waste the assets if he doesn't like it.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: You really have two choices. If you require findings, you can either reverse the order and go back to a definite amount if the judge doesn't make the right kind of order, doesn't prepare it properly, you reverse and require a bond in the full amount. Or probably, more sensibly, send it back to the trial judge to go through that process again of redrafting the order like we do when findings are not made when you have a right to request them.

And that really does get you into a lot of going back and forth to no purpose, I think.

MR. SADBERRY: Well, I think that's the point. And I agree with Alternative 1 requiring essentially two major findings, we wonder what the court of appeals might address as far as additional findings that may be required in the Rule 49(A) provisions.

CHAIRMAN SOULES: Does anyone have any suggestions for further changes to 47 or 49 other than those that we've talked about?

PROFESSOR EDGAR: Yes, I have a question.

CHAIRMAN SOULES: Yes, sir. Hadley Edgar.

PROFESSOR EDGAR: In looking at subsections (D) and (E) and in comparing those with 47(D) and (E) as they currently exist, the current provisions provide that the appellee shall have his execution against any other property of the appellant. And apparently the subcommittee is eliminating that provision which reduces the security currently afforded a judgment creditor. And I would like for them to comment on that.

CHARMAN SOULES: Let's see, Hadley.

Are you reading the current rule book?

PROFESSOR EDGAR: 47(D) and (E), foreclosure on real estate and foreclosure on personal property.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: And there might be some others. I really haven't had an opportunity to examine it. You see, we don't know exactly what has been eliminated.

MR. McCONNICO: We don't.

PROFESSOR EDGAR: And I know that because -- I know the problem because of the time crunch you are working under. But I just noticed that those were deleted, and I would just like a comment.

MR. McCONNICO: The deletion is we didn't want to get into the fight -- and this -- I should have brought this up. We didn't want to get up into the fight on the priority of the liens in our new rule because we have a situation now as to priority of liens. And we didn't want to bring that back up because looking at the Federal experience and the other states' experience, that's created a lot of problem on foreclosure of real estate, foreclosure of personal property.

But, I don't know if anyone on the subcommittee feels strongly, really strongly, about that or not.

That was -- and I don't know if that's something -- basically, I think that is something we should discuss here. And I don't know if it's something that should be eliminated here because we didn't reach a consensus on that. Our feeling was that we didn't want to get into the fighting of the priority of the lien between the judgment debtor -- or the judgment creditor and the other creditors of the debtor.

PROFESSOR EDGAR: Well, this certainly is a change and --

MR. McCONNICO: It's a change.

PROFESSOR EDGAR: -- and I was concerned about the committee's reason for deleting it.

MR. McCONNICO: Right.

PROFESSOR EDGAR: That was the only thing I wanted to raise.

CHAIRMAN SOULES: Can you speak to that Bill Dorsaneo?

PROFESSOR DORSANEO: From my involvement with the committee, that language more

or less kind of went away without a lot of consideration.

MR. McCONNICO: It did.

PROFESSOR DORSANEO: I would suggest we put it back in.

CHAIRMAN SOULES: Well, let's put it back. Let's try to pull it back up through the cracks and put it back were it was.

MR. McCONNICO: Yeah.

CHAIRMAN SOULES: What do we have to do to do that?

MR. McCONNICO: What I said was the only discussion that was had, and that didn't have a lot of discussion.

PROFESSOR CARLSON: I guess I just felt from reading it that it was giving the trial court consistent discretionary authority and security. But really it's not -- the standard is not even mentioned, Hadley, in (D) and (E) that we see in (B), but perhaps it's not desirable.

CHAIRMAN SOULES: Let me ask the committee to restore that language back in --

MR. McCONNICO: Sure.

CHAIRMAN SOULES: -- and then assume that that is going to get done in edit. Any

further discussion?

JUSTICE WALLACE: One comment on 49. Now there was some question about the standard and review by the court of appeals. It's going to be an abuse of discretion unless it is specified otherwise. And if we're going to make this consistent with the way the system is working, it's going to end up being abuse of discretion anyway. I don't know how else an appellate court would look at what the trial court does as to whether they have abused the discretion, whether they followed the principles and rules of law that they had to work under.

These are the rules that trial courts are going to be working under, he's going to use his discretion in setting this bond and I don't know how -- I don't think you'll find a court of appeals anywhere that's going to overturn one. So I just wanted the committee to know that when you start appealing one of these, you're going to be using an abuse of discretion standard. And if the committee thinks it ought to be different, you ought to discuss it. If you don't think it should, then that's fine.

MR. BEARD: How would we make it

different?

JUSTICE WALLACE: What?

MR. BEARD: Judge Wallace, what other standards --

JUSTICE WALLACE: That's what I'm saying. There was some discussion earlier about maybe abuse of discretion was not the proper standard, but I'm saying that's what we've got.

MR. BEARD: I don't think it is a proper standard. But what other standard--

JUSTICE WALLACE: I don't know of any other. We're going to have to change our entire concept because -- or trial and appellate procedure if we get away from that abuse of discretion.

MR. BEARD: No. We would have, I think, preferred that the appellate court could substitute it's judgment for the trial court but I don't know how we can do that. See, we had the other issue of how do we get to the Supreme Court to straighten out the court of appeals? That's going to take a mandamus, as far as I know. We don't know of any way the appeal can go on to the Supreme Court at that stage.

CHAIRMAN SOULES: Assuming the edit to

put back in the language that Hadley addressed -- and, Hadley, would you work with the committee on that edit sometime during the day just to -- in effect, just suggest -- tell them exactly what you want back in and where? And then sometime during the day, I'll get mine --

PROFESSOR EDGAR: Well, I just raised the question. I noticed that it was deleted and it wasn't a change, I noticed, and I was just curious about why it had been deleted.

CHAIRMAN SOULES: Well, the consensus is that it should go back in --

MR. McCONNICO: Right.

CHAIRMAN SOULES: -- and I think we're going to vote on it assuming that that's been done. And would you help locate the places to put it back in?

PROFESSOR EDGAR: Yes.

MR. TINDALL: Luke, I have one suggestion on (G).

CHAIRMAN SOULES: Harry Tindall.

MR. TINDALL: Our Family Code has tended over the last ten years to get rid of the word "custody."

CHAIRMAN SOULES: All right.

MR. TINDALL: And (G) ought to be -- I can work with the subcommittee if they're going to meet this afternoon and change the phrasing. No substantive change, just --

CHAIRMAN SOULES: What word should we use?

MR. TINDALL: I would say "Conservatorship" or "Custody" should be the caption of (G), and then there are two places in the rules where the word "care" is. Strike the word "care" and put "conservatorship."

CHAIRMAN SOULES: But do we continue to use the word "custody"?

MR. TINDALL: Yes, because there are references in the Family Code to the Uniform Child Custody Jurisdiction Act, so we probably ought to keep the term in there but make it subordinate to the term conservatorship or custody.

CHAIRMAN SOULES: The caption is "Conservatorship" --

MR. TINDALL: Or "Custody." And then where it says "care or custody," change it to "conservatorship or custody" in the two places where -- line 2 and 4, and that's it.

CHAIRMAN SOULES: Thank you for that

suggestion. Any further discussion on 47 and 49? Rusty.

MR. McMAINS: Luke, I -- 49 has obviously three subparts, (A), (B), (C). Now we've got (A) and (B) in the new Rule 49. One of the things I was curious about, (A) is labeled Appellate Review of Suspension of Enforcement of Judgment Pending Appeal. And it appears to me -- and maybe I'm wrong -- it is a limitation, probably, of the court of appeals jurisdiction to review that issue. Is that intended as a restriction?

MR. McCONNICO: It's not intended -- explain to me how you see that as a limitation, Rusty.

MR. McMAINS: Well, it just says "the trial court's order pursuant to Rule 47" -- you don't need a trial court order to permit the posting of a bond, okay, in terms of that purports to be for the amount of the cost. The sufficiency of the sureties is a very serious problem. If you go get two deadbeats on the street -- and there's no district clerk that I have ever seen that refuses to file a bond that has two people's names on it without regards to anything.

And you can ask Clinton Mangus about whether or not that's been successful in San Antonio. But -- I mean the review of the sufficiency of the sureties, there is no real prescribed procedure at all in Rule 47 for where to contest in the trial courts. And the assumption that the clerk approves it is just hogwash because it is not -- it doesn't happen.

MR. BEARD: Well, Rusty, I think your point is well taken. How would you just say --

MR. McMAINS: Well, right now to be perfectly honest with you, our review of the sufficiency of the sureties in the appellate court ain't worth nothing. It's -- what I'm saying is, we need to give the trial court jurisdiction to review the sufficiency of the sureties, I guess is what --

MR. BEARD: Well, shouldn't you file a motion in the trial court and contest the insufficiency of the sureties and bring it up that way? Won't that give you relief?

MR. McMAINS: But we don't have any place in Rule 47 that authorizes us to do that. That's what I'm saying.

PROFESSOR CARLSON: What if with Rule

47 --

CHAIRMAN SOULES: Well, Rusty, if you read that broad enough, type of security, it could include the security of -- meaning better sureties than what you have, that type of -- I'm looking now at 47(K).

MR. McMAINS: There is no order in the trial court that is reviewable by the court of appeals now in 49. That's the number one problem.

MR. McCONNICO: So you don't like to put "order" in 49(A).

MR. McMAINS: Well, no, all I'm saying is when you put trial court order in then you have taken out --

MR. McCONNICO: You eliminate the --

MR. McMAINS: -- the sufficiency of the sureties as even being a reviewable issue.

MR. McCONNICO: All right.

CHAIRMAN SOULES: I think --

MR. BEARD: But Rusty, you've got to have that hearing in the trial court. I mean how is the appellate court going to determine the sufficiency of the sureties.

MR. McMAINS: That's the whole problem we have now.

CHAIRMAN SOULES: Under 47(K) --

MR. McMAINS: Because we have situations where they didn't post the security until you got to the appellate court.

CHAIRMAN SOULES: Under 47(K), you can move to have the sufficiency of the sureties reviewed in the trial court -- under 47(K). That's where you move in the trial court to have the sufficiency of the sureties reviewed.

MR. BEARD: Well, it is not our intention to leave a gap on all of these --

CHAIRMAN SOULES: The type of sureties.

MR. BEARD: I'm really thinking a better (K) would take care of it.

MR. McMAINS: I'm telling you that I just --

CHAIRMAN SOULES: Now we've made a record that it was so intended.

MR. McMAINS: Well, I'm just telling you the sufficiency of surety language appears now only in Rule 49; it doesn't appear in Rule 47. And 47 really doesn't talk about -- it talks about a proper supersedeas bond, but it doesn't say what that means.

MR. McCONNICO: Well, would it help you if we state the sufficiency of the supersedeas bond or the trial court's order pursuant to Rule 47 is subject to review by motion to the court of appeals? Go back to Rule 49 as it is now written and substitute in the first part of that sentence.

MR. FULLER: Where would we put that in? I'm sorry, I lost where you were talking about.

MR. McMAINS: See, this one --

MR. McCONNICO: The way it's written now we have the Appellate Review of Suspension of Enforcement of Judgment Pending Appeal. And Rusty says in our new change we're leaving out the sufficiency of the supersedeas bond or the surety.

MR. McMAINS: Or the surety. Or the securities deposited, or --

CHAIRMAN SOULES: Bill Dorsaneo suggested we should leave (A), the current 49(A) in there, and then make the new 49 -- and make that (B) and (C) and don't -- just leave (A) in there.

MR. McMAINS: I don't have a problem with that.

CHAIRMAN SOULES: Does that fix it?

MR. McCONNICO: Well it solves Rusty's problem.

MR. McMAINS: Well it solves the problem with no appellate review of the sufficiency of the sureties. I'm not sure it solves the intrinsic problem of trying to get a review on the sufficiency of the sureties.

MR. McCONNICO: I think --

JUSTICE WALLACE: I'm not sure what authority we use, but I can recall at least two instances where we have granted a motion to increase a bond because the interest had accumulated --

MR. McMAINS: Correct.

JUSTICE WALLACE: -- to such an extent.

MR. McMAINS: Correct.

JUSTICE WALLACE: But now, again, I don't -- but we have done it at least twice in recent months so there is an appellate review of it right now, maybe without any authority other than under our own power.

MR. McMAINS: Well that's in terms of the amount of the bond, Judge, and I agree with that. That needs to be something, too, that has

to be addressed in terms of the Supreme Court's power.

CHAIRMAN SOULES: Well does -- if we leave 49(A) in there and make the proposal (B) and (C), does that fix the immediate problem that you're raising, Rusty?

MR. McMAINS: I guess there is nothing specific in the trial court rules authorizing review of the sufficiency of the sureties.

CHAIRMAN SOULES: Okay. Well let me get -- can I get back to that? What if we put in (K) "to order the amount and type of security" -- let me see, "the trial court shall have continuing jurisdiction during the pendency of the appeal from the judgment even after the ~~expression~~ ivation of its plenary power to order the amount and the type of security, to review the sufficiency of sureties" -- and put it in there somewhere right there.

PROFESSOR EDGAR: That's during the pendency of the appeal, though.

MR. McCONNICO: That's right.

PROFESSOR EDGAR: I think Rusty is concerned with a review bel non of the quality of the surety. Isn't that what I -- and that would not be covered by that, nor would it be covered by

49(A) because that's talking about the appellate court. He's talking about some provision by which the trial court will determine the adequacy of the surety as an entity prior to the time of the supersedeas bond.

CHAIRMAN SOULES: Okay. How about --

MR. McMAINS: -- Texaco provision, we know insurance sureties are okay. They are provided for by statute.

CHAIRMAN SOULES: Let me see if I can get it here. In the fourth line of the first page: "good and sufficient bond to be approved by the clerk subject to review by the court." And just --

JUDGE CASSEB: Okay, right at the beginning?

CHAIRMAN SOULES: Right at the beginning. Subject to review by the court.

MR. McCONNICO: I'm sorry, Luke, I'm not understanding.

CHAIRMAN SOULES: Okay. In the fourth line of 47(A).

MR. McCONNICO: Okay.

CHAIRMAN SOULES: Start reading in the third line: "Execution of the judgment by filing

a good and sufficient bond to be approved by the clerk subject to review by the court."

PROFESSOR CARLSON: So it's the position now that the clerk has the absolute authority on sufficiency?

MR. McMAINS: Yeah. See, that's the basic problem. The clerk always just files it and once it's filed, that's it.

CHAIRMAN SOULES: Subject to review by the court upon making a deposit. Of course, that's not reviewed by the court. And that fixes a problem we hadn't thought about until you raised it.

MR. SPARKS (EL PASO): Shouldn't we have "on application" or something? That way it would be just subject to review. It seems like it's kind of automatically the responsibility of the judge to go in there and review each of the approvals of the clerk, subject to review --

MR. McMAINS: Upon motion of hearing?

CHAIRMAN SOULES: All you have to say is "hearing" because "hearing" picks up motion and notice and all the other things.

JUDGE CASSEB: Subject to review --

CHAIRMAN SOULES: By the court on

hearing?

JUDGE CASSEB: Yes.

MR. McMAINS: Or after hearing. I don't care.

JUDGE RIVERA: The sufficiency of which may be reviewed upon motion -- may be reviewed by the court upon motion by either party.

CHAIRMAN SOULES: Hearing is a pretty formal thing when you get to looking at the case law of what's meant by hearing. You've got to have motion of notice to the parties and setting.

MR. McCONNICO: You want to just say "upon motion" and leave out "hearing"?

CHAIRMAN SOULES: No, because you might have to have a hearing. If you have a hearing -- a hearing requires a motion, but a motion does not require a hearing.

MR. McCONNICO: Exactly. That's what I'm saying.

CHAIRMAN SOULES: No, I think they're wanting to have a hearing. I think the judgment creditor wants to have a hearing before he finds out his bond has been cancelled.

MR. McCONNICO: Right. I don't think that would happen with the other provisions.

MR. BEARD: We've got that problem all through the rules that the clerk has that power to approve that bond and we don't have, you know, garnishment and all of that. We don't have any provision --

CHAIRMAN SOULES: But this is what's done. We might as well say so. I mean if we can fix it here, because we don't have time.

In the next two years, we're going to have subcommittees that study blocks of rules to try to bring them together maybe in a more orderly way than they are. And on January 1 of 1990 maybe we will have some reorganization in the rules as a whole, but we can't do that at this time. So let's try that. Any further discussion on 47 and 49?

JUDGE CASSEB: Why don't you read what you have.

CHAIRMAN SOULES: Okay. The parenthetical that I put in there was "subject to review by the court on hearing."

JUDGE CASSEB: Okay. But I mean on the other one.

CHAIRMAN SOULES: Okay. And then on 49 we would put (A) back in as it is in the

current T.R.A.P. Rules, and then change the proposal to (B) and (C).

MR. McCONNICO: But we don't need all of the language which is insufficiency now in (A) in the current rule if we put it back in with the amendment.

CHAIRMAN SOULES: Would you? And add it on that, then, and give that to me.

MR. McCONNICO: Yes.

PROFESSOR CARLSON: Then the name of the Rule 49 needs to go back to Appellate Review of Bonds.

CHAIRMAN SOULES: I'm sorry, Elaine?

PROFESSOR CARLSON: Then I think the title of 49 needs to go back to Appellate Review of Bonds because Subsection (A) of 49 deals not only with security or supersedeas, but the review of cost bonds as well.

MR. McCONNICO: Well, the problem is security -- doesn't security include cost bonds?

PROFESSOR CARLSON: I don't know.

MR. McCONNICO: Leave it. I think it does.

CHAIRMAN SOULES: You can have -- post a bond or security for costs. How about Appellate

Review of Bond or Security in civil cases?

PROFESSOR DORSANEO: Actually when we did the appellate rules we changed Rule 41, for example, and other rules to speak about security for costs or security rather than bond. We took the language "bond" out in other places.

CHAIRMAN SOULES: Just assuming a bond was a type of security?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: All right. Well, let's leave it then consistent with the rewrite.

PROFESSOR DORSANEO: Yes.

JUDGE CASSEB: That would be better, then, to just leave it there.

CHAIRMAN SOULES: Are we ready to vote?

MR. LOW: Luke, could I ask Justice Wallace one question? Are you -- would you suggest or think it would be better if the appellate court could exercise its own discretion without having to find an abuse, or are you suggesting that because it could be done? In other words, you are right, the appellate court is never going to reverse, and you could just have a sentence in there that review by appellate court

shall be -- shall not require a finding of abuse of discretion but maybe the appellate court can independently exercise its own discretion. Are you suggesting this?

JUSTICE WALLACE: I think, Buddy, that's contrary to the entire concept of an appellate court being a fact finder.

MR. LOW: I understand that.

JUSTICE WALLACE: And the fact finding ought to be done down in the trial court.

MR. LOW: Right.

JUSTICE WALLACE: And I would leave it that way.

MR. LOW: Okay. Well, I don't disagree with that, I was just wondering if I had adequately flagged your concern.

CHAIRMAN SOULES: Are you saying this is what the court would be looking for the way it is now?

JUSTICE WALLACE: Right.

CHAIRMAN SOULES: Any further discussion? Okay. Those in favor of the -- recommend to the Supreme Court that they adopt T.R.A.P. 47 and 49 as now amended and before the committee show by hands?

JUDGE CASSEB: With the inclusion.

CHAIRMAN SOULES: And those opposed? Okay. That's unanimous by the committee; that includes the changes.

JUDGE CASSEB: Okay.

CHAIRMAN SOULES: Thank you for that report and for that work that was done -- an awful lot of work done in a short period of time, Steve.

Gilbert, is Broadus going to be here?

PROFESSOR EDGAR: No.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: There's a note here. I don't know where it came from. It just said that Broadus is in oral argument at the moment and will attend the meeting after 1 p.m.

CHAIRMAN SOULES: Should we wait for Broadus to talk about Rule 13, or what's your pleasure on that? It doesn't make a bit of difference to me. I know that you and he have fought the battles of the legislature diligently over this issue and he may want to have a say. How do you feel about it?

MR. ADAMS: Well is he -- does that note say he's going to be in later this afternoon?

PROFESSOR EDGAR: I don't even know

where this came from. It just says he's in a meeting today at ten o'clock, that he is in oral argument at the moment and will attend the meeting after 1 p.m.

MR. ADAMS: He's been in trial in Houston all week, so that's probably what he's -- they're probably having jury summation.

MR. SPARKS (EL PASO): A lady just brought that in so obviously he called.

CHAIRMAN SOULES: Okay. Well, why don't we wait until 1 and give Broadus a shot at this because you're going to be hearing about the lambasting that we've been taking over there from Gilbert and Broadus. And no one has taken more than they have, I guess, in this session, for the benefit of so many.

MR. ADAMS: Well, Lefty here, he ought to get a little credit too.

CHAIRMAN SOULES: And Lefty. Yeah, I saw Lefty over there a time or two.

Well, why don't we pass over that 13 for now and go to the next subject.

MR. TINDALL: Are we still on the supplement, Luke?

CHAIRMAN SOULES: Let me try to get

organized; just a second. That's hard for me. I guess we can go to Rules 1 through 14. I don't think Diana is here, but they would be in the main book at page 66 and just start at the beginning. The local rules we're not going to do until the interim. So page 79 would be the next point in the book where we would have something.

And I don't know what this new statute that Ray Judice told us about -- Judge Schattman who gives us a lot of good input read Rule 3a and realized that it talks about administrative judicial district and there's not any more district, it's region now. And does this new administrative act change that, Judge? Are they still called regions?

JUSTICE WALLACE: They are still regions, right.

CHAIRMAN SOULES: That's just a word change in 3a to make it comply with the language that's used in the statute. Any opposition to that?

MR. McCONNICO: Move it's adoption.

MR. FULLER: Second.

CHAIRMAN SOULES: Voice vote. Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That's unanimously adopted. And page 83, the next page over, this is actually just a rewrite.

JUDGE CASSEB: Pardon me, Luke. What page?

CHAIRMAN SOULES: This is on page 83 and 84. Just turn the page over to page 83 and 84 of the notes. This was given to Judge Thomas to rewrite after the meeting before last meeting. She was not at the last meeting. She is not at this meeting.

I rewrote it according to my notes, and I believe that this is an accurate rewrite of what the committee did. It's very simple. In order to get the exhibits out of the clerk's offices and provide for some way to do it, we just changed 14b to "clerk shall dispose of them as the Supreme Court may order."

PROFESSOR EDGAR: That's the way we handled the disposition of depositions.

CHAIRMAN SOULES: Exactly, which Hadley did. And then we proposed an order which attracts what Hadley did for depositions. And --

PROFESSOR EDGAR: And we approved

that, as I recall.

CHAIRMAN SOULES: And we approved that, and that's already been promulgated by the Supreme Court to become effective.

JUDGE CASSEB: And this is just doing it on exhibits?

CHAIRMAN SOULES: This is just doing the same thing on exhibits. Any motion on this?

MR. FULLER: Move adoption.

CHAIRMAN SOULES: Move adoption. Second?

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: Any discussion? Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? Then that's unanimously adopted.

Sam, your subcommittee on rules 15-166a again had a heavy laboring oar to pull to get a lot of work to us. That report begins with page --

MR. SPARKS (EL PASO): I owe an apology to my subcommittee. I had the wrong list. I sent to several people our subcommittee's initial report, and none of them sent answers back

which didn't surprise me. Then I found out when I got down here and read your book I sent it to the wrong people.

If you'll go to page 99, I think we can get some of these out of the way very quickly. The Administration of Justice has recommended the deletion of Rule 57, everybody who has written has recommended deletion. I couldn't find anybody who could tell me why it shouldn't be deleted, so I move that we delete Rule 57.

MR. TINDALL: I so move -- or second.

CHAIRMAN SOULES: Moved and seconded. Any discussion? Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That's unanimously recommended.

MR. SPARKS (EL PASO): Okay. And then if we go to -- I'm going to try to take the ones I don't think there's much controversy on. Let's go to Rule 142 which would be in the big book, it's on 93. This was a suggestion by, I think, one of the Harris County people to conform Rule 142 as it is now to the statutes to eliminate "security for costs" to the term "fees for services rendered."

There were two things involved in this

request. One was just to simply change the term "fees for services rendered" to comply with what the statute says. And then secondly, apparently there is a real problem -- and it's going to come up in some of these other rules -- as to when things are to be filed. The request wanted a rule that the filing will be done when the fees for services are rendered.

The only change I made to the proposed rule was to incorporate Rule 145 that we passed some time ago -- which is the affidavit of inability, pauper's oath, whatever we call it -- I don't know what we call it now -- but it appears to me to be a good proposal and there's not much complexity about it.

CHAIRMAN SOULES: You move the -- you recommend the Supreme Court amend Rule 142 as indicated on page 93?

MR. SPARKS (EL PASO): Yes, sir.

CHAIRMAN SOULES: Second?

MR. NIX: Second.

JUSTICE WALLACE: Luke, on this --

CHAIRMAN SOULES: Justice Wallace.

JUSTICE WALLACE: -- affidavit in lieu of cost, 145, I think I've had two or three

letters on that, all of which have come from family law judges urging that the county clerk should -- someone should be able to contest those. And I just wondered if the family law practicioners on the committee have had any problem with that?

MR. TINDALL: I have not heard anything.

MR. SPARKS (EL PASO): Well, the way -- the rule that we have recommended to the Court has an application for any party to contest the costs as well as the clerk.

CHAIRMAN SOULES: No, not the clerk.

MR. SPARKS (EL PASO): That's right. We did take the clerk out. You're right.

CHAIRMAN SOULES: Because Ray Hardy felt like if he had the authority, he had the duty as a fiduciary to his counsel to file a contest of every affidavit and was doing so.

MR. SPARKS (EL PASO): And that was the problem that the folks had because in the interim, during the contest, nothing was happening and people were getting beat and that -- you're right.

JUSTICE WALLACE: As I recall, Judge

Robinson, Mary Lou Robinson, and -- no, Barbara Culver, Mary Lou is on the Federal bench. Judge Barbara Culver and some other judge, and I can't remember his name -- those two -- about the county going to pay additional costs, and I just wondered if in family law cases -- that's what they were addressing -- and I was wondering if anybody had run into that problem from any other source.

CHAIRMAN SOULES: Apparently it was if the husband and wife couldn't get along on anything else, at least they could get along on not paying costs. I don't think it's a very pervasive problem. It hasn't raised a lot of interest here. But, Judge, I appreciate your making that inquiry.

Okay, so 142 was unanimously recommended. Next, Sam?

MR. SPARKS (EL PASO): Then let's go to the next one that doesn't really have a whole lot of meat to it, I don't think, and that's Rule 71 --

MR. TINDALL: What page?

MR. SPARKS (EL PASO): I'm looking.

MR. TINDALL: Oh.

MR. SPARKS (EL PASO): It's on page

92. And I never have had this problem until I was trying a case the last couple of weeks in which the plaintiff had four first amended original petitions. And all this is supposed to do -- and I drafted it in response to some letters -- in some different places, apparently, the clerks will change a pleading -- if you send in a second amended petition, and if you misnomer it first amended, they just write it second amended.

And they wanted some consistency throughout the state, so what the purpose of the change is that the pleadings will be docketed as filed and as named, and they will remain as such unless the court orders redesignation. And I don't have any feeling one way or the other, but I didn't see any objection to it. I think a court could order it redesignated, but I --

CHAIRMAN SOULES: Is there any motion on it? You move that it be adopted?

MR. SPARKS (EL PASO): I move that we amend 71 for that purpose.

CHAIRMAN SOULES: Is there a second?

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: Hadley. Any discussion on that rule? Bill Dorsaneo.

PROFESSOR DORSANEO: This may be a bit picky, but "the pleadings shall be docketed as originally filed"? What does that mean in English? Does that mean somebody will write on the docket sheet what they say they are?

PROFESSOR EDGAR: Shall not be docketed as originally denominated is what he --

MR. SPARKS (EL PASO): Or named.

PROFESSOR EDGAR: Or named is what is meant.

MR. TINDALL: Well, what is a docketing of a pleading, though, that's raising -- Bill has got a point. How do you docket a pleading? You file them. They are not docketed.

MR. LOW: You write it on the docket sheet.

PROFESSOR DORSANEO: That's written on the docket sheet. That's right.

MR. TINDALL: Well our county doesn't docket it. It just goes in the file.

PROFESSOR DORSANEO: You're kidding me.

MR. TINDALL: What? No. The docket sheet is only the judge's notes for the rulings.

PROFESSOR EDGAR: You're talking about

the clerk's docket. We're not talking about --

MR. FULLER: Well, that's the law in Harris County. That doesn't matter.

CHAIRMAN SOULES: Really it means originally denominated is what you're saying there, isn't it?

MR. SPARKS (EL PASO): And I'm not so sure we ought to use "denominated" since we have used the word "identified." How about as "originally identified"?

MR. FULLER: There you go.

MR. SPARKS (EL PASO): Titled, that's a good one.

CHAIRMAN SOULES: As originally titled?

PROFESSOR EDGAR: As originally entitled?

MR. BEARD: I don't really think that amendment is necessary. You can take care of that without the amendment and these rules are eventually going to be thousands of pages long.

MR. MORRIS: Amen.

PROFESSOR DORSANEO: I think designated would be a better word to use uniformly.

MR. BEARD: You already have it. You have it in there.

PROFESSOR DORSANEO: "Pleadings shall be docketed as originally designated and to remain identified as designated unless the court orders redesignation."

JUDGE CASSEB: You've got a consistency.

MR. SPARKS (EL PASO): Okay. I think that's good.

CHAIRMAN SOULES: So the committee accepts that amendment?

MR. SPARKS (EL PASO): Sure.

CHAIRMAN SOULES: Are we ready to vote? Those in favor of it with the committee's accepted amendments say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

COMMITTEE MEMBER: No.

CHAIRMAN SOULES: It's the House to one.

MR. SPARKS (EL PASO): Then we go to Rule 8 which should be on page 87. And we really got a lot of information on this and lots of different kinds of suggestions and what not.

CHAIRMAN SOULES: What page?

MR. SPARKS (EL PASO): Page 87. And what I tried to do was to go through all of these wonderful suggestions to the most simple thing that we could and that's what I've come up with, Rule 8. I don't know how you can embrace all of the circumstances where one lawyer or firm files a lawsuit, they don't get an order withdrawing, another one comes in with another amendment or what not, all across the area where I guess local rules are not in effect or are not being enforced where you designate a leading counsel.

This proposal just simply says that the attorney who files -- I dropped out the word "first employed." I don't know how -- that's been in there for a long time. I don't know how they ever figured that one out. But we just said: "The attorney who places his signature on the initial pleadings for any party shall be considered leading counsel unless formal pleadings are filed subsequently." And that gives enough direction to the court and the clerk for notice.

MR. LOW: What happens in a situation where -- a lot of times we file and three lawyers

sign -- I mean me and Franklin, Jr. and then, you know, somebody else. Now, are you saying that the one whose signature -- or are we all three -- well, we've all three signed it now. What happens there?

MR. SPARKS (EL PASO): Well, that rule doesn't speak to that. Maybe we ought to.

CHAIRMAN SOULES: May I suggest this? "The attorney whose signature first appears on the initial pleadings."

MR. LOW: Yeah, that's what I would say.

MR. SPARKS (EL PASO): So get your signature first so you can control the litigation.

MR. McMAINS: Which controls, right or left?

MR. SPARKS (EL PASO): You're not going to be able to designate on what part of the page because we're coming to a rule that -- in a minute. But we'll save the fun for later.

CHAIRMAN SOULES: That's a motion. Is there a second on this change, this Rule 8 change?

MR. FULLER: So move and second.

MR. BRANSON: Excuse me, could I have some discussion? Is there any merit to letting

lead counsel make the change as well as the parties? It says it. All right.

MR. SPARKS (EL PASO): It says "made by party or attorney upon pleading." Most of them will be lawyers. And most local rules that I'm aware of, you're supposed to certify the lead counsel anyway. But I don't think the clerks ever looked that far anyway.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: This rule talks in ownership kind of terms. Would it be better in light of what we're trying to accomplish here to say that the attorney shall be responsible for the management of the cause rather than we shall have control of the management of the cause? It's not a big point, but it seems that the rule as it is evolving is a different kind of animal than it was designed to be originally.

MR. SPARKS (EL PASO): I don't have any objection to that, Bill. That phrase I took from most of the consensus of the local rules that we had. But I don't -- that's what it means, you're responsible.

CHAIRMAN SOULES: Is that an acceptable amendment?

MR. LOW: That's not really true. All three have a professional responsibility --

MR. FULLER: I'll accept it on behalf of whoever seconded it first.

MR. RAGLAND: Is that really the only problem is who gets notice to the clerk's office? Isn't that what the problem is, Sam?

MR. SPARKS (EL PASO): Well, most of the comment was who is to be notified. But then there is also an element we're going to get into in the next -- in this motion's rule proposed on 21 -- it's when three lawyers are signing one petition and the other side only sends notice to one. So, it's not just the clerk, it's --

MR. ADAMS: What about the motion for continuance, too? I mean you've got three or four lawyers on the case. The court really ought to know which one is the one that's going to be important with regard to the motion for continuance without being unavailable.

MR. BRANSON: I think under the changes to Rule 13 the legislature just amended, you're also going to have some problems there.

MR. SPARKS (EL PASO): I'm not aware of what that is.

MR. BRANSON: They basically adopted Rule 11 of the Federal rules.

CHAIRMAN SOULES: That will be coming up with Broadus and Gilbert in a minute.

MR. BRANSON: But I'm wondering if it's not really going to apply here because lead counsel is going to be -- I assume -- assigned to all the pleadings.

Speaking of that, when you say "or attorney by formal pleadings," is that too broad, maybe, for what we're talking about? Does it make any difference what attorney amends that? Would you want the lead counsel to personally change lead counsels?

MR. RAGLAND: He may be fired; he may not want to sign something. It looks like to me Rule 8 ought to just say that the clerk should be required to send all notices to the person designated as lead counsel by the party, period.

MR. SPARKS (EL PASO): But that's the problem. And then there's no designation as to who is lead counsel, and they call the clerk or they call the lawyer and they say you have to notify --

MR. RAGLAND: Well, in the absence of

designation, then, the first attorney's name and address that appears on the pleading.

MR. SPARKS (EL PASO): I really think the idea is good. I think it will help -- if everybody followed their own local rules, you wouldn't have the problem. But nobody is doing that, apparently.

MR. LOW: Sam, I agree. This deals only with notice but it doesn't say that. Maybe it's technical to somebody. A lot of lawyers have the responsibility --

CHAIRMAN SOULES: Buddy, I'm sorry. We can't hear with all this noise going on back here.

MR. LOW: I'm saying that the lawyers have a responsibility -- Sam says this only deals with notice, okay, or to -- what?

MR. SPARKS (EL PASO): This is just really a rule that defines who the leading counsel is. Now the effect of it is not.

MR. LOW: I know. For purpose, the effect is notice. But if you put a rule in there and you don't say that and you say "shall have responsibility" -- I mean all lawyers have a professional responsibility if your name appears

on the pleadings. I would object to the Professor's designation of responsibility. I think it might be misleading.

MR. SPARKS (EL PASO): Well maybe that's why they use the word "leading."

PROFESSOR DORSANEO: After hearing the comments, I would at least say "primarily responsible."

MR. LOW: Yeah.

MR. TINDALL: It's really "lead counsel" not "leading counsel," isn't it?

CHAIRMAN SOULES: Our rules use the word "leading." Well, let's see if we've got this.

"The attorney whose signature first appears on the initial pleadings for any party shall be considered leading counsel in the case and shall have control in the management of the cause unless a change is made by the party or attorney by formal pleadings filed with the clerk." Now that's the recommendation. Is there a second?

PROFESSOR EDGAR: Well, I come back to what Buddy said --

CHAIRMAN SOULES: Let me get -- let's see, was that already moved and seconded?

MR. FULLER: It was.

CHAIRMAN SOULES: Okay. And we're now in discussion and Hadley, did you have --

PROFESSOR EDGAR: Just coming back to what Buddy said, it seems to me that the insertion of the clause "and shall have control of the management of the case" really is beyond the scope of the rule. And I would suggest that we consider just eliminating that clause so that it reads: "The attorney whose signature first appears on the initial pleadings for any party shall be considered leading counsel in the case and shall so continue unless a change is made by the party or attorney by formal pleadings filed with the clerk."

Now, that's what you're intending to do. And then you eliminate the problem that Buddy has raised because that's just a red herring, it's not intended, and I don't think it serves any useful purpose.

MR. BRANSON: I second the motion.

CHAIRMAN SOULES: Is that acceptable?

MR. LOW: Yes, sir.

CHAIRMAN SOULES: All right. Let me read it again then. "The attorney whose signature

first appears on the initial pleadings for any party shall be considered leading counsel in the case for that party and shall so continue unless a change is made by the party or attorney by formal pleadings filed with the clerk."

MR. SPARKS (EL PASO): Let me say I am personally in favor of that change because I think that's what this rule should say only because of the heading on it. But that really doesn't speak to some of the reasons behind the suggestions by some lawyers, many clerks and some judges; they want that responsibility. And I like the way it's amended, but I think I'm obligated to tell you that we have gotten correspondence where they want a person designated who has that responsibility by rule.

CHAIRMAN SOULES: I believe the way this rule now reads -- the way Hadley has it, though, it carries with it -- what the courts have been wanting to know and what has been fuzzy is, if we want to command that a party be here and they've got multiple counsel, who do we go to? And that was one of Ray Hardy's complaints too, "Who do I give notice as a clerk to?" And now they can say leading counsel. And we know now who

that is unless -- I mean we know who it is by definition. So maybe it does speak some to those complaints that you and I have read.

MR. SPARKS (EL PASO): It's an improvement.

CHAIRMAN SOULES: An improvement. Okay. Those in favor say aye.

JUDGE CASSEB: Would you mind reading it back?

CHAIRMAN SOULES: Okay. I'll read it back again. "The attorney whose signature first appears on the initial pleadings for any party shall be considered leading counsel in the case for that party and shall so continue unless a change is made by the attorney" --

PROFESSOR EDGAR: Do you have "for that party" or -- this says "for any party." Start over again.

CHAIRMAN SOULES: I put "for that party" after the word "case." Start over again. "The attorney whose signature first appears on the initial pleadings for any party shall be considered leading counsel in the case for that party and shall so continue unless a change is made by the party or attorney by formal pleadings

with the clerk."

MR. LOW: Luke, I have just one technical --

CHAIRMAN SOULES: Buddy Low.

MR. LOW: -- one technical point. I realize the rules have always said "leading counsel," but for a long time I have not heard anything other than just "lead counsel." That's kind of what we speak of. I guess it doesn't make any difference, but that's the term the courts usually talk about. People who lead -- leading counsel --

CHAIRMAN SOULES: Okay. What's the consensus? Do we change "leading" to "lead" or leave it the same?

MR. LOW: It's no big deal --

MR. TINDALL: Yes.

MR. NIX: Yes.

MR. ADAMS: Does it appear in any other rules?

MR. TINDALL: No, I just checked the index.

JUDGE RIVERA: I have one more suggestion.

CHAIRMAN SOULES: Yes, sir, Judge

Rivera.

JUDGE RIVERA: Can we remove the word "considered"? It would be more direct.

CHAIRMAN SOULES: Yes, sir. Any objection to that?

PROFESSOR EDGAR: No. That's a good idea.

MR. LOW: Yes. That's right. Luke, the caption should be changed too. Lead counsel instead of leading counsel.

CHAIRMAN SOULES: Okay. That's good. Okay. As it's written now, those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That's unanimously recommended.

MR. SPARKS (EL PASO): If you go right across the page to Rule 88 --

MR. McMAINS: Rule 21.

MR. SPARKS (EL PASO): Rule 21. This is changing the notice from three to five days. Apparently, in central Texas, a lawyer will mail a notice to Dallas or to San Antonio or Austin about a hearing in Houston, and if it's over the weekend -- and with the mail, it is, a lot of times --

according to the correspondence we get, they'll get notice of the hearing on a Friday for a Monday or a Tuesday or what not.

They have requested several alternatives. Most of the suggestions went to five because apparently that's -- I don't know why, but they've got five -- and they wanted excluding Saturdays, Sundays and legal holidays. I can speak for the rule in El Paso -- just like tomorrow there's only one airplane I can get back from Austin to El Paso on -- and if you mail me a letter, it now takes four days to get to El Paso. Why, I don't know. And I expect it's similar to Lubbock and everybody else. So I thought that was a good one. And I move that we amend Rule 21 to five days, inserting a phrase "excluding Saturdays, Sundays and legal holidays."

CHAIRMAN SOULES: Ken Fuller.

MR. FULLER: I think you're overkilling it. If you've got a special problem dealing with mail notice, let's write a mail notice rule. But I tell you in our practice, this would be a total disaster in family law because we have to have hurry-up hearings and you're talking about a week to get some of this stuff.

Now, if we've got a mailing problem, let's write a special rule for mail notice, but let's get a shorter fuse for hand-delivered notices.

CHAIRMAN SOULES: The rule right now on mail notice is six days unless shortened by the court because you get three days on any time period if service is by mail. That's whatever, 21 or someplace up there.

MR. TINDALL: Yes, but if you -- right now, the rule is if you need a hearing on Monday and this were Friday, you could get a hearing today and send it by messenger to the other side. But this proposal would mean you could not get a hearing before next Friday.

CHAIRMAN SOULES: I think there are two issues and I'd like this Chair to separate them. Three or five is one issue; and then include counting or not counting Saturdays and Sundays and legal holidays, I think, is a different issue.

MR. SPARKS (EL PASO): Well I --

CHAIRMAN SOULES: And then the mail is still another issue because you get -- certified mail adds three days to any period. And that's under, what, 21a or --

JUDGE CASSEB: 21a.

PROFESSOR DORSANEO: This is not going to be completely responsive, but I have thought for some time that our Rule 21a is in need of review and careful revision. It wasn't drafted very well the last time that we drafted it.

And all of these problems about days and mail notice and whether you do, in fact, get three additional days after the hearing is set are located in a poorly drafted Rule 21a.

CHAIRMAN SOULES: Yeah.

PROFESSOR DORSANEO: And I think that that needs to be -- these problems need to be taken care of there so they are resolved wherever they come up on this business of notice.

CHAIRMAN SOULES: Changing from three to five is going to slow down a lot of dockets dramatically. And now whether you count the weekends, I have seen that problem. You know, you get noticed on Friday for a hearing on Monday and that's three days.

MR. FULLER: Hasn't it also been your experience, though, that if you've really got a heavy-duty motion you're going to hear, you can go to court and tell them that; that's just a minimum

notice.

CHAIRMAN SOULES: But you get the hearing and you get it at five o'clock on Friday when the court is out and it's set for nine o'clock on Monday, that is really a problem. And that is there, there may be some unfairness in that, I don't know. Maybe there's not.

MR. FULLER: That ain't three days.

MR. TINDALL: Yes it is.

CHAIRMAN SOULES: Yes, it is.

MR. FULLER: Friday until Monday? I thought you were entitled to three full days.

CHAIRMAN SOULES: No. You don't count Friday, but you do count Saturday, Sunday and Monday. How many feel that -- we voted on this one in our meeting last year. How many reject the five? How many feel that we should retain the three day notice first? Those in favor of retaining the three days say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Those in favor of five? Okay. So we're going to retain three. Now then we'll vote on whether we count or don't count Saturday, Sundays and legal holidays. How many say count them in the three?

MR. TINDALL: Let me speak on that first.

CHAIRMAN SOULES: Okay.

MR. TINDALL: I think the way it's drafted here, we're going to be doing violence to 21a which attempts, I think generally, to combine all computations under one rule. This would be creating a special computation rule.

PROFESSOR DORSANEO: And four and five, I don't think this is the place to do this numerology.

MR. TINDALL: And I would urge we continue this computation we have now until we look at computation in general.

CHAIRMAN SOULES: Okay. Any further discussion?

MR. BRANSON: Let me ask a question. In the family law cases -- in most of my litigations, excluding the holidays wouldn't make any difference. In the family law litigation, would it make a big difference?

MR. TINDALL: It sure would. We couldn't get to court for a week.

MR. FULLER: That's short fuse stuff.

MR. TINDALL: You couldn't get to

court -- if you exclude Saturdays, Sundays and holidays, it would mean if you had a client with you today, you couldn't get to court on Monday, it would have to be at least Thursday.

JUSTICE WALLACE: As a matter of information, how do you handle a situation where a guy gets out of his office an hour early on Friday, and at 4:30 he gets a notice that he is supposed to be in court on Monday morning and he goes directly down to a hearing previously set and he doesn't even know about it? How -- doesn't that present a problem, or does it?

MR. SPARKS (EL PASO): Well, that's what these letters say.

MR. FULLER: Well what usually happens there is they announce they haven't had time to obtain counsel and they get a continuance.

MR. TINDALL: Yeah, it's continued but if it's a situation with another lawyer --

CHAIRMAN SOULES: You don't even know that the notice is in your office.

MR. BRANSON: I think Judge Wallace is asking about where you've got a lawyer and the lawyer doesn't get it until after he has already gone from his office.

CHAIRMAN SOULES: And it's a Monday hearing, 9:00 they call the docket, the lawyer doesn't even know he's supposed to be someplace.

PROFESSOR EDGAR: That really isn't three days, Luke.

CHAIRMAN SOULES: Pardon me?

PROFESSOR EDGAR: That really isn't three days.

PROFESSOR DORSANEO: It's not three days by the right channels because it's three full days --

PROFESSOR EDGAR: Because you don't count the day of service under computation time.

MR. TINDALL: Okay. But you don't -- that's right. So you have Saturday, Sunday and Monday --

CHAIRMAN SOULES: But you do count --

MR. TINDALL: -- which you do count the last day.

MR. McMAINS: Yes, but you've got three days notice before the hearing. And that's what Bill is saying. The problem is what does "before" mean? That's what is ill defined.

CHAIRMAN SOULES: Yeah.

MR. McMAINS: There is case authority

for the proposition that three full days means that you get the entire day of Monday and you can't have it heard until Tuesday.

PROFESSOR DORSANEO: But admittedly the cases are all over the ballpark.

MR. McMAINS: But it's because it is an ill definition in the computation of time rule of what the "before" means. You know, we have different times when we say you can't have a hearing before --

MR. TINDALL: Not less than three days before. Yes, I see the glitch.

CHAIRMAN SOULES: But if you read 21a, you can count the day that the action is supposed to happen. You can count that day.

MR. McMAINS: You can't possibly count the day that it happens as being before.

CHAIRMAN SOULES: But you do. In interrogatories and discovery responses.

MR. FULLER: Well, I think that this points out the idea that carries in 21a, not here.

CHAIRMAN SOULES: I think that's right, and I agree with Bill --

PROFESSOR DORSANEO: Mr. Chairman, regardless of what we do on this I move that

either this subcommittee or a special subcommittee be appointed to study computation problems involving rule -- at least Rule 21, 21a, Rule 4 and Rule 5 of the civil procedure rules.

CHAIRMAN SOULES: Okay. That's assigned to Sam. And we'll send you a memorandum on that.

MR. SPARKS (EL PASO): That's why I'm moving to just do 21 and quit. But I'll accept --

CHAIRMAN SOULES: Okay. Do we count or not count Saturdays, Sundays and legal holidays?

MR. SPARKS (EL PASO): Let me just -- if we're going to draft it, let me ask Harry and the family law practitioners for a minute, because they always dismiss the family law practitioners by saying, "Well, it can be shortened by the court." Give me a response for that.

MR. TINDALL: Well, the judge is not there. You don't deal with the court. You deal with the clerk.

MR. McMAINS: Well, but the more important question is: Are you entitled to notice of the motion to shorten it? I mean that's --

MR. TINDALL: That's a mirror, mirror

problem.

MR. SPARKS (EL PASO): But the rule does say "unless shortened," and that's the flack I get when we say that that may be sufficient.

CHAIRMAN SOULES: Let's try not to raise too many new problems as we go through this heavy docket or we'll be here Monday working.

MR. SPARKS (EL PASO): But we need to know that if we're going to redraft these because that generally is the exception that comes into conflict with the family law practitioners.

MR. TINDALL: It might be -- and I'm speaking just without consulting with my colleague in arms here, Ken Fuller -- we could say five days of the time and that would get rid of the four-day glitch and would add one day to get around -- as long as you included Saturdays, Sundays and holidays. So if you got the 4:30 messenger run and you've gone home, you couldn't be forced to court before Tuesday. That would deal with that if you had five days, but you would always include Saturdays and Sundays and not do violence to the computation under 21a.

CHAIRMAN SOULES: Ken Fuller.

MR. FULLER: One more time, this one

ain't broke, 21a is. This says "before"; but 21a says "before" and doesn't mean "before." I think this one is fine like it is and if you're going to do something to look at the computation of the days --

CHAIRMAN SOULES: Okay. Those in favor of counting Saturdays, Sundays and legal holidays say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Those who want to exclude them say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Okay. I need a show of hands on that, then. Those who will --

MR. RAGLAND: We've already decided on the three days, haven't we?

CHAIRMAN SOULES: The three days is voted on. We'll retain three. Okay. Those who would count Saturdays, Sundays and legal holidays show your hands, please? Okay. Hold them up for a second. That's 12 I count.

Those who would exclude those days, show by hands. Three. That's a vote of 12 to three to retain the practice of counting those days; but it's unanimous to retain three days instead of

five days as the time period. So there will be no change.

MR. SPARKS (EL PASO): So 21 will stay as written. But tell me what we want to do, we want to look at 21a, 4 and 5, was that the --

PROFESSOR DORSANEO: Yes.

MR. SPARKS (EL PASO): All right.

PROFESSOR DORSANEO: If I may say, this problem comes up in the computation area in a whole range of computations, including a situation where you have to take action within a particular period. And there the cases seem to say you're counting full days for sure, and our computation rule was just simply inadequate together with 21a being in it.

MR. FULLER: Particularly in light of the new emphasis on sanctions.

PROFESSOR DORSANEO: That's right. And now it makes a very large difference in many cases whether you miss it --

CHAIRMAN SOULES: Just one other thing. We are going to send a transcript of this to Sam, but if 21 said, "No hearing may be set on less than three days notice," then it would key

into 21a the way it's written. And we don't have many rules that have -- we don't have many problems with 21a, at least I don't in my practice.

This is the toughest one, and it's because the language in 21 is out of step with 21a. Most of the language in the rules is in step with 21a. So if we said "No hearing on less than three days notice," then you know how to count under 21a. But you can't count before; it's using the word "before" in this rule. It's got --

MR. FULLER: I wouldn't have any problem with that.

MR. TINDALL: It should be "of the time" at least as opposed to the word "before the time."

CHAIRMAN SOULES: Just "No hearing can be set on less than three days notice unless the notice is shortened by the court." But either way you fix it, I don't want to fix it here because we're getting along okay with our practice. We've got more important things to do.

But you could fix 21 and you wouldn't have to change 21a. And I think if you change 21a, that's going to start having ripple effects through some

discovery and some things that we've got that we already know how to count and may not know how to count after that. It's just an idea.

PROFESSOR DORSANEO: It may be more 4 -- 4 and 5 -- especially 5. The computation may be more of the problem.

CHAIRMAN SOULES: But we need to look at those in the interim -- in our interim study committees.

Okay. We've got 21. What's the next item, Sam?

MR. SPARKS (EL PASO): Well, now we go to the ones that are a little more complex. Let's go to Rule 22, and it starts here. And apparently a lot of folks file by computer, and I don't know -- I'm just going to present the problem from these initial drafts and then we can go from here.

22 has been suggested -- most of these are, of course, Harris County suggestions -- they want filing by electronic transfer as well as hard copy original by hand and mail, and, of course, to comply with the statute -- with the exclusion of Rule 145 that it's not filed until the statutory fee is received.

So there are two changes in proposed Rule

22: One, filing when the statutory fee is received; and two, that you can file by electronic transfer. And that's -- we're going to go into several subsequent rules with this electronic transfer stuff. But those are the two changes on 22.

MR. FULLER: May I ask a question?

CHAIRMAN SOULES: Ken Fuller.

MR. FULLER: We found in drafting legislation a lot of times we thought we had bigger problems than we turned out to. How big is the ground swell for the electronic parties? I mean is it one or two people, or do we really have a lot of folks out there that think it's a problem?

MR. SPARKS (EL PASO): I can't answer that. The correspondence all comes from Houston, but apparently a lot of people are filing by computer in Houston. But I --

MR. McMAINS: Are these primarily tax suits?

CHAIRMAN SOULES: It needs to be accommodated. It does. It's the wave -- Judge?

JUSTICE WALLACE: It's the wave of the future, probably.

CHAIRMAN SOULES: Yeah, it really is. And -- Judge Wallace?

JUSTICE WALLACE: Just another question of information. How do they handle that signature of the lead counsel when they electronically file it?

MR. LOW: Or sign any of it? You certify by signing it. How do they do that?

MR. SPARKS (EL PASO): Well, there's a rule proposed on the signing coming up because apparently you take a large firm in Houston -- as I understand it, they're tied into the district clerk's computer and they just punch a button and file a pleading and they'll have a number which they want as a signature. We're going to get to that in a minute.

MR. RAGLAND: How does the defendant get served? Do they take the computer out to his house?

MR. TINDALL: By modem.

MR. SPARKS (EL PASO): We might just go through these so you'll have the whole breadth of these wonderful ones.

CHAIRMAN SOULES: I guess so. Let's just turn through the ones that deal with this

idea.

MR. SPARKS (EL PASO): Rule 22a is requested to accommodate this, and that is to make -- you can still file by written pleadings apparently. But then you can transform the copy to the records library medium approved by the Supreme Court, and apparently there's a rule on that already.

And then one of the things I didn't like about this proposal -- you can read it right quick -- it is suggested then that the electronically transmitted instrument will be the original. And apparently the clerks don't want the hard copy any more; they want to give it back to the filing party who is responsible to retain the instrument. I didn't like that at all myself, but this is the exact proposal they have requested.

MR. BRANSON: Let me ask you a question. What happens when the computer crashes?

MR. SPARKS (EL PASO): Don't ask me any questions. I don't do anything by computer. I prefer going by longhand.

CHAIRMAN SOULES: That's a problem about not retaining hard copies, no question. Frank?

MR. BRANSON: I really hesitate to give up the original being the hard copy filed with the court. I can understand the need for computer transfers, but all you have to do is to have had a case on appeal where the day before your brief was due, your brief got scrambled in the computer crash and got lost. And that happened in our office and it's really frightening.

CHAIRMAN SOULES: Because then you are depending on a clerk to back up his disks, and if he fails to back up his disks, then a lot of information gets lost and it's totally out of everyone's control. Hadley Edgar.

PROFESSOR EDGAR: Being from Lubbock, I don't understand a lot of this. And I would just like for somebody to very clearly explain to me the distinct difference between a hard copy original and an electronic transfer.

MR. SPARKS (EL PASO): Okay. Well, I called Houston because Lubbock isn't too far from El Paso, and I was advised that a hard copy is what we are used to. Hard copy is just a pleading or something on paper. It can be a xerox, but it's something that you can hold and feel and

read. And apparently, though, there's a lot of practice -- and I don't know if it's in any other city, although they're telling me they are doing it in Dallas, too, and there's a Supreme Court rule that authorizes this -- but the Houston firms, particularly, and people who practice in Houston directly tie in to the Houston computers so they can prepare a pleading in their office, punch the code, it appears in the clerk's office as a medium somehow and it's in the files.

PROFESSOR CARLSON: Hadley, it's like telling your computer to save it, but you don't actually print it up so that is the medium --

PROFESSOR EDGAR: Well, where is it then?

PROFESSOR CARLSON: It's in the storage, and in your hard disk or copy disk.

PROFESSOR EDGAR: So it's not in the file anywhere, it's simply in the storage bank of the computer in Harris County in the district clerk's office.

CHAIRMAN SOULES: Electronic memory.

PROFESSOR CARLSON: And they can order it to be printed.

MR. SPARKS (EL PASO): Yes. And

there's no question that Harris County wants to do away with any storage of hard copy.

PROFESSOR CARLSON: They have to provide the backup if they're going to do away with hard copy.

MR. LOW: Could this be accomplished by leaving the rule as it is but allowing the Supreme Court to -- you know, like we've done on other rules, provide rules for those local people that have that? You know, in other words, deal with Houston and Dallas by the Supreme Court just making a rule locally to accommodate those people?

MR. SPARKS (EL PASO): As far as I'm concerned, it can be, but I don't know.

MR. BRANSON: Here's what bothers me. Joe Blow out here in Pecos may not have a computer that works with the one in Houston. They're not all compatible as I understand it.

PROFESSOR EDGAR: Well, he would have to file a hard copy original as I understand what they are saying. It's only those people that --

MR. BRANSON: Well, isn't he being placed at a substantial disadvantage when his adversary -- I mean it's not going to make a lot of people go out and buy computers that may be

compatible, but a lot of lawyers in the state would be placed at a substantial disadvantage and their clients would also.

PROFESSOR EDGAR: Well presumably, though, the Houston firm would still be required to send a copy to the Pecos lawyer as now required by the rule. It's simply trying to do away with, apparently, the filing storage problem that the district clerks in these larger populated areas now have.

MR. SPARKS (EL PASO): Well that's part of it. But they also want this rule -- and the main thing I think we could take out, and I think we should take it out unless people know a lot more about computers than I do -- the safeguard of keeping the hard copy pleadings. But they want the electronic-transferred document to be considered an original pleading, and that's why they are proposing this rule.

PROFESSOR CARLSON: Well let me just say it's not just the larger firms.

MR. SPARKS (EL PASO): Oh, I understand.

PROFESSOR CARLSON: Medium-sized firms are using this also.

MR. SPARKS (EL PASO): When I spoke with folks there in Houston, they seemed to tell me if it's not a majority of the filing, it's a substantial minority that aren't.

MR. BEARD: As far as I'm concerned, if Harris County wants it, let's give it to them. It ain't going to affect anybody else in the room.

MR. LOW: Well, again, couldn't that be dealt with by those -- by Supreme Court rules as we've stated before, allowing that --

MR. SPARKS (EL PASO): Let me ask Judge Wallace because they told me that there was a rule or rules already by the Supreme Court that would permit this, but they needed the rule of procedure for designation and that type of thing. Do you know what they are -- I asked them for a copy, but I haven't --

PROFESSOR CARLSON: You know where you can find that, I think the Houston Bar Journal has an article on this.

JUDGE RIVERA: There is a rule permitting Dallas in a private project --

JUSTICE WALLACE: Was it in a local rule that we had approved, is that where it's found?

PROFESSOR CARLSON: I think that's it.

JUSTICE WALLACE: It could be a local rule for Harris County that we approved back quite some time ago.

JUDGE RIVERA: I know you approved a rule for Dallas for electronic reporting.

CHAIRMAN SOULES: Let me see if we can get to this if we -- let's just take the first sentence of this and we change it to where he's got to retain the hard copy, but we permit his electronic medium copy to be a duplicate original. Now we've got the hard copy and an electronic duplicate original, and let them worry about using which one was the original.

PROFESSOR EDGAR: Well, then, what problem have we solved for them if they still have to maintain those files?

CHAIRMAN SOULES: Then -- okay, then the second part of this thought on my part is we have -- we have gotten rid of discovery out of the clerk's office. We're going to look at rules here in a little while that are going to get rid -- if we pass them -- that are going to get rid of the need to file depositions. We're going to -- we've told them they can get rid of the old depositions.

We've given them a way to get rid of exhibits. So we've taken care of exhibits, old and new, depositions, old -- we may get rid of the new -- all other discovery instruments except for request for admissions. We have hugely relieved the clerks' offices of paper storage.

Now we're just talking about storing what's typically in the transcript for appeal and you're not talking about any -- you know, by comparison, near as much material. Let's leave the hard copy pleadings in their responsibility for the time being until we know a little bit more about this electronic --

MR. SPARKS (EL PASO): I agree, but that's not what Rule 22 seeks. If I'm going to be involved in a lawsuit in Harris County, I'm going to be sending hard copy because that's the way my office practices.

CHAIRMAN SOULES: I'm talking about 22a.

MR. SPARKS (EL PASO): Okay.

CHAIRMAN SOULES: 22a. Let them file electronically or any other way over there under 22, but they've got to keep --

MR. RAGLAND: Is that a motion or a

command from the Chair to table this --

CHAIRMAN SOULES: Well, it's not anything. I'm just trying to focus in on is this a way to get at this problem without a great deal of time.

MR. RAGLAND: I move we table this until we have a chance to study this a little more.

PROFESSOR EDGAR: What we're going to have it seems to me is a file -- and Sam just reminded me of this -- some people not using electronic transfer are going to file their pleadings manually. So the clerk's office is going to have to maintain a file on case number so-and-so, and it's going to have in it only some of the documents because if some of them are filed by electronic transfer and some of them are filed by hard copy original, the file is not going to be complete. And there isn't any way for Hardy to get around that.

PROFESSOR DORSANEO: No. He'll just put it in the library and there won't even be a physical file.

MR. SPARKS (EL PASO): That's exactly the point.

PROFESSOR DORSANEO: There will be a computer file and he will send you yours back.

PROFESSOR EDGAR: All right. Then he will take it, then, and through his word processor put it into the file.

PROFESSOR DORSANEO: And it will not be a physical file, it will be a file in the computer.

MR. FULLER: And it may get wiped out.

CHAIRMAN SOULES: Well, but this -- what I'm saying here is that a party can file electronically and if he does, he's at his risk if that electronic gadget breaks and he's lost. Or he can file it by hard copy; if he does that, the clerk has got to retain the hard copy. Now the clerk can put it into his electronic memory if he wants to, but he can't dispose of a hard copy that you file.

JUDGE RIVERA: That's what this rule says, though.

PROFESSOR EDGAR: Somebody just said, though, that what happens is that Hardy puts it into his computer and then returns it to you.

CHAIRMAN SOULES: But that's if we retain the second two-thirds of 22a which I'm

saying I don't think we should retain. I think we should make him keep any hard copy that's filed.

JUDGE CASSEB: That isn't what he wants to do.

CHAIRMAN SOULES: I know that's not what he wants to do.

JUDGE CASSEB: I move we do away with 22 and not even adopt it.

CHAIRMAN SOULES: They need this.

MR. FULLER: Luke, let me add this comment. Sitting at the clerk's desk in there is one thing; you've got all of the equipment. Let's say you're trying this lawsuit, okay?

CHAIRMAN SOULES: Okay. Ken.

MR. FULLER: You're trying this lawsuit. You need a hard copy to read to the jury, to give them as an exhibit, for the Judge to take judicial notice of. Now if he doesn't have the file there with hard copies in it during the trial of that lawsuit and you say, "Well, now wait a minute, Judge. You entered an order about this six months ago during the pretrial. Well, let's see where that order" -- what's he going to do, stop and go into the clerk's office and pull it up on a monitor and let the jury go? I mean, this is

ridiculous.

CHAIRMAN SOULES: That's right.

MR. BRANSON: I think the time you're saving the clerk on space, you're taking away from the trial court.

CHAIRMAN SOULES: That's right.

MR. FULLER: I mean you've just got to have hard copies, now, at this stage of technology unless they've got something to show me.

CHAIRMAN SOULES: Well now they are already filing electronically.

MR. SPARKS (EL PASO): Well I'm not sure -- and I need help from the Houston lawyers -- but I'm not sure they have hard copies now? I don't think they do.

CHAIRMAN SOULES: They do if they are filed.

MR. SPARKS (EL PASO): Oh, I see.

CHAIRMAN SOULES: But they don't have to file hard copies. They can file by electronic medium and are doing so.

MR. LOW: Well, they may not because I heard somebody say they are putting them in on computer and mailing them back, that they are not keeping any hard copies.

MR. SPARKS (EL PASO): That's what this rule --

CHAIRMAN SOULES: One more time. What I'm suggesting here is that we permit electronic filing under 22, but if a party files a hard copy, the clerk has to keep that in his file and can't send it back.

MR. FULLER: But what happens if he files electronic? That's what I haven't grasped yet.

CHAIRMAN SOULES: If he files electronic, he's at his --

MR. FULLER: Well I'm at his risk, too, if I'm standing there, though, and I don't have a copy of it.

CHAIRMAN SOULES: Well the only way you can get a copy of it is before trial and go -- and if you don't have your own transcript --

MR. FULLER: Okay. Well, then I'm against that rule. You can move it, but I'm against that rule.

MR. RAGLAND: I'm renewing my motion to table Rule 22a.

JUDGE CASSEB: I second it.

CHAIRMAN SOULES: Motion has been

moved and seconded to table Rule 22a. Those in favor show by hands. Opposed? Rule is tabled.

MR. SPARKS (EL PASO): Okay. Let the record reflect I'm not going to work on it any more. It's tabled.

I really wanted you all to look at 45e because I wanted to know what the personal identification number, PIN, code was. I asked Reasoner but I haven't received a reply.

CHAIRMAN SOULES: Can I get a -- what are we going to do about Rule 22 before we leave that? We've talked about it. That permits electronic filing. Are we going to permit or not permit electronic filing?

MR. BRANSON: Can we leave that up to the local rules? Isn't that the way to handle that? Should we table 22 also?

CHAIRMAN SOULES: We can do anything we want to with it.

JUDGE RIVERA: I think that would be better because they're supposed to be promulgated by the Supreme Court anyway, the local rules.

MR. BRANSON: Well, let's find out if we can table it. I move to table Rule 22.

CHAIRMAN SOULES: Who seconds it?

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: Those in favor of tabling 22?

JUDGE CASSEB: No. Why don't we leave 22 as it was?

MR. FULLER: Well that's what tabling that means. That's what will happen if we table it.

JUDGE CASSEB: Oh, you mean table this thing?

MR. FULLER: Yes.

JUDGE CASSEB: I second.

CHAIRMAN SOULES: Okay. Anybody opposed to that tabling?

MR. SPARKS (EL PASO): You have to table all of these rules because if you allow them to file, then you'll have to personalize it --

MR. BRANSON: I'll accept that amendment.

CHAIRMAN SOULES: Well, now let me -- we need to say why we're doing these things, and I think we have. But this transcript will be mailed back to the party who requested this rule change, verbatim. We xerox the copy of this transcript. And the discussion that we give a rule request

goes back to the requesting party. And so it's important that we address it fully and give our reasons for tabling it. And I guess the reason is we don't fully understand what they want and we're not ready to move all the way in their direction at this time. Is that the consensus of the committee on this?

MR. RAGLAND: Nobody has explained to me what this electronic filing is and how it's going to work in Calvert, Texas, or Franklin, Texas, you know, where they've got one clerk and maybe a little Apple II computer there. And they're going to try to cram all of that stuff -- see, nobody has explained this to me and I just don't feel comfortable voting on something that significant without having more information.

PROFESSOR DORSANEO: I think our entire rule book is drafted on the assumption that we'll have written drafts of pleadings and orders and other documents filed with the clerk unless there's an explicit direction to the contrary. And you just can't go in and make a few little changes to accommodate the computer generation without making a mess.

MR. FULLER: It's going to take a

whole change.

CHAIRMAN SOULES: Say that again, Ken?

MR. FULLER: It's going to take an overview of all the rules if you're going to start doing electronic filing because it doesn't just impact on whether or not they have got to get off of their duff and go down to the courthouse and file a piece of paper. It impacts on everything about when you receive things, deadlines. We've got all kinds of rules that require that certain type things be in writing.

CHAIRMAN SOULES: I'll ask if Ray Hardy or someone from his office, at a subsequent meeting of this advisory committee, come and make a presentation of their system so that we can understand it and understand how it would impact the rural practitioner as well because, after all, you may or may not have cases pending in Houston now, or you may have in the past or you may have in the future. But --

MR. RAGLAND: Not if I can help it.

CHAIRMAN SOULES: But that's what I'll do to try to get us better informed about this so that we can undertake it again. But I'm not going to ask that it be studied in the interim. I think

we first need their presentation. Judge Casseb.

JUDGE CASSEB: I just want to add a suggestion that not only Ray Hardy, but also a representative of the Harris County Bar.

CHAIRMAN SOULES: All right.

MR. SPARKS (EL PASO): That's what I was going to suggest. And I think the record ought to show they have supplied us with a lot of information. I just may not have been up to absorbing it all. But I think that it is the real subject matter of local rules down there.

Now there may need to be some rules that we need to study as to whether it can be considered an original pleading. That may be something that we would have to do, and we can do that after more edification. But the main thing is, as far as I know, it's just in Harris County. And it seems to me that's a perfect area that Mr. Hardy might should apply to his judges down there for a local rule rather than our statewide rule.

MR. BRANSON: So should I expand my motion to table Rule 22 to include all the computer rules?

CHAIRMAN SOULES: No. I think we -- I just wanted to get the discussion fully on the

record for the reasons. And I -- if anyone else has anything else to say about it, well that's fine.

MR. BRANSON: Why don't I expand my motion to include all the rules dealing with the electronic transfer?

MR. FULLER: Since this is going to go to them, I think it needs to be said that we don't recognize -- we do recognize this is the wave of the future, but we just -- I personally do not feel that I understand enough of what they want to do, to do it at this time. And it's something that we're going to have to address on down the line and now is the time to start getting the information, but don't go off half cocked.

CHAIRMAN SOULES: We hope by rules effective January 1, 1990, that we can fully understand and accommodate this practice. Is that the consensus of the committee?

JUSTICE WALLACE: Let me suggest to them that they work with this committee and give us all the information instead of taking our time trying to battle over in the legislature. That belongs over here, and we can get a whole lot more cooperation and get a better product out.

CHAIRMAN SOULES: Well said. All right. Then, Sam, what rules in the same vein would we table?

MR. SPARKS (EL PASO): 45e. 22, 22a, 45e --

CHAIRMAN SOULES: And this, then, will go back to the requesting party with the transcript and the request for full presentation to the committee by the district clerk and by a member of the Bar.

MR. SPARKS (EL PASO): Then the next rule would be on page 90 --

PROFESSOR EDGAR: I don't think we have voted on that yet.

MR. SPARKS (EL PASO): All right.

PROFESSOR EDGAR: I think it ought to be in the form of some kind of motion.

CHAIRMAN SOULES: Those in favor of tabling Rule 45e say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That's tabled unanimously.

MR. SPARKS (EL PASO): Let me ask you, Luke, what you want to do on 57. I think every subcommittee has something to do with Rule 11 of

the Federal rules and --

CHAIRMAN SOULES: Let's wait -- let's pass that and go to Rule 13 whenever Broadus gets here because that's the committee that's given the most attention to this problem.

MR. SPARKS (EL PASO): Okay. The next one would be on page 95 --

CHAIRMAN SOULES: Sam, where was that? Oh, here's 57. Excuse me.

JUDGE CASSEB: On page 95?

MR. SPARKS (EL PASO): Yes, sir. And now we'll just go on like we're supposed to. On page 95, this is a modification of -- and I read somewhere in the newspaper that there may be a legislative act to change the general denial and that type of thing -- but this is one that came in that says 120 days after the disposition of motions numerated that you, in effect, will have Federal pleadings, admit and deny, that type of thing, and I just present it because the presentor sent it in specifically.

CHAIRMAN SOULES: And is it the recommendation that it be adopted or not adopted?

MR. SPARKS (EL PASO): I don't recommend it be adopted.

CHAIRMAN SOULES: The motion is that this suggestion to Rule 85 be rejected. Is there a second?

MR. BEARD: I second.

MR. NIX: Second.

CHAIRMAN SOULES: Those in favor of rejecting -- is there any discussion? Those in favor of rejecting this change to Rule 85 say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That's unanimously rejected.

MR. SPARKS (EL PASO): On the next page is Rule 101, and I really thought that we had passed this before, but maybe we have not. The Administration of Justice has passed one similar, but I didn't understand Pat Hazel's letter to Luke. He says it was rejected, then he passed it on and said it was passed unanimously.

What they did was they didn't like the next -- Monday next after 20 days, and they recommended a change of 30 days. This committee last year voted to retain that language and to add the last paragraph, and it was reformed after Rusty worked on it a little bit, too. And, really, that's the real change.

MR. TINDALL: Sam, I worked on this one, too, because it was part of my mandate to look at combining 99, 100 and 101 -- and I don't know if it's time now, Luke -- on page 374 is my effort at combining those three rules into one rule. Page 374 of the page marker pages, and I've picked up on the suggestion --

CHAIRMAN SOULES: Let's discuss 30 versus 20. That's really the only thing that's an open issue here, Harry, if you will, and then we'll get to your combined deal later.

MR. TINDALL: All right.

CHAIRMAN SOULES: We have discussed this before. Does everybody have their view of whether we should --

MR. SPARKS (EL PASO): Well, there are really three things. Do we go to -- do we eliminate the "of the Monday next after" and just have a straight Federal rule? That's what the suggestion is.

CHAIRMAN SOULES: The committee in this session has rejected that concept.

MR. SPARKS (EL PASO): That's right. We have done that before. Then you have the 20 versus 30 which comes from the Administration of

Justice. But you do have that statement at the bottom of -- a simplified statement to the defendant that apparently can be more informative than what the citation is going to say.

CHAIRMAN SOULES: Okay. Let's vote on 20 versus 30 in the last paragraph. How many feel we should retain 20 days answer period?

MR. FULLER: Are we going to talk on this or just going to vote?

CHAIRMAN SOULES: Okay. How many feel otherwise? Well, that's the House -- how many feel that there should be a 30-day answer period? Okay. It's unanimous to retain 20.

Now then, the last plain language notice to the defendant, you can read that. How many feel that it would be appropriate to put that sort of a legend on a citation? Those opposed?

MR. McMAINS: Can we --

CHAIRMAN SOULES: Do you want some discussion on it?

MR. McMAINS: Yeah, I would like --

CHAIRMAN SOULES: Sure.

MR. McMAINS: Well, I just want one consideration. Has there been -- and I don't know what the cost of citation forms are in terms of

backlog or whatever we have, and what it costs to reprint the forms of citations. That's one of the reasons I think that we really did not want to change the days that we talked about last time is the cost factor that the county has had with trying to manufacture new citation forms.

MR. RAGLAND: Rusty, couldn't this be -- this last paragraph be dealt with just with a rubber stamp?

CHAIRMAN SOULES: It could be.

JUDGE CASSEB: Just put a rubber stamp on them or whatever.

CHAIRMAN SOULES: We changed the notice, Pat and I did -- Pat and I were working on all extraordinary writ things, tried to change notices that were on those -- of course, they are not used as frequently as citations, no question about that -- to make them more modernized and more informative. This kind of goes along with that effort.

Of course, the Monday next after 20 days had as lot of reasons for retention because the first thing, it means something to just about everybody. But this plain language, this is not going to go into effect until January 1, 1988, and everybody

is going to have some notice to get their forms retyped and reprinted and they can do it by rubber stamp as has been pointed out.

MR. McMAINS: But it's a mandatory "shall" is what I'm saying here.

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: Yes, and the failure to include that will certainly be a valid ground on setting aside a default judgment.

MR. TINDALL: The State Bar is going to start printing citations and selling them to lawyers because the new state law is that lawyers can type out their own citations and the clerks can charge a fee for putting a seal or signature on it. So the State Bar is gearing up to get into the business of citations -- of selling citations to lawyers anyway.

CHAIRMAN SOULES: Rusty, I may have missed your point. I'm afraid I may have. I'm not sure that I-- do you feel that I understood your point about the -- are we talking about this mandatory --

MR. McMAINS: Well, all I'm saying is that you've got a "shall." It's a mandatory language. And any defect in the citation, any

violation of the "shall" in the citation is a basis for setting aside a default judgment.

PROFESSOR EDGAR: Yes.

MR. McMAINS: So I mean all I've got a question is, is whether or not you want to put this -- you know, just say --

PROFESSOR EDGAR: A "shall" or a "may."

MR. TINDALL: "Shall." It would be worthless if it --

MR. BEARD: As I understand it, to have a serving of the citation, the plaintiff gets the sheriff to serve it if it's on a local basis. We don't ever see it. It's a trap in that respect if the lawyer doesn't realize that the clerk picked up the wrong form and doesn't do it. But I don't -- whoever gets that kind of notice.

MR. McMAINS: What I'm saying is why don't you put it in the petition or something. I mean it makes more sense if you're going to put the problem on the lawyer.

MR. TINDALL: Well, Rusty, I see a lot of out-of-state citations from, not Federal courts, from local courts where clients in my home town get served. And they -- it's a prevailing

practice nationwide to say, "Hey, you've been sued. If you don't file an answer, a judgment will be taken against you." Some simple language like that which is hardly revolutionary. And that's not buried in the pleading, it's right there on the --

MR. McMAINS: This doesn't say where it goes; it just says it shall be included.

MR. BEARD: You know, the notice says written notice after -- if not filed within 20 days. That's not really a correct statement.

PROFESSOR DORSANEO: It also says with the appropriate court and that's really kind of misleading. It's not going to be filed with the court, per se.

MR. BEARD: First Monday next after 20 days, the defendant will never figure that out.

MR. FULLER: If you're going to make this magic language, I suggest that you write the exact language.

CHAIRMAN SOULES: That's exactly what I'm doing right now just like we did in the writs. We put a -- we gave a legend that had to be there and that's what they used. And what I'm writing here is, "You have been sued. You may employ an

attorney" -- I'm just going right down the -- "If you or your attorney do not file a written answer with the appropriate clerk within 20 days after service of citation and petition, a default judgment may be taken against you."

JUDGE CASSEB: That's good.

JUSTICE WALLACE: I think you can get more specific there. With the "either district or county clerk of so-and-so county."

MR. TINDALL: "Clerk of the court."

CHAIRMAN SOULES: "With the clerk of the court"?

JUSTICE WALLACE: If you're going to give Joe Blow out there a notice, he doesn't know why each court has a separate clerk. But if you file it with the county court -- or county clerk or district clerk in that county, why don't you just tell him that?

CHAIRMAN SOULES: With the --

JUDGE CASSEB: "Clerk issuing this notice."

CHAIRMAN SOULES: With the --

JUDGE CASSEB: "Clerk of the court issuing this notice."

MR. TINDALL: Yeah, that will cut it.

So that if it's civil, county or district, it will --

JUDGE CASSEB: Yes, because it may be a different county.

CHAIRMAN SOULES: "To the clerk of the court" --

MR. TINDALL: "Issuing this citation."

CHAIRMAN SOULES: How about "with the clerk of the court where you have been sued"? We're trying to make a generic -- "the clerk of the court where you have been sued"?

MR. McMAINS: Harris County at least you can't do that because there isn't anybody that will accept anything in the courtroom. Everything goes through the --

MR. FULLER: See, I told you they do it different in Harris County.

MR. TINDALL: That's right.

CHAIRMAN SOULES: And Ray Hardy is the clerk of that court. He's the clerk of every court.

MR. TINDALL: Yes, but you can't go to that courtroom and file a general denial, but they'll send you over.

CHAIRMAN SOULES: "With the clerk who

issued the citation."

PROFESSOR EDGAR: Issuing this citation.

CHAIRMAN SOULES: "Clerk who issued this citation."

Okay. So let me run through this again. Citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation" -- "who issued the citation within 20 days after service of the citation" --

MR. TINDALL: That's not correct unless we go to the 20-day rule.

CHAIRMAN SOULES: "Within the Monday next after 20 days."

MR. TINDALL: By 10:00 a.m. on the Monday next after --

CHAIRMAN SOULES: Now this is going to be on a citation so why don't we say "this citation"?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Okay. One more time. The citation shall include the following notice to the defendant --

JUDGE CASSEB: To each defendant.

CHAIRMAN SOULES: No. Just to the defendant that's been cited.

JUDGE CASSEB: Oh, it has to be served separately. You're right.

CHAIRMAN SOULES: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of 20 days after service of this citation and petition, a default judgment may be taken against you."

JUSTICE WALLACE: "After you were served with this citation."

CHAIRMAN SOULES: "After you were served" -- yes, Judge. Thank you.

MR. FULLER: You don't make it too easy because that won't work in a divorce petition. Go ahead.

PROFESSOR DORSANEO: That's right. No default judgments in divorce cases. You know, there's an Alaska Supreme Court opinion called the Olgachak (phonetic) case where they fashioned language to go in citations to deal with this problem. It may be worth looking at that.

CHAIRMAN SOULES: No. We can't.

PROFESSOR DORSANEO: We don't have time?

CHAIRMAN SOULES: Yes. Okay. Those in favor of that legend being required as a mandatory part of the citation -- that means it's defective if it's not on there -- hold up your hands? Those otherwise? Okay. That's the House to one.

MR. TINDALL: We're not through with this rule, are we?

CHAIRMAN SOULES: I think so. What else?

MR. TINDALL: Well, I --

CHAIRMAN SOULES: The only change we're going to make in the rule is require a new legend in 101.

MR. TINDALL: What about the suggestion in 101? Are we adopting it as proposed?

CHAIRMAN SOULES: No. We rejected everything about it except the legend part, and we've rewritten the legend.

MR. TINDALL: Well, there is one important part in this rule that Sam has presented

and it is, rather than directing the defendant to appear -- that's insane. It doesn't happen that way. That's Hagadorn (phonetic). He went to court, and it didn't do any good. And I mean it should be that he's directed to file a written answer.

MR. SPARKS (EL PASO): That's right. I eliminated --

MR. TINDALL: And I think that is a good suggestion.

MR. SPARKS (EL PASO): -- to appear by filing.

CHAIRMAN SOULES: All right. Where is that?

MR. TINDALL: The third line.

JUDGE CASSEB: I thought you left it as he suggested.

MR. TINDALL: No. We weren't taking any of the suggestions as I understood the Chair.

CHAIRMAN SOULES: All right. Let me get caught up with you because I failed you here.

MR. TINDALL: All right.

CHAIRMAN SOULES: "Shall command the defendant" --

JUDGE CASSEB: We took out "to appear

by filing."

MR. TINDALL: "To file a written answer."

CHAIRMAN SOULES: "To file a written answer on the plaintiff's petition at or before 10:00 a.m." -- and we're going to leave that in there -- "on the Monday next" -- take out "before" -- "the next following the expiration of 20 days after date of service of the citation and petition upon the defendant."

MR. SPARKS (EL PASO): And for the record I'm going to second Harry's motion to drop the words "to appear by filing" and substitute "to file."

CHAIRMAN SOULES: Okay. "The citation shall state the location of the court, the date the filing" -- is the rest of that okay? Okay. Now maybe I'm with you. Let me go back through it again.

We're going to accept the subcommittee report down to the -- okay. We're going to retain the Monday next following the expiration of 20 days as the date. Except for that, the first paragraph, as I understand the motion, is that it be accepted as recommended.

MR. BEARD: Is there any reason -- I mean what is the reason for having the citation go bad in 90 days?

PROFESSOR EDGAR: Revenue.

MR. TINDALL: Revenue. The sheriff doesn't want to be required for five years to keep trying to serve someone.

CHAIRMAN SOULES: That's a new problem. Raise it next year.

MR. BEARD: Okay.

CHAIRMAN SOULES: Okay. The way we've got it now is that we direct the defendant to file an answer rather than to "appear." We leave the time period the same. The rest of paragraph one would be recommended to the Court, and then we'll draft a legend that is exactly what has to go on there. Those in favor -- is there another question? Elaine.

PROFESSOR CARLSON: As long as we're giving the defendant this remedial notice of what he's supposed to do, why don't we just say "after the Monday next on the expiration of 20 days from the date of service, you may lose by a default," instead of "a default judgment may be taken against the defendant." That really tells him he

needs to do something. He'll understand --

MR. LOW: What if he's served with something that's not -- where they are asking something against him, but where -- an interpleader, you know, just has an interest. You're not really going to enter a default against him, but you could enter a judgment --

PROFESSOR CARLSON: The way it is now stated, it's going to say to him a default judgment may be taken against the defendant.

MR. LOW: Against you, yes.

PROFESSOR CARLSON: Why don't we just say "you may lose by default" -- you may not, but you may. And the word "lose" would kind of tell him -- might help him to decide how fast he's going to --

MR. ADAMS: It still creates sort of a trap in that -- in the sense that you say file a written answer, but it's not just a written answer. He's got to file a written answer that's in conformity with a general denial.

PROFESSOR CARLSON: That's true.

MR. ADAMS: Or he's in a trap.

MR. LOW: Or appropriate written answer.

CHAIRMAN SOULES: Really, though, anything he files, anything is an appearance and you can't take a default against him once he's appeared.

MR. LOW: That's right. Yeah.

CHAIRMAN SOULES: Anything he puts in there prevents a default. Anything.

Elaine, there are some -- that is technical to say that a default judgment may be taken against you, but it does say what happens as a matter of law, too. And I wonder if there is not some advantage to just saying it -- even though it's more technical -- say "default judgment may be taken against you" because that's exactly what happens under the law rather than losing by default.

MR. SPARKS (EL PASO): If they can read -- and they do read -- that alerts them more than what goes on now and that's an improvement.

CHAIRMAN SOULES: Okay. Any further discussion?

MR. SADBERRY: One thing, Mr. Chairman.

CHAIRMAN SOULES: Yes, sir. Tony Sadberry.

MR. SADBERRY: I agree with Harry that some indication -- written pleading as opposed to appearance --

MR. TINDALL: I think we agreed on that. We took that out.

MR. SADBERRY: My question is: Now we know Rule 85 allows the answer to include more than just an answer, it may be a motion or otherwise. Are we in any way causing a problem by indicating that he has to file an answer as opposed to a motion to transfer?

PROFESSOR DORSANEO: No. "Answer" is a generic term. It means motions and answers, yeah.

MR. SADBERRY: In this case. It certainly is by Rule 85.

PROFESSOR DORSANEO: Answer doesn't necessarily mean on the merits.

MR. TINDALL: Any kind of response, special appearance --

PROFESSOR DORSANEO: Yes. Answer means response.

JUSTICE WALLACE: Anybody that knows the difference is going to be a lawyer in the first place.

MR. TINDALL: That's right.

CHAIRMAN SOULES: How about a written answer or a pleading to the -- I mean, does that add anything?

MR. TINDALL: Written answer will be --

CHAIRMAN SOULES: Okay. Any further discussion? Okay. Those in favor of Rule 101 as we now have it set before the committee show by --

MR. TINDALL: Subject to my merger rule later.

CHAIRMAN SOULES: -- show by hands. Subject to Harry's later work, show by hands? Opposed? That's unanimous. And our lunch is out in the hallway. Let's break for about 30 minutes.

(Recess - lunch.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS X
COUNTY OF TRAVIS X

I, Priscilla Judge, Court Reporter for the State of Texas, do hereby certify that the above and foregoing typewritten pages contain a true and correct transcription of all the proceedings directed by counsel to be included in the statement of facts in THE SUPREME COURT ADVISORY COMMITTEE MEETING, and 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 $_____.

WITNESS MY HAND AND SEAL OF OFFICE this, the 14th day of July, 1987.

Priscilla Judge

Priscilla Judge, Court Reporter
316 W. 12th Street, Suite 315
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Notary Public expires 08-05-90
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