501

SUPREME COURT OF TEXAS

SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

VOLUME 1 OF 2

Between the hours of 8:30 AM and 6:00 PM

May 26, 1989

100 Congress, Suite 1400

Austin, Texas

Luther H. Soules III, Chairman, presiding

Supreme Court Justice Nathan L. Hecht, Liaison

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ORIGINAL

LAWYER'S NOTES

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MEMBERS PRESENT

Mr. Gilbert T. Adams Jr.

Mr. Pat Beard

Mr. David J. Beck

Mr. Thomas Black

Prof. Newell Blakely

Prof. Elaine Carlson

Judge Sam Houston Clinton

Mr. John E. Collins

Mr. Tom H. Davis

Prof. William V. Dorsaneo III

Prof. J. Hadley Edgar

Mr. Kenneth D. Fuller

Mr. Michael A. Hatchell

Mr. Charles F. Herring

Mr. Vester T. Hughes Jr.

Mr. Franklin Jones Jr.

Mr. Gilbert I. Low

Mr. Steve McConnico

Mr. Russell McMains

Mr. Charles Morris

Mr. John O'Quinn

Judge Stan Pemberton

Mr. Tom L. Ragland

Judge Raul Rivera

Justice Ted Z. Robertson

Mr. Luther H. Soules III

Mr. Broadus A. Spivey

Anthony J. Sadberry

SUPREME COURT ADVISORY COMMITTEE

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VOLUME 1

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CHAIRMAN SOULES: We'll go ahead and convene the meeting. Welcome to everyone. I do appreciate you being here to work on the rules. The Supreme Court particularly appreciates your efforts, too, because the Court recognizes that everyone who comes and works on these rules does so on their own time and without any sort of remuneration, not even reimbursement for your travel expenses. And the quality of the work product couldn't be better at any price.

Justice Hecht is our new liaison member of the Supreme Court. He's the liaison to this committee and responsible for its work product and getting that work product back to the Court.

I would like to recognize Justice Hecht, to welcome you, Justice Hecht, to make any remarks that you may make to our committee.

JUSTICE HECHT: Well, thank you.

I will add to what Luke just said. The Court does very much appreciate the dedicated effort of this committee offer the years, over the decades, really. The formulation of rules of procedure and evidence for the courts is an ever increasingly complex matter and it would be impossible for the Court even to begin to undertake that on its own. And so we're deeply indebted for your commitment and your work on all these rules,

and very grateful for that, and I'm looking forward to hearing your comments in the next two days.

CHAIRMAN SOULES: Thank you, Your Honor.

I think that Chief Justice Phillips will be joining us for some of the time. When he comes in, I will, of course, recognize him and tell him our appreciation for the opportunity to work with him and hear any remarks he has.

The next person I want to express appreciation to is Holly Halfacre, who is our -- I say "our" -- she's our legal assistant. She spends about two-thirds of her time on rules. She's a senior staff person in my office and she's the one who is responsible for the good shape that these materials are in, for the promptness with which the subcommittees get the materials. As soon as we get anything in our office, Holly takes care of it, ships it to the Court, copies to the Court, copies to the Committee on Administration of Justice, and copies to the subcommittees of this committee for work and reports.

When those reports come back, then she collects them and keeps them organized and ultimately, prior to the meeting, produces the materials that you have here. Essentially, she really runs this committee, if the recognition is given where it should be.

So this is Holly Halfacre here and I know you may want to during the day sometime express your appreciation as I have mine to her for the work she has done.

And Sarah Duncan, one of my law partners, is going to try to help me keep things straight as we go today.

I think the first thing I want to talk about is this sheet that I just passed out. Really, without much being known about it and on the Local and Consent Calendar the Legislature has passed this statute, SB 874. And this is a radical departure from 50 years of rule-making by the Supreme Court of Texas, with the assistance of this committee.

In 1939, when the Legislature passed a statute giving rule-making authority to the Supreme Court of Texas, if it had to pass that statute -- that's still a big question, whether that was even necessary, but at any rate it did -- the Court was given authority to repeal statutes which the Court identified as being in conflict with the procedural rules that the Court made.

Of course, then the Court adopted extensive rules and repealed all the statutes by filing a repealer with the Secretary of State.

And since that time, when the Court has passed rules that were inconsistent with statutes, it would file repealers, as was the case with Rule 13, which repealed Chapter 9 of the Tort Reform Act, which was the frivolous pleadings part. Tort reform applied only to tort cases. So that statute, when it passed, gave sanctions for frivolous pleadings in tort cases but not in any other cases.

This committee, then, recommended to the Supreme Court that we adopt Rule 13, which gave sanctions for frivolous pleadings in all cases, thinking that that was an expansion of what the Legislature had done and thinking that it would be appreciated. It was not.

Senator Caperton got extremely agitated over the fact that the Supreme Court had repealed Chapter 9. Even though it took Chapter 9 and made it broad to cover all cases, it was apparently a pet item. And so this bill was filed by him and has now been passed by both Houses, which says that the Supreme Court of Texas cannot pass a rule inconsistent with a statute. And if the Supreme Court of Texas wants a procedural statute repealed it sends -- in the words of this -- to the Texas Judicial Council a list of the article that it wants repealed. It doesn't say what the Texas Judicial

Council does with it. I think that's sort of telling the Court: "Don't send it to the Legislature, because we're not going to do anything. Just send it to the Texas Judicial Council." Of course, they don't have the authority to do anything, so nothing happens.

And the statute then, even if it's inconsistent with the rule we try to make, according to this statute, is prevalent.

I don't know whether this bill is constitutional or not, but if any of you have any influence on the Governor, this needs to be vetoed so that this Court can continue as it has for the past 50 years with its full scope of rule-making authority. We've worked too hard for what we've got.

But this passed on the Local and Consent Calendar. And I was not aware of it until it had passed on second reading in the House and had already passed the Senate. And at that point, when I called all our legislators, it took two-thirds vote no to keep it from passing. It was impossible to catch. So there it is.

And there's no reason, from the Court's perspective, I've been advised, that this should not be vetoed if we can influence the Governor to do so. Important, however, in this is that --

Is it Senate Bill or House Bill 101, Your

Honor?

JUSTICE HECHT: House Bill 101.

CHAIRMAN SOULES: House Bill 101 that provides for increased pay, particularly to the district judges, that is under some threat of veto. It was vetoed by the Governor, I believe, last session, was it not, Your Honor?

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: So, at the same time, if any contact was made on this, we certainly want to urge the Governor to support the trial bench as well by signing the pay-raise bill for the district judges.

JUSTICE HECHT: Right.

CHAIRMAN SOULES: In further evidence of Caperton's peeve with us, and part of that, I guess, is my fault that I didn't contact somebody and explain what Rule 13 was and what it did, here's a concurrent resolution that Orlando Garcia, Representative from San Antonio, called me about yesterday. Senator Caperton was trying to get this Senate concurrent resolution attached to an unrelated bill that Garcia had in the House on the Local and Consent Calendar.

"Whereas, amendment of the Texas Rules of Civil Procedure to conform with the Federal Rules of Civil Procedure will promote clarification and ease of

usage of these rules and it will bring Texas into parity with a number of states that have already amended their Rules of Civil Procedure to conform with federal guidelines;

"Now, therefore, be it resolved the 71st Legislature strongly urges the Supreme Court of Texas to amend the Texas Rules of Civil Procedure to adopt new rules of civil procedure as necessary to conform such rules to the Federal Rules of Civil Procedure."

So there is, for whatever reason, activity in the Legislature to limit what we in the Court do about rule making.

Does anyone have any comments about that?

MR. FULLER: Yes. Who made him mad?

CHAIRMAN SOULES: He got mad over Rule 13, which I told you broadened Chapter 9 to take it to all cases.

PROFESSOR EDGAR: Well, maybe the day is coming when the Court is just going to have to determine whether or not under its inherent power it has the power to adopt the rules without regard to the Legislature.

CHAIRMAN SOULES: It certainly looks that way, doesn't it? Because the Legislature is going to try to get active in --

PROFESSOR EDGAR: And if the Court doesn't

have the inherent power, well, then, we'll just let the Legislature do it.

CHAIRMAN SOULES: How many would vote for that?

[Laughter]

PROFESSOR EDGAR: It's a sobering thought this early in the morning, but --

CHAIRMAN SOULES: Yes, it is.

Steve McConnico has told me that he has a commitment that is going to take him away and he's regretfully going to have to leave. I want, therefore, to get his report first. And that actually is at the end of Volume 2 on Page 1128 is where I think it begins, the rules that would be under his committee's scrutiny. Page 1128 in Volume 2.

Is that right, Steve?

MR. MCCONNICO: Luke, I've got it starting is on Page 1135, dealing with Rule 687(e). This first rule is pretty clerical, it's not important. What we did is when we changed earlier Rule 680, which extended the length of the TRO from 10 days to 14 days, we did not make the same change of Rule 687(e), which says what needs to go in the body of a TRO. And we now need to make the rule consistent because 687(e) as it now reads continues the old 10-day period for a TRO. And we need

to extend that period to 14 days where 687(e) and 680 are consistent. It's that simple.

CHAIRMAN SOULES: So move?

Any opposition?

All in favor, aye.

That's unanimously recommended to the Supreme Court.

MR. MCCONNICO: Luke, you gave me one other thing to report on. I cannot find it here in the book. I don't know if you even want me to mention it, but it's a rule of evidence.

CHAIRMAN SOULES: What rule is it?

MR. MCCONNICO: I got it, but it's not under my subcommittee.

CHAIRMAN SOULES: I must have misdirected it. What rule of evidence was it, Steve?

MR. MCCONNICO: It was Rule of Evidence 703. What we were trying to do was to make it consistent with the proposed change in Rule 166b. I think that should be taken up later. I don't think I should present that now.

CHAIRMAN SOULES: All right.

MR. MCCONNICO: Because that's not going to be understandable until you talk about the proposed changes on 166b.

CHAIRMAN SOULES: All right. Well, we can take that up later.

Let me see here. Let's go back to 1128, since this is in your group of rules, and go ahead and get these done. Your rules cover from 592 to 734 in the Rules of Civil Procedure. 1128.

MR. MCCONNICO: Can you give me a minute? Because, to be honest, this is the first time I didn't get copies of these rules prior to the meeting, these proposed changes, for some reason. The only ones I got were the ones I just told you about. But I think I could be here for an hour and a half or so. I'm just going to trial next Tuesday, so I need to meet with some witnesses today, but if you can give me some time to study this, I think it will make it consistent. All these are dealing with the consistency of the 14-day requirement.

CHAIRMAN SOULES: Fine. Will you let me know whenever you are ready to finish your report?

MR. MCCONNICO: Sure.

CHAIRMAN SOULES: And we will go right to that.

MR. MCCONNICO: Okay.

CHAIRMAN SOULES: Next, then, we'll just start --

JUSTICE HECHT: Luke, Judge Sam Houston Clinton just came in, our liaison.

CHAIRMAN SOULES: Oh, good. We want to welcome Judge Sam Houston Clinton from the Court of Criminal Appeals.

Judge, thank you for joining us today. We certainly appreciate you being here.

JUDGE CLINTON: I'm not staying here if it's not in my subject matter, but I sure want to stick with what you're talking about that's in our line of work.

CHAIRMAN SOULES: Well, we probably ought to go to the appellate rules early on today.

JUDGE CLINTON: Well, don't do it on my account.

CHAIRMAN SOULES: And I want to express our appreciation of this committee and no doubt of the Supreme Court for your court's concurrence in the amendments to the appellate rules that had to do with certain civil matters that were adopted back in 1980. We appreciate your court's recent order on that.

JUDGE CLINTON: Sorry we took so long.

CHAIRMAN SOULES: Elaine, would you give us --

Yes, sir, Judge Pemberton.

JUDGE PEMBERTON: Did you get Evan Avant's

letter of May 22nd with the summary of the Committee on Administration of Justice actions?

CHAIRMAN SOULES: I did, Judge. If you will help me today, because it may slip my mind from time to time, I would like to have you, if you will, give us the Committee on Administration of Justice positions on these rules, where there are positions, as we go along.

JUDGE PEMBERTON: Either that or anybody who wants a copy of it can get a copy.

THE COURT: This is Judge Stan Pemberton, who is a member of this committee and is Chairman of the Committee on Administration of Justice. And the Supreme Court, I think very wisely, has made the chair of that committee a voting member of this committee.

Judge Pemberton has done an outstanding job of chairing that committee for the last year and has an extensive report on the positions of that committee.

To the extent we need to hear those, Judge, they may be some routine matters, like this last one, where they may not be important, but for the most part I think they are. Would you bring them to our attention, please, sir?

JUDGE PEMBERTON: All right.

CHAIRMAN SOULES: Elaine Carlson, would you give us a report on the local rules effort?

PROFESSOR CARLSON: As you might recall, the last time we met, the Legislature, in 1987, passed the Court Administration Act, assigned them a number of activities, including drafting or compiling local rules so that there would be some consistency throughout the state.

Pursuant to that mandate, the Texas Supreme Court adopted the Rules of Judicial Administration in 1987, setting forth that local rules, insofar as practical, should be consistent.

The matter was then referred to this subcommittee and the chair appointed Professor Dorsaneo and myself as cochair to look at the local rules and to attempt to achieve its purpose. Bill and I put together a set of local rules that would serve as a model and guidelines for deviating from that model of local rules and we presented it last summer to a draft rules subcommittee which is comprised of many practitioners and judges from throughout the state.

We had a series of meetings in Austin last summer and the consensus of those meetings in which we looked at this draft model of local rules and discussed problems that might be used in utilizing that policy in different areas of the state, metropolitan versus rural, and looking at single-judge versus multi-judge

districts, the consensus of those meetings, the long and short of it, was that we determined that it would perhaps be better to adopt pattern local rules. And we attempted and I think have been successful in compiling local rules from all courts throughout the state.

We took our draft proposal that was an incomplete compilation but as best as we could do, last September, I believe it was, to the Texas Judicial Conference in Fort Worth and presented that draft to that body, who sanctioned the progress of the project and sent us forth to continue that compilation and to do some editorial work and re-present those pattern local rules at the upcoming Judicial Conference.

And the project is now at a point where we feel we've compiled all of such local rules and are at the edting phase, which will require going through and weeding out those rules that are duplicitous and cross-referencing where the rules are coming from so all judges can look at the project and know where their rules are.

In addition, we are going to edit out or suggest an editing deleting those rules which are patently inconsistent with the Rules of Civil Procedure.

And that's where the project is at.

CHAIRMAN SOULES: Thank you, Elaine.

The local rules are collected in two volumes, and they're about the size of your agenda here. Holly has put them all on our word processor in a uniform order, uniform numbering system. There are 201 counties. Is that right?

MS. HALFACRE: I believe so.

CHAIRMAN SOULES: There are 201 counties that have written local rules, and they are all in that book. There are 53 counties that do not have written local rules. I'm sure they've got local rules, they're just not written.

[Laughter]

CHAIRMAN SOULES: And I'm sure some of the other 201 have some local rules that are not among those we've collected, but, at any rate, Elaine has taken that set of materials and is in the course right now of reading all of the rules under a certain number. And maybe there might be 50 different rules under Rule 1.13, but maybe there are only 10 of them that are different from each other. She's trying to consolidate, condense those down to the number of options that really differ among themselves. Where that's headed -- well, I guess I need to back up just a bit.

After Holly put all these rules on our word processor, then she went back and just from the disk

regenerated the local rules of every county. And we sent those back to the judges, the local administrative judges, so that they could review what was coming off of our disks to see if that really was their local rules or if we had something in there that poltergeist put there or something. And we got some feedback on that. It was very little and it was all positive. So we feel like what's on the disk is pretty accurate.

Now, when Elaine gets done, she may take Option 50 under that Rule 1.13, which may be Taylor County's rule, and it looks just like, say, Tarrant County's rule as far as meaning is concerned. So, at her call, not for anything other than arbitrariness and just trying to get it condensed, she will decide which one of those two to use and maybe even change it a bit so that it maybe grammatically fits the overall scheme, but without changing the meaning of it, and with some grammatical changes to Tarrant County's rule she says, "Well, that's Taylor and Tarrant," so Taylor will then be deleted as far as the text of its Rule 1.13 and the Taylor County tag will be put up with Tarrant County.

When that effort is completely done, then we're gonna regenerate the local rules of every county again. So when Taylor County gets its rules back this time, its Rule 1.13 won't read like it did when it came

to us.

The judges then will look at that and decide whether they can live with the revision or the modification. And if they can, and most of them are committed to try to do that, then we will be able to reduce this to a certain number of options under each rule, whatever number is really necessary for the local courts to have all the rules they want but to have them to some extent conform.

Local rules have to exist. We've talked about that before. You can't get a setting exactly the same way in a multicounty single district court where the judge is on circuit -- getting a trial setting there is a different sort of problem than getting a setting for trial in a county that has multiple district courts and a central docket. There are just some places where local rules have to differ from statewide rules.

But, anyway, when we get all this done, we're supposed to be able to condense it to a single-volume work so that a lawyer or a judge going to a different county could look back and find Taylor County and it would say Rule 1.13, Option 4; Rule 1.14, Option 2. You can turn in that book and find the local rules of every county that has written local rules. And they all will have. There will have to be 254, because certain local

rules are mandatory under the statute. You'll be able to find the local rules of every county in the state in a single volume.

And the Supreme Court will then re-emphasize the fact that local rules that are not published and distributed can't be used at least to substantively dispose of a matter on its merits. They may be used for a continuance or something like that, but not to terminate a party's rights.

That is a huge effort. And we are looking, aren't we, Elaine, to try to have that done and to try to have all the local rules back and approved by the Supreme Court and in a publishable form by January 1 of '92? Is that right? Or '91?

PROFESSOR CARLSON: We should be able to accomplish that by '91.

CHAIRMAN SOULES: Kind of depends. Once these materials are published, then they've got to be sent to the local administrative judges throughout the state and those local administrative judges then have got to use these materials as a menu to choose from to do their own rules.

Of course, we're going to be giving them a set of rules that comes right out of that menu that we think is what they've got already. So it's not going to

take a lot of work, but it's going to take some time. It may take a year or it may go quickly, we don't know that.

Ken Fuller.

MR. FULLER: Luke, I'm on that committee. And the thing that has really bothered me about this whole process, we're compiling all this, but who's making the quality judgment on whether or not a rule should be in there? I haven't seen any culling process. I just see a gathering of things and matching up and no one looking at the quality. Should there be a local rule that says -- I'm just picking an example -- that if you don't get a trial setting within X number of days of filing your lawsuit, it's going to be dismissed? Who's looking at the content of this thing?

CHAIRMAN SOULES: Well, there are two things, I think, in response to that:

Looking at the content to see what's duplicative, like I just said, Elaine is doing that.

Looking at the content to say what can or cannot be had by a county is something that very little, if any, is going to be done. Because if we start that, the district judges are never going to bow on the effort. And the effort is too important to let that collapse it, we feel.

JUSTICE HECHT: I think the Court will want to have some input into that, though, along the way.

MR. FULLER: I would hope so.

JUSTICE HECHT: As to what is appropriate for local rules and what is not.

MR. FULLER: That's what I'm talking about. Who's gonna make that judgment?

JUSTICE HECHT: I hope that when we get the collation done and some idea that this is the kind of topics covered by the local rules around the state, that we can then focus in on some of them and say, "These are just not appropriate for local rules."

MR. FULLER: I think it's going to be about as thick as that book in front of Luke.

CHAIRMAN SOULES: It is.

MR. FULLER: It's going to be a horrendous task for someone to quantitatively look at.

JUSTICE HECHT: We hope that the subject matters will begin to delineate it somewhat.

CHAIRMAN SOULES: Another thing that Elaine is doing, however, whenever she finds local rules that are inconsistent with the Rules of Civil Procedure, she's tagging those for deletion, because they will be deleted, they will not be permitted. They're not permitted now by the Supreme Court's own rules, but

there are some around.

MR. FULLER: You bet.

CHAIRMAN SOULES: So that culling process she's doing as she also deletes duplicates.

And, Elaine, we owe you a huge debt of gratitude for taking that project on.

Chief Justice Phillips has joined us. Chief Justice Phillips, welcome. We appreciate you being here. We'll give you an opportunity to make some remarks, if you would like that opportunity.

CHIEF JUSTICE PHILLIPS: The Supreme Court always appreciates everybody being here, especially on your own nickle. I think we ought to keep working rather than me making orations.

CHAIRMAN SOULES: Okay.

Steve, are you current? Or do you want me to give you some more time?

MR. MCCONNICO: No, Luke, I'm current.

THE COURT: Okay. Volume 2, Page 1128.

MR. MCCONNICO: As you'll see, this is the temporary restraining order rule. This was a proposal by District Court Judge John Marshall up in Dallas. This proposal was made in 1987, before we made the 1988 change in the rule that TROs were extended from 10 days to 14 days. Consequently, I'm not in favor of this

proposal. You can see it in the rule where it states that "shall expire by the Friday next after the expiration of two days, excluding the date of service." Again, this was made before we adopted the 14-day length of time for TROs. And I don't see any reason to change that length of time within a year after we adopted it. I think we ought to give the Bar and Bench time to adjust to it. And I don't know of any problems that are resulting from the 14-day period. So I'm not in favor of this proposal.

CHAIRMAN SOULES: You think we've already fixed Rule 680 a different way and it doesn't need this fix?

MR. MCCONNICO: That's right.

CHAIRMAN SOULES: All right.

So you recommend no change?

MR. MCCONNICO: I do.

MR. FULLER: I second that, if it's in the form of a motion.

CHAIRMAN SOULES: Second.

All in favor say aye, please.

Opposed?

Okay. We recommend no change on Rule 680.

MR. MCCONNICO: The changes that start on Page 1133 are the same changes that we voted on earlier

and adopted making Rule 687 and Rule 680 consistent, that both state that there will be the 14-day period. The only difference is, this is the Committee on the Administration of Justice proposal, which is exactly the same as the proposal that we adopted. So, really, we don't need to take any action on Pages 1133 through 1137, because we've already adopted that.

CHAIRMAN SOULES: All right.

MR. MCCONNICO: That's it.

CHAIRMAN SOULES: Okay. Is that all the rules you have?

MR. MCCONNICO: It is, Luke.

CHAIRMAN SOULES: Okay. Thank you, Steve.

Rusty, are you ready to talk about what looks like a short item right at the front of Volume 1?

MR. MCMAINS: Well, insofar as I understand the letter, yes.

CHAIRMAN SOULES: Page 6 of Volume 1?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Let's turn to that.

MR. MCMAINS: First of all, it's talking about an NRE designation, which, of course, doesn't exist under our rules now. So I'm not sure what actually the letter is intended to convey. We revised the rule the last time to comport with the legislative

amendment with regard to jurisdictional statute, and the practice is now called "writ denied" and it's not called NRE. The subject of the letter is some complaint that there is some confusion in that. I suppose that's because of the fact that there is still a writ of error and maybe they use NRE designations or something that -- West or something, but I think they use "writ denied," too, so I frankly don't think there's any need to change the rule. It already has incorporated a difference and distinction between the NRE and writ denied. And I think there is a substantive distinction. And if the suggestion is somehow that we should require classification of old NRE cases as writ denied in citations, I disagree with that, frankly, because I think there is a difference under the substantive jurisdictional argument. You can argue for greater precedential value for the old NRE than you probably can the new writ denied. And I would recommend against any tinkering with the writ-denied practice that we've adopted in our Rule 30.

CHAIRMAN SOULES: This is probably the first suggestion we got after our last meeting in 1987. Maybe its date is really more the point here.

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Because the Legislature had

acted and we had made a recommendation to the Supreme Court to change to writ denied, but none of that was really published until after the date of this letter. And I guess it's already been fixed. So you recommend no change on this?

MR. MCMAINS: Right.

CHAIRMAN SOULES: In favor say aye, please.

Opposed?

Recommend no change on that.

And next, Ken, are you prepared to testify on this -- well, it's your letter on Page 8.

MR. FULLER: Yes, yes. Okay. First of all, you violated the first rule of running the committee. You put a very controversial topic at the top of the agenda. That's supposed to be brought up when everybody has got to catch airplanes.

[Laughter]

CHAIRMAN SOULES: Okay.

MR. FULLER: Boy, I tell you, this really opened Pandora's box. This was a proposal from a practicing attorney to get the committee to recommend enactment of rules governing the sealing of files -- pardon me, the purging of files having to do with allegations of child abuse that were not proven. This is a problem. But I'll tell you it's about as dangerous

as trying to worm your bird dog. It scares me to death. The more I talk to people, I don't want to touch it. Boy, these child-abuse people will eat your lunch. And you've got the newspapers on you. It is, to me, of such a magnitude that it really -- if anyone is hot on it, I'd like to offer a hand-off of the baton and let them get a group together and research this some and feel the pulse. But it's a real lightning rod. And I certainly don't think, with the Court being in the position it is now, and lawyers and courts and all not being particularly popular people over at the Legislature, that it would be very politick for us to take this on. Certainly it's a project that needs -- if we're going to do anything on it, it takes a lot of looking and a lot of touching of bases.

CHAIRMAN SOULES: Do you think there's any significance to the fact that the Legislative Committee of the Family Law Section thought it ought to be dealt with by the Rules Committee?

MR. FULLER: That's right. Because I was chairman of that committee and it was my recommendation to try to get it out of there and throw it over here. And I haven't changed my opinion a bit.

CHAIRMAN SOULES: And you haven't been able to get rid of the hot potato.

MR. FULLER: I haven't. You threw it right back at me. But, truly, that is my recommendation. It's tough, man. It's really tough.

CHAIRMAN SOULES: David Beck.

MR. BECK: Your point was my point. I was curious as to whether the Family Law Section had any recommendation. But I see what you say in your letter.

MR. FULLER: We didn't want to touch it, either. It was too hot of a potato.

CHAIRMAN SOULES: Is the recommendation that there be no change as a result of these materials? They start on Page 8 and go to where?

MS. HALFACRE: Page 14.

MR. FULLER: Page 14.

CHAIRMAN SOULES: Okay. Is that the recommendation, then, that there be no change to the Rules of Civil Procedure as a result of this suggestion?

MR. FULLER: That's my recommendation.

CHAIRMAN SOULES: Is there any suggestion?

MR. BECK: I guess the comment I would make is, if we say no change, aren't we in effect commenting on the issue. Wouldn't it be better just to either not take a position or table it or do something? I hate to vote it down because I don't know enough to vote it down.

MR. FULLER: That's what I discovered. You really hit right on it, is that anything you say is wrong. I don't know how to handle it.

JUDGE RIVERA: Just table it.

MR. FULLER: Okay. Just table it. But anything you say on this topic is wrong, I guarantee you.

CHAIRMAN SOULES: Could I just get a motion to, I guess, table it?

MR. FULLER: I move we table it.

CHAIRMAN SOULES: Okay.

[The motion was seconded]

CHAIRMAN SOULES: In favor, say aye.

Opposed?

Table it.

David, I believe that Frank is not here but Judge Robertson did come and I think may wish to share in this report with you. But do you have a report on this Code of Judicial Conduct, these materials that start on Page 15?

MR. BECK: Yes. Our committee addressed this issue, as did Frank Branson's subcommittee. I'll give our subcommittee's recommendation and then I guess the Judge can comment on Frank's.

There are actually two principal issues

raised by Canon 5 E of the Texas Canons of Judicial Conduct. Judge Robert Seerden of Corpus Christi raises the issue of whether an active judge should be permitted to act as an arbitrator or mediator in a case not in his Court. Canon 5 E expressly prohibits that.

Judge Seerden believes that it is an unnecessary and an unfair restraint, particularly in a time of crowded dockets, when we're looking for good arbitrators, and his concern is that we're losing a lot of good, talented people who cannot serve as an arbitrator or mediator in a case not pending in their particular court.

By the way, I would mention that there's no prohibition in the Code of Judicial Conduct for any retired or former judge sitting as an arbitrator. So all we're talking about is an active judge.

The second issue raised is whether a judge should be permitted to engage in settlement discussions in a case pending in his court. Now, Judge Seerden was concerned about what he viewed as an unnecessary restraint proposed by Canon 5 E as it's interpreted by a couple of the opinions.

The canon as interpreted encourages a trial judge to encourage settlement between the parties. However, the concern expressed is that once a trial

judge moves from the level of encouragement to a greater level, he really, in effect, becomes a mediator. And that is prohibited by Canon 5 E of the Code of Judicial Conduct. So those are the two issues.

Judge Frank Evans, I think, has a very well-reasoned letter which is part of the papers here. Judge Frank Evans, Chief Judge of the First Court of Appeals in Houston, recommends no changes be made in the rule. His view is that a sitting judge ought not to be serving as an arbitrator or mediator at all.

And, frankly, I'm not sure about this, there may be a statutory prohibition against the judge receiving a fee for performing services in a role other than a judicial role. But I'm not certain about that.

So Judge Evans is of the view that Canon 5 E is a good rule insofar as it prevents a judge, an active judge, from serving as a mediator or an arbitrator in a case not in his court.

He also thinks the rule as interpreted is good insofar as it preclues a judge from doing more than just encouraging settlement between parties in a case in his court. And his view is that once a judge starts going beyond encouragement it almost becomes coercion as far as settlement.

So he recommends no changes and our

subcommittee recommends no changes.

CHAIRMAN SOULES: Any further discussion on that?

Chief Justice Phillips.

CHIEF JUSTICE PHILLIPS: These opinions, 120 and 121, came out on the eve of settlement weeks that had been planned at least in Tarrant County and maybe some other counties to take place during dead week, during the first half of the Judicial Section Meeting in September.

And the plan that those counties were using was adopted on what was being done in Cincinnati and a number of other towns where -- well, Columbus, Ohio, I think, where the judges take cases that are not pending in their court but are pending in another court and have a settlement conference and try to mediate those. It's been very successful in other places. I think most places in Texas went ahead and did it anyway.

To me, the intent of these canons is to prohibit a judge from, as David mentioned, receiving a fee, working outside as an arbitrator, and not to prohibit a judge from taking an active role in settlement of cases on his or her docket or those of another judge.

Under Rule 330, I think a judge can always

act for another judge within a district. So whatever one judge can do to his own docket I think another judge could do.

But these opinions have caused quite a bit of confusion among our trial bar as to what they can do and cannot do to promote settlement.

And I am afraid that these opinions arose out of the mind-set that the judge was there merely to try cases, the lawyers brought those cases, the judge took the next case up, tried it, no questions asked, which is fine if you have a docket of 200 cases, not so good if you have a docket of three or four thousand cases.

And I don't know if it's appropriate for the Rules Committee to do anything about it, but I believe these opinions have had a very pernicious effect around the state, just from my conversations with trial judges, and I wish somebody would do something about it. Because we're drowning in litigation. And trial judges, if they're not going to become irrelevant, as Judge Seerden points out, need to be able to take a handle in more active management of their own dockets.

CHAIRMAN SOULES: Anyone else have any comment on this?

MR. FULLER: I'll tell you my fear as a practicing attorney. And I've heard it voiced, Mr.

Justice Phillips, by others with reference to the role that, say, retired or former judges are taking sometimes in these things. And it has not been a pleasant experience to be involved in a negotiating session with a person that maybe you are paid to be obstreperous. That may be your client's position. And particularly in family law matters, which I deal with. But then to face that same judge on a trial in another case sort of makes the hair on the back of your neck raise up a little. And that's our reluctance to it. And that's the reason I prefer not to have the judges participate. I'll be very frank with you. Because I am forced to take positions sometimes in negotiating sessions that really I'd rather not but my client has a perfect right to take that position. And it's not a good way to win friends and influence people. That's the reason I don't want judges involved, retired or otherwise, if they're gonna be sitting. I may be trying a case in front of them next week.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: The Fifth Circuit had a practice they would get some judge in if the Fifth Circuit felt like they were bogged down. So they would get some judge in and they were going to get the parties together and try to work out their differences and use

everything. And it fizzled. It just didn't work. You're familiar with that program, aren't you?

And it just plain didn't work. It was something that that judge wouldn't go back to -- he wouldn't tell the panel. It just didn't work. I think about as far as you can go is to say that the judge should encourage settlement. Different people have different interpretations of "encourage." And each judge has got to handle his own docket, but I don't think this system would work.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: In the draft of local rules that went through the Committee on Administration of Justice, was at least reviewed by that committee, there are several rules that deal with this subject requiring counsel to go to particular conferences with authority to settle the case or to make agreements, requiring the attorney in charge to go. And together with that there is a companion proposal that if it is still in the booklet, and I believe it is, suggesting what the judge can do to encourage counsel to comply, stopping short of saying that the judge can order people to settle, but moving more toward that than the judge can mention settlement as something that's desirable.

CHAIRMAN SOULES: The ADR statute requires

that summary jury trials, mediation, each of those Alternate Dispute Resolution methods be conducted by someone other than the trial judge. And, of course, in Bexar County, every judge is in every court. So, if the judge didn't have a central docket, it wouldn't work. The retired judges can. I suppose, Chief Justice Phillips, that if you take all this as being the black-letter law, this means that retired judges would have to conduct dead week, because they're not precluded from serving as mediators, actually. But elected and sitting trial judges are precluded.

Is that right, David, the way this reads?

MR. BECK: Well, this rule does not prevent a judge, either a sitting judge for a case in his court or a judge looking at a case in another judge's court, from encouraging settlement. It really gets down to the definition of "encouragement." And my experience has been that some trial judges are pretty darned innovative in the ways they can encourage settlement.

[Laughter]

MR. BECK: And, you know, I think we've got to leave some of this to the discretion of the judges. I think if we start trying to write a rule saying, "You can do ABC, you can't do DEF," I just think all you're doing is hamstringing the judge. And, frankly, I think

the lawyers end up suffering.

CHAIRMAN SOULES: Is there anything broken that we need to fix or shall we leave this alone?

Judge, did you have your hand up?

JUDGE RIVERA: Do nothing.

CHIEF JUSTICE PHILLIPS: To me, it seems Opinion 121 has broken something. But that's my view. The question was: Can the judge conduct a conference in his or another court where he only conveys offers and asks questions? He sets no values, gives no opinions and discloses no information. And the answer is: The judge can not do that.

What I've heard around the table is leaving the judge a discretion, not putting in the rule the judge must do something or must not, but putting some outer limits on what they do. And this seems to me to be an inner limit. It seems to restrict the judge more than he should be restricted. These do not have the force of law, but most judges try to follow these opinions pretty carefully in the absence of other guidance.

MR. BECK: Luke, I think the specific problem is presented because if you look at the assumptions built into the question it says assume that the judge only conveys settlement offers and asks questions.

Well, most judges do that. I view that as encouraging settlement. Whereas the answer talks about how the described procedure appears to make the judge a mediator. I disagree with that conclusion. But I don't know what we can do as far as the Texas Rules of Civil Procedure are concerned. Maybe we can give the Court our views as to whether or not that is or is not encouraging settlement or mediation.

CHAIRMAN SOULES: Actually, this is a Code of Judicial Conduct matter, but we have advised the Court through the years on Code of Judicial Conduct matters. Really, our interest was directed to the Code of Judicial Conduct back when 18a came up, recusal, and there was a question about whether you could even constitutionally have recusal and we kind of got into it.

Since that time, these matters have been brought to our attention. So, if we think that the Code of Judicial Conduct should be changed, we're permitted to make that suggestion to the Court. The Court can do what it wishes, of course, with that suggestion. But that's, I guess, what we're really talking about. Do we feel that the Code of Judicial Conduct, Canon 5 E, should be changed somehow? We can't change this Ethics Committee's letter. It's done. Except ask them, I

guess. Maybe they can reconsider it. I don't know what we would do in that connection, do you?

CHIEF JUSTICE PHILLIPS: The only place I think the rules could impact on Rule 166, where it says the trial judge can take such other matters as may aid in the disposition of the action, you could put comma including holding settlement conference.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Our 166 is, of course, modeled on the federal pretrial conference rule, which has been modified over the past several years to provide more explicitly for the trial judge to exercise authority over these types of discussions.

The problem with just taking the companion federal rule now, to the extent there is a problem, is that that rule is highly controversial because it is relatively general. And opponents of a general type of rule that gives a lot of discretion to a trial judge can point out situations in which the trial judge has gone so far as to order people to settle and punished them accordingly when they did not. And most people think that that goes too far, in most kinds of cases, at least, because it keeps you from having your day in court, very simply.

I made reference to the local rules before.

We tried to deal with that problem by focusing on the ins and outs of it in a little more detail. So what I would suggest is that if we're going to make some sort of an adjustment in the big rules, it be done in 166, but we might consider doing something a little more specific, in light of the work that's already been done, than would be the case if we simply adopted Federal Rule 16.

CHAIRMAN SOULES: Do we want to assign this to the committee that has Rule 166 for some review? This is not a duck. If we want to act on it now, we'll act. On the other hand, it sounds to me like maybe we haven't really got it compartmentalized. What pigeon hole should we put it in and what should we put there? Maybe, if that's the case, we should study this until another meeting. That is, whether or not to change Rule 166.

I think David's recommendation that 5 E not be changed we ought to act on. Does that suit everybody? Is that the consensus? Let's act on David's proposal first -- that is, that there be no change to the Code of Judicial Conduct 5 E. In favor say aye.

Opposed?

Okay. We recommend to the Court that there be no change in Canon 5 E.

And then we will assign to -- well, David, that's actually your committee, too. It's supposed to go through 166, not 165.

MR. BECK: Am I supposed to go to 166?

CHAIRMAN SOULES: Yes, sir. And I guess my numbers have been wrong.

JUDGE PEMBERTON: Mr. Chairman, does the Supreme Court of Texas appoint the Ethics Committee of the Judicial Section? Or is that their own little deal?

JUSTICE HECHT: Their own little deal.

JUDGE PEMBERTON: You know, I was on the Supreme Court Ethics Committee for a number of terms. The chairman, Buddy Low, is here today. You can go back to the beginning of time on those ethics changes and they make sense, they fit, you can tell where the changes were made and why they were made.

You get into these judicial opinions, we've got situations like a local administrative judge who is retired can sit on the board of a bank and they make a big deal out of Judge So-and-so. But a sitting judge can't do it. Some of those old opinions are almost unbelievable. They say you can introduce around a candidate but you can't endorse him. The letter from Jim Mattox says we can now endorse candidates. But that is a crazy quilt. We cannot solicit for our own church,

but we can show up at somebody's deal.

I wish the Supreme Court appointed the members of that committee. Because it's those judges writing those rules to take care of immediate need and it is a crazy quilt. It really is.

CHAIRMAN SOULES: Your committee is appointed by the Supreme Court. Is that right?

JUDGE PEMBERTON: The Ethics Committee is appointed by the Supreme Court by state law. It's one of three committees. But this thing, the retired judges have their own little deal, you see.

CHAIRMAN SOULES: Is it your suggestion that the Supreme Court have a companion committee that deals with judicial ethical questions?

JUDGE PEMBERTON: Well, that's up to the Supreme Court.

CHAIRMAN SOULES: But is that your suggestion?

JUDGE PEMBERTON: I would like it personally.

MR. LOW: We overrule opinions when they're no longer -- you know, we just come out and say overruled. But I don't think any of the judicial canons have ever been overruled. They just linger on, you know.

CHIEF JUSTICE PHILLIPS: Judge Doggett is the

Supreme Court liaison to the whole ethical area. And he has been authorized by the Supreme Court to start forming a committee, with our approval, for another look at the whole ethical area. And I think at that time -- these suggestions are well-taken, but I believe that the Court will look at formulating a companion committee to what we do on the Code of Professional Conduct. But those of you who have ideas on this should probably communicate with Judge Doggett. I'm sorry he's not here for this discussion.

CHAIRMAN SOULES: Looks to me like there's essentially unanimity that that would be a good thought. Let's hear a voice vote. Those who favor Judge Pemberton's suggestion to the Court say aye.

Opposed?

Judge, then you have that consensus for your consideration.

PROFESSOR EDGAR: Luke, what did we do with the suggestion about sending this specific problem to the Rule 166 subcommittee?

CHAIRMAN SOULES: To assign the question of whether Rule 166 should be amended somehow to deal with settlement encouragement, or whatever the right term is, and any other points, I guess, of adding detail into Rule 166. Rule 166 has not been amended. Although

it's been talked about a lot by this committee, it hasn't been amended that I recall. And there is a lot more experience with pretrial experience practice now than there was back when this was -- I don't know whether this was put in in '39. Some of these things came in later.

PROFESSOR DORSANEO: That's an original.

CHAIRMAN SOULES: It is?

PROFESSOR DORSANEO: It's one of the three main ideas that came from those procedural reformists that developed ideas in the Thirties.

CHAIRMAN SOULES: There are other things now that happen at pretrial. I have tried on occasion to get to Rule 166 to get authority for a state trial judge to do something pretrial. And you look at it and maybe what you're looking for just isn't really there. It probably needs more work than just the settlement-encouragement concept.

David, could we just sort of assign that to you to look at?

MR. BECK: Sure. You want to take a look at the whole rule, not just limit it to settlement issues?

CHAIRMAN SOULES: Do we have a consensus that David's committee should just sort of review this whole pretrial concept Texas-wise and give us whatever their

suggestions may be?

I see heads shaking. I think that's right, David.

MR. BECK: Okay.

CHAIRMAN SOULES: I believe that gets us to Newell Blakely's report.

PROFESSOR BLAKELY: Mr. Chairman, the evidence pages begin at 25, but those pages include a mixture of the report of the evidence subcommittee and correspondence to the Court and to Luther, and from the chairman of the subcommittee to members of the subcommittee. So I don't want to take things up in the order in which they appear here.

Five items have been raised by Harry Tindall. And the first of these I want to take up begins on 56 and deals with Evidence Rule 705. Paragraph 1 sets out the present 705 on the civil side. And as you see, it permits the expert, in the course of giving his opinion, to testify with respect to the basis of his opinion, including the data on which he's based his opinion.

Harry thinks that permitting the expert to testify on direct to some of these data lets in a lot of trash. And he wants to get rid of that by -- if you'll look down at Paragraph 2 -- eliminating the language which permits disclosure on direct and goes back to

the -- in essence, goes back to the federal rule.

The evidence subcommittee voted 4 to 2 to reject his proposed amendment, with three members not voting.

[Laughter]

PROFESSOR BLAKELY: Arguments against the proposal are that the party calling the expert knows that the jury has got to evaluate the expert's opinion; and the stronger the basis of the opinion, the more apt the jury is to buy it; and that the calling party should be entitled to explore that basis to show how strong it is and to make it more persuasive to the jury.

Those data that were not otherwise admissible in evidence can be used as a part of the basis of his opinion under 703. And I think -- well, obviously 705 contemplates letting him testify to them, if the objection would be hearsay, not for the truth of the matter stated in those out-of-court statements, but simply to show the basis of his opinion.

And I think that's what the federal rule means, though the federal rule doesn't refer to direct examination. Because the advisory committee to the federal rule said in the advisory committee note: While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to giving of

an expert opinion if he chooses. That, of course, is referring to direct.

The instances in which he is required to do so are reduced. This is true where the expert bases his opinion on data furnished him secondhand or observed by him firsthand.

Really, I think the deletion of the word "direct" simply takes you back to the federal rule, which would permit the same thing.

Before I move to reject, which is the committee's position, the State Bar Committee on Rules of Evidence has communicated to the Supreme Court a recommendation of adding a paragraph to 705 which would make explicit that the trial judge can, if the prejudicial effect of those data would substantially outweigh its usefulness, he could exclude it on a case-by-case basis, you see, or leave it in and give a limiting instruction.

I want to circulate a copy taken from Tom Black, who is chairman of the State Bar committee, an excerpt from his letter to the Supreme Court, that pertinent part. And I'll let these be circulating while we debate. And I'm hoping that this may persuade a few people who would be for Harry but who are close to the line might come back across and accept this as a

satisfactory remedy.

And if you do reject Harry's position, then I'm going to move this paragraph amendment that I'm circulating.

Mr. Chairman, I move rejection of the proposed amendment.

CHAIRMAN SOULES: All right.

Any further discussion on that?

Those in favor say aye.

Opposed?

The suggested change to Texas Rule of Civil Evidence 705, which is on Page 56 of the materials, then, we unanimously recommend no change.

And then, Newell, you have this material that's circulating that follows up now. Right?

PROFESSOR BLAKELY: That's right. If I may, I move the amendment that's set out there. It would reduce 705 as presently written to Part A, Subparagraph a, and then would put in Subparagraph b the underlying language.

I take it everyone has a copy of that.

I think, actually, the Court presently has the power, that we simply would be making it explicit here. I think 403, the rule which permits the judge to, if probative value is outweighed by those counter-

factors --

MR. MCMAINS: Isn't that a relevance argument, Dean?

PROFESSOR BLAKELY: 403 is. And certainly has got the general power to give limiting instructions. So I think we're simply making explicit some things that could be done already.

CHAIRMAN SOULES: Did we say it the same way?

PROFESSOR DORSANEO: No.

MR. MCMAINS: No.

CHAIRMAN SOULES: If not, then why not? That's what happens a lot of times where we say, "We're just doing something here that's already available elsewhere," and then it's in different words and then people begin to analyze why it's in different words. And if we mean the same thing, maybe we ought to try to use the same words.

Tom, this came out of your committee.

MR. BLACK: Well, yes, this has been before our committee twice. Both times they voted on this proposal. I don't really know what my duties are as chairman of that committee with respect to taking a position here, but I am not strongly in favor of adding this amendment to the rule personally. I mean, my committee may be, but I'm not. Because I think what

Newell has said is correct, that Rule 403 allows the trial judge to exclude any evidence that is highly prejudicial or comes out to support an expert's opinion. And I think we ought to just leave it that way.

And I agree with you that if it is going to be changed it ought to be in the same wording as 403. We ought to make it more of an exclusion than you would under 403.

CHAIRMAN SOULES: Newell.

PROFESSOR BLAKELY: Mr. Chairman, to be consistent with 403, I think it would be appropriate to put the word "substantially" before the word "outweighs."

CHAIRMAN SOULES: Rusty McMains has his hand up.

MR. MCMAINS: Along the same line of doing something different, as I understood it, the theory of this rule is that it's just discretionary with the trial judge. But the actual rule says "the Court shall exclude" if the danger that it will be used for an improper purpose outweighs --

All of that seems to me to be a different focus, really, than -- looks almost like it focuses on the intent of the lawyers, which courts have a tendency sometimes to presume to be improper, as opposed to, you

know, the considerations of pure legal relevance.

I have less problem with suggesting that maybe there be a limitation in what is in essence 705 (a) that says subject to the prescriptions of 403. But to put in a separate thing and highlight this in some way and treat this as a different character invites a double standard and special attention. In my judgment, that is probably not warranted.

CHAIRMAN SOULES: Tony Sadberry, you had your hand up.

MR. SADBERRY: Mr. Chairman, I had a procedural question. I think my comment has just been stated. The procedural question I have is what would be the effect of a report that's made to the Supreme Court by the State Bar Committee on the Administration of Evidence? In other words, are we doing something now or considering something now that may have any impact on that report? Or would we be either adding our opinions or observations for the Supreme Court to take both?

CHAIRMAN SOULES: Well, this committee of the Supreme Court, Supreme Court Advisory Committee, advises the Supreme Court on Rules of Civil Procedure, Rules of Civil Evidence, Rules of Appellate Procedure, Code of Judicial Conduct, all of those things. So the State Bar committees that send things to the Court, in effect,

those are first considered here and then we give the Court our recommendation.

MR. SADBERRY: I think we should make comment. And the thing I've heard that closely resembles what I would say -- and I'm on the Dean's subcommittee and was opposed to Harry's change, but I think something perhaps is in order. My observation is in line with Rusty's that perhaps a reference to the Evidence Rule 403 would be appropriate, or redrafting to put that language as appropriately stated in 705.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Right now when stuff comes in, the judge can give a limiting instruction. "We object to that, Judge. Not true" or "Hearsay." You ask for limiting instructions. Not received for the truth of the matter, but merely to prove notice. Why do we have to change anything to do that? Then we've got 403. Why do we need anything to give special attention to that?

CHAIRMAN SOULES: Ken Fuller.

MR. FULLER: Luke, what I hear in my neck of the woods up in North Texas is the lawyers are really sick and tired of all the changes that are coming down unless there's a need for them. It's hell to keep up with. And I think we should philosophically approach this thing. If something is broke, all right, fix it.

But if it's not, we're causing confusion. And in all deference to the judges present, most of the practicing lawyers are against judicial discretion. We want some rules so we know what we're dealing with when we go in the courtroom.

CHAIRMAN SOULES: Judge Thurman, he doesn't like judicial discretion, either, he wants some rules, too.

[Laughter]

CHAIRMAN SOULES: Other comments?

Yes, Tom Black.

MR. BLACK: Well, I would like to say I don't have any big objection to adding subject to Rule 403 and to the language of 705 (a), but why don't we add it to every rule of evidence?

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: Bill says, "Right."

Chief Justice Phillips.

CHIEF JUSTICE PHILLIPS: I agree it's very pernicious to start adding Rule 403 to some rules and not to others. And I don't think the (b) is needed. But there is a problem here. If you read 705 (a), it says the expert may give this background testimony unless the court requires otherwise, which seems to me to be an offhand reference to Rule 403, and then it says

the expert may in any event disclose hearsay. And the "in any event" seems to me to say that second sentence excludes Rule 403. I think the committee ought to consider removing the "in any event" or trying to get that unless "the Court requires otherwise" to modify the whole rule. But as a trial judge, I would read that "in any event" to be a limitation on the general rules that would apply.

CHAIRMAN SOULES: Why is the second sentence of 705 (a) -- what does that add?

PROFESSOR BLAKELY: I think that was -- well, remember that prior to the rules the expert had to testify through a hypothetical question. 705 was intended to get rid of the hypothetical question and let him testify without prior disclosure of his basis if he wanted to. But he could, in any event -- he would be forced, in any event, to tell what his basis was on cross-examination. And that's the argument on "in any event."

The aim was so clearly at getting rid of the hypothetical question, I think, that it really lost sight of the problem of his giving his basis on direct examination. I think it sort of took that for granted, that he could do that.

JUSTICE HECHT: Luke, "in any event" works

until you add "disclose on direct examination."

CHIEF JUSTICE PHILLIPS: Just move it to the second half.

CHAIRMAN SOULES: What was the comment?

CHIEF JUSTICE PHILLIPS: Maybe you can just move it to "the expert may on direct examination or in any event be required to disclose on cross."

PROFESSOR DORSANEO: Second the motion.

CHAIRMAN SOULES: Give me that language again, Judge. Read (a).

CHIEF JUSTICE PHILLIPS: You strike "in any event" before "disclose on direct examination" and add it in after the word "or." Where you have "comma, or in any event be required."

CHAIRMAN SOULES: If this change were adopted or were recommended by this committee, the second sentence of 705 (a) would read: "The expert may" -- we would delete "in any event" -- pick up "disclose on direct examination, or" -- this insert "in any event be required to disclose on cross-examination the underlying facts."

Now I'll read it clean. "The expert may disclose on direct examination, or in any event be required to disclose on cross-examination the underlying facts."

MR. BEARD: Why do you have to have "in any event" at all?

PROFESSOR BLAKELY: Mr. Chairman, that worries me a little. It sounds like that if he doesn't disclose on direct, which would be unusual, but he might not go very far into it, then it must be disclosed on cross. And the cross-examiner may want to let it alone rather than forcing him to disclose. Might.

This sounds like: By golly, if you don't disclose it on direct, you're just going to have to do it on cross.

CHAIRMAN SOULES: John Collins.

MR. COLLINS: Mr. Chairman, I would just like to make a point of inquiry. Has anybody else had the problem Harry complains about? Quite frankly, I haven't. Most of the judges that I'm in front of usually handle it in pretty short shrift. I have not seen it abused, apparently, like Harry has.

CHAIRMAN SOULES: Are you calling for the question? Calling for the vote?

MR. BLACK: What's the motion?

MR. COLLINS: We're spending an awful lot of time on one person's report of a problem. I'm not sure it's a problem.

CHAIRMAN SOULES: The motion is to add 705

(b) to Rule 705, Texas Rules of Civil Evidence. Is there any further discussion?

Those in favor of adding it --

MR. FULLER: I don't think it was ever seconded.

CHAIRMAN SOULES: Well, I know, but let's get a consensus anyway. We're a little bit less formal than that.

PROFESSOR BLAKELY: Mr. Chairman, as the person who moved, I accepted the addition in (b) of the word "substantially" before "outweighs" as a kind of friendly amendment. But beyond that I haven't agreed to any change. And if that's been seconded, then maybe if somebody wants to change it, they ought to move an amendment and get the amendment voted on.

CHAIRMAN SOULES: Okay. So we're now voting on whether to add 705 (b) with the word "substantially" put in right about the middle of the underscored portion there, after the word "improper purpose." "Substantially outweighs." Any further discussion? Those in favor of adding this say aye.

Opposed, no.

All right. The committee recommends no change to 705.

PROFESSOR BLAKELY: Mr. Chairman, the next

item, if we may move to Page 70 --

MR. BECK: Excuse me. What did we do on 705 (a)? Nothing?

CHAIRMAN SOULES: No change at all to 705.

PROFESSOR EDGAR: What page, Newell?

PROFESSOR BLAKELY: 70. Now, this proposal relates to the affidavit of cost and assessing it. This is presently in the Civil Practice and Remedies Code, 18.001. Paragraph 1 sets out that statute.

Harry Tindall wants to put this in the evidence rules, over in the authentication section. And I believe he says he makes no substantive changes, a few editorial changes, but the important thing is, he adds an authentication affidavit comparable to the affidavit that we use to authenticate business records. That's 902 (10). He's adding here a 902 (12). And you see his affidavit set out here. It would be very useful to have the form set out in the rules, Harry feels, produce uniformity in the affidavits.

An argument against it is that this statute and the evidence rule would deal with sufficiency -- not only admissibility, but with sufficiency -- because the statute, as you know, says that the affidavit is sufficient to support a finding of fact.

Now, the evidence rules generally deal with

admissibility and not with sufficiency. And there is the argument that you're opening floodgates that everybody will want to provide that this, that or the other is sufficient to provide this, that or the other. I don't know how strong an argument it is. But this problem of putting the affidavit in the evidence rules comes up with some frequency. It's been rejected by this committee previously. But a majority of the subcommittee -- the subcommittee voted 4 to 2 for this change, 3 not voting --

[Laughter]

MR. MCMAINS: Were they absent?

MR. O'QUINN: The same 3, Dean?

MR. BECK: You're not going to pin them down.

[Laughter]

PROFESSOR BLAKELY: So, Mr. Chairman, as subcommittee chairman, I move the adoption of this proposal. Now, this is going to involve the problem of the statute. Are you going to leave the statute sitting there or are you going to abolish the statute? And, if so, you've got this procedure to go through we talked about.

PROFESSOR EDGAR: You better talk to Ken.

CHAIRMAN SOULES: As far as the statute, I think we ought to go on and do our work, not knowing

whether the Governor is going to sign that statute and, if he does, not knowing what it means. At least anticipating, we'll go on without regard to that Senate Bill 874 that we passed around. But that doesn't say we do or don't do it. That's what we'll take up now, how the committee feels. Dean Blakely has made his recommendation.

Tom Davis, you have your hand up.

MR. DAVIS: I don't want to divert us too much, but, quite frankly, the Caperton thing took me a little by surprise and maybe I didn't fully appreciate the magnitude of the situation. But whether we do that now because it is related to what we're doing or whether we do it pretty soon I would like that we discuss that some more in full. Because the more I think about it, the more I get disturbed. I may be paranoid, but that doesn't mean they're not after me.

[Laughter]

CHAIRMAN SOULES: It certainly is disturbing to me, too, Tom.

MR. DAVIS: I'd like to hear some expression from the Court as to what their attitude is about it. Because that's going to have a lot of influence about what happens, I would think.

CHIEF JUSTICE PHILLIPS: The Court is almost

unanimously opposed. One judge says he doesn't have any problem with it. You would be surprised who that is, too.

I tried early on to reason with Caperton two or three times. And that didn't work. And I talked to several other senators and a representative or two. And Nathan has done the same thing. Frankly, we're just not the most popular group on the Hill right now. And the more I talk about it, the more strongly people seem to be for it. And we decided not to go to the wall with it because of our very crying need to get some pay for trial judges. We've let a lot of junk through this legislative session without fighting it because of our desire to get that budget through. I will talk to the Governor and ask him to veto it, but I suspect I know how popular we are with him as well.

MR. DAVIS: Now it's up to the Governor?

MR. MCMAINS: What does the statute actually do? Does it just basically deprive you of the power --

CHIEF JUSTICE PHILLIPS: No. As I read it, it's a partial repealer of the enabling act. It just says that none of our rules can overrule a statute unless we go through this.

MR. DAVIS: It seems to me that anytime a lawyer loses a case because of a rule he can go to his

representative and have him put a bill in the next legislature to have him change it.

CHAIRMAN SOULES: That's right.

CHIEF JUSTICE PHILLIPS: There's no change there. The only change is, it used to be that the Supreme Court could go change it back and so notify the Legislature. And now we can't. But I didn't talk to anybody -- and I talked to probably five people who were leaders in the Legislature -- who was at all sympathetic to the Supreme Court's rule-making power. And whether that's based on some misperception of facts -- and I think it is -- or whether it's just general philosophy, they pointed out to me, "The Supreme Court of the United States has to lay every federal change out before Congress and we're being a lot more generous to you than the United States Congress is to the U. S. Supreme Court, so you better take what you got." That was kind of the pitch I got.

Judge Hecht, did you --

JUSTICE HECHT: And this is just the tip of the iceberg. The same theme is repeated in the joint resolution. And there was a statute requiring the Court to adopt the Federal Rules by the next session of the Legislature which did not come out of the House Calendars Committee. At least, it hasn't yet. But

there have been a number of other issues related to this issue -- family court guidelines, child support guidelines. The Legislature has been very upset about that this session.

And, frankly, I think we decided as a Court to fight the big issues that we felt we could win on and to just let the other stuff go. Because at some point you're going to risk everything trying to fight it all. And this is not a piece of legislation that's favorable to the Court or its rule-making power, but it doesn't go as far as some of the stuff that we managed to get deep-six'd.

MR. DAVIS: It's one thing fighting before the Legislature, but now it's before the Governor. It's just a little different ballpark.

CHIEF JUSTICE PHILLIPS: Will you help me make a pitch to the Governor?

MR. DAVIS: If I thought he would pay any attention to me, I would.

CHIEF JUSTICE PHILLIPS: You write it out and I'll present it.

MR. DAVIS: At least there's some hope that at least three members of the Court might have some influence with the Governor.

CHAIRMAN SOULES: We need every effort of

every person to bring to bear on Governor Clements to veto this bill.

MR. DAVIS: I think we ought to spend some more time on that here than some of these other little things.

CHAIRMAN SOULES: John Collins.

MR. COLLINS: Mr. Chairman, there is some precedence for the Chief Justice going to the Governor about a matter affecting procedures and rules. In 1983 the Legislature, in very short fashion, passed the Civil Practice and Remedies Code over damned near everybody's objection. And Chief Justice Pope went to Governor White at that time and persuaded him to veto it because it had not been thoroughly analyzed, hadn't been fully discussed in public hearings. And I think you can make the same argument for this bill. Nobody knows the impact of it, quite frankly. So at least that's one argument that can be made.

CHAIRMAN SOULES: It passed on local and consent.

MR. DAVIS: Resubmit it in special session. At least it will be heard then.

MR. BEARD: Vester Hughes and I will ask the Governor not to veto it, if that will help out a little bit.

[Laughter]

CHAIRMAN SOULES: We do need to discuss this from time to time. Everybody keep their thinking caps on as to how we can get at this problem with the Governor. Hopefully by the time we recess tomorrow we'll have some sort of a strategy together on that.

Can we go, I guess, now to the question?

CHIEF JUSTICE PHILLIPS: I will say one thing. George Bayoud and the staff will be very important in this area. The Governor is going on vacation, he's going to be back in town about 10 or 12 days after the session ends, and he'll have a stack of recommendations. And I really think that's a lot of where the action is. Mike Toomey, George Bayoud, Barry McBee, Rider Scott. If you know those people, I think they'll be -- and I will be at the Governor's Office urging him to veto this, also urging him not to veto the trial judges' salary raise.

CHAIRMAN SOULES: We need to do both of those things. The names you were giving us, Judge, George Bayoud and who else?

CHIEF JUSTICE PHILLIPS: Mike Toomey, Rider Scott and Barry McBee I think will all have --

JUSTICE HECHT: Maybe James Huffines.

CHAIRMAN SOULES: Search your thoughts about

who knows those people. Maybe we can work a strategy before we get done here tomorrow on how to approach the Governor with this serious problem.

Okay, Newell, your motion was what now, to add this --

PROFESSOR BLAKELY: The subcommittee moves this amendment, yes.

CHAIRMAN SOULES: Moves the amendment that we see on Pages 70, 71, 72, 73 and 74 -- 70 through 74 -- well, actually, the text of the rule is from Page 71 through 74 at the top. And it would amend Rule 902 (12) of the Texas Rules of Civil Evidence.

Discussion?

Ken Fuller.

MR. FULLER: We are going through a self-fulfilling prophecy. We just spent about 15 minutes discussing political problems we have. We're about to aggravate it. Let me tell you something. The majority of those people over at that Legislature are lawyers, and they're tired of rules coming down every time we get together. And there is no need for this. And it violates the very thing we're talking about. It's repealing a statute, or purporting to, and moving it into the Evidence Code, which not only changes the effect of the rule, it goes to sufficiency as well

as admissibility. I think it's ill-advised.

CHAIRMAN SOULES: Judge Pemberton.

JUDGE PEMBERTON: Well, what it does is, the Civil Remedies Code, like on medical records, you get into reasonableness of the fee. And under the current Civil Evidence Rule, you can't prove up reasonableness. That's one of the things it does. It lets you prove up reasonableness of the doctor's charge by making these two things consistent.

THE COURT: Other discussion?

Those in favor of a change say aye.

Opposed?

I need a show of hands on that. Those in favor please show hands.

Nine.

Those opposed, please.

By a vote of 12 to 9, that fails.

PROFESSOR BLAKELY: Mr. Chairman, the next item is on Page 25. The Rules of Civil Procedure 184 and 184a deal with judicial notice of the laws of other states, the laws of foreign countries, and the evidence rules contain both of those provisions and they are word for word the same. And Harry has proposed that the Rules of Civil Procedure 184 and 184a be repealed. And our subcommittee did not consider that because that's

not an evidence problem. Let's see. And I don't believe he proposed a comment, either. So the evidence committee makes no recommendations, no evidence changes are proposed. We don't have any jurisdiction over Rules of Civil Procedure.

CHAIRMAN SOULES: All right. Is this something that's not broke?

PROFESSOR BLAKELY: I don't know whether it was submitted to any procedure committee, subcommittee. I just don't know.

CHAIRMAN SOULES: Does anyone feel we need to make a change to Rule 184 in this regard?

Okay, Bill Dorsaneo has a comment.

PROFESSOR DORSANEO: Well, we have had in the Rules of Civil Procedure, in the section referred to previously, and maybe it still is, under Ron McDonald's organization of the rules initially, depositions and evidence, a number of evidence rules. We have been eliminating those evidence rules one by one, two by two over the last several years on exactly this basis. That is to say, the matter is covered in the rules of evidence and it doesn't need to be covered in two places, especially given the fact that when it is covered in two places inconsistencies develop when one is amended and the other is not.

It seems to me that we should leave the Rules of Evidence to the Rules of Evidence and not duplicate the same language in the Rules of Civil Procedure. Although I understand that someone could make the argument that all of the rules ought to be in one place, under one heading.

So I would recommend taking those Rules 184 and 184a out of the Rules of Procedure, because there's no need for them to be there. The only reason that they are there at the present time is because we did not have Rules of Evidence as distinguished from the Rules of Procedure at the time things got started.

PROFESSOR EDGAR: If that's a motion, I second that. It may be out of order because there might be a prior motion on the floor, I don't know, but --

CHAIRMAN SOULES: Let's see. Rule 203 is exactly like 184a. Is that right? But there's not a 184 in the Rules of Evidence, is there?

PROFESSOR BLAKELY: Yes.

CHAIRMAN SOULES: Where is it?

JUSTICE HECHT: 202.

CHAIRMAN SOULES: 202. All right.

Bill's motion is to repeal 184 and 184a of the Rules of Civil Procedure, stating that the purpose of the repealer is to what, delete redundancy because

these are covered by the Rules of Evidence?

PROFESSOR DORSANEO: The comment to what used to be Rule 182 could be used as a model. Promulgation of Texas Rules of Civil Evidence, fill in the blank, fully satisfies all needs served by --

CHAIRMAN SOULES: All right. So use that explanation as a comment --

MR. FULLER: Cite them to the rules like they do here.

CHAIRMAN SOULES: Any discussion?

Rusty McMains.

MR. MCMAINS: I just have a question in general. Maybe Bill or Newell can help me on it. I'm always concerned about the judicial notice aspect of nontrial-phase issues. That is, suppose you're after the trial. I mean, technically the evidence is closed. Maybe the judge hasn't ruled even on whether or not you get notice or whatever. When you get to the Rules of Evidence, issues on getting rulings and waiver and things like that on appeal are cropping up all the time. And I feel a little bit more comfort level if the Rules of Civil Procedure allowed judicial knowledge at any time. And I realize the Rules of Civil Evidence also say "at any time." But judges have a tendency to look at the evidence rules as applying to when the evidence

is going on. When the evidence is closed, then they figure that if they've escaped a ruling they don't have to rule. And I'm just concerned with not having something somewhere where we can be clear that the evidence rules just don't necessarily apply to that phase of the trial that we commonly refer to as when the evidence is over.

I'm not sure that this would substantively make any change, but on its face people are likely to read more into it than maybe is there. And as they tend to look and see that we're referring to the Rules of Evidence and you refer to that as the evidence phase, you know, they just say, "Well, I'm sorry, we've already passed that."

CHAIRMAN SOULES: Rule of Civil Evidence 201 (f), I believe, is exactly like its counterpart in the Federal Rules. I haven't seen any state court cases that hold that appellate courts can take judicial notice for the first time. But there are federal cases that hold that the appellate courts can take judicial notice for the first time. Something outside the record. Unless it's one of those things that has to be in the record before they can take judicial notice. But the day of the week or a date on the calendar or things like that they take judicial notice of on appeal even though

there's nothing in the trial court record. As I say, there are federal cases that do that based on the federal counterpart of 201 (f).

MR. MCMAINS: I'm just saying that most of the appellate cases in Texas that talk about either presumption that judicial notice was taken or that talk about judicial notice being taken obviously predate the Rules of Evidence and refer to them under Rule 184, 184a.

CHAIRMAN SOULES: You are making those comments in opposition to the deletion of 184 and 184a?

MR. MCMAINS: Maybe I'm seeing things that aren't really there and maybe the Rules of Evidence have a broader application and should have a broader application than that, but the perception of many trial judges that I appear before posttrial say, you know, "We don't want to hear anything that's related to the Rules of Evidence, because that phase of the case is over."

PROFESSOR EDGAR: Luke, I haven't really thought through this, but if Rusty's observation is correct, then it seems to me, and I'm just looking at Rule 182, because that's the one that Bill raised a moment ago, that Rule 182 talks about the report of disposition -- it's now Rule 607 and Rule 601 (b). Rule 607 talks about the report of disposition of

property, which might well be post-verdict.

And 601 is talking about --

CHAIRMAN SOULES: 610, isn't it?

PROFESSOR EDGAR: Pardon me. 610 is talking about distress warrants and orders. Perhaps we should give more concern to that than we should worry about judicial notice. Because that's going to occur post-verdict probably more often than having to take judicial notice of something. And I'm just saying that if Rusty's argument has some validity, then we might have more problems than we have anticipated.

MR. MCMAINS: I'm not saying it has legal validity. I'm worried about the practical validity.

CHAIRMAN SOULES: Are we ready for a vote on this? Or is there further discussion?

Tom Ragland.

MR. RAGLAND: Anybody have any problem with this? I haven't seen any cases that address it. Is it causing anybody any problem?

MR. MCMAINS: Do you mean to leave it in?

MR. RAGLAND: Yes.

MR. MCMAINS: No.

MR. RAGLAND: I move to table this.

CHAIRMAN SOULES: Let's just vote it up or down.

Those in favor of repeal of 184 and 184a say aye.

Opposed?

Okay. Let me see a show of hands. Those who favor repealing 184 and 184a, hold up your hands.

There are eleven hands up.

Those who are opposed to that repealer, show your hands.

Eleven.

[Laughter]

CHAIRMAN SOULES: Why didn't I table it?

[Laughter]

CHAIRMAN SOULES: Somebody else vote. Come on. Let's see hands one more time. We've got a tie.

MR. O'QUINN: Wait a second. You're supposed to vote.

MR. MCMAINS: Vote.

CHAIRMAN SOULES: I vote to repeal. We'll repeal. I vote we recommend it be repealed.

Now, does anybody want to change sides?

[Laughter]

MR. O'QUINN: Move to reconsider.

CHAIRMAN SOULES: Move to reconsider. You've got it.

[Laughter]

MR. O'QUINN: I didn't mean that.

PROFESSOR BLAKELY: Mr. Chairman, the next item is on Pages 36 and 37.

CHAIRMAN SOULES: That is, to repeal with the notation that Bill suggested that it's covered by the Rules of Civil Evidence. Excuse me.

Now, which pages, Newell?

PROFESSOR BLAKELY: 36 and 37. Harry Tindall wants a change in the Rules of Civil Procedure on interpreters. You'll note Paragraph 1 is present 604, the Rules of Civil Procedure -- wait a minute now, wait a minute.

PROFESSOR DORSANEO: That's evidence.

PROFESSOR BLAKELY: Is this evidence?

PROFESSOR DORSANEO: Yes.

PROFESSOR BLAKELY: I think I've made a mistake.

PROFESSOR DORSANEO: So you wouldn't be talking about rules of procedure.

MR. FULLER: He wants to change the comment, doesn't he?

PROFESSOR BLAKELY: That's right.

MR. FULLER: Not change the rule, just change the comment.

PROFESSOR BLAKELY: That's right. He wants

to change Rules of Civil Procedure 183 on interpreters. Come down to Paragraph 4 on Page 36 and you've got Harry's proposal. "I propose amending Rule 183, Rules of Civil Procedure, to be the same as 43 (f), Federal." And then you've got federal quoted there.

Now, our subcommittee doesn't consider that. That's not evidence. But Harry wants -- if you do change the Rules of Civil Procedure, he wants a comment in the evidence rules added to 604 evidence rules. And the comment is up there in Paragraph 2. And it is: "See Rule 183, Texas Rules of Civil Procedure, respecting employment of interpreters."

And the subcommittee voted 6 to 3, 3 not voting, to add that comment if the Rules of Civil Procedure on interpreters is changed.

MR. O'QUINN: Point of order.

PROFESSOR BLAKELY: So we recommend that change. I move that comment to the evidence rules, Rule 604, with the condition precedent that the Rule of Civil Procedure changes.

CHAIRMAN SOULES: Well, let's vote them together. Those of you who have a rule book, Rule 183 as it's now in the book says, "The court may, when necessary, appoint interpreters, who may be summoned in the same manner as witnesses, and shall be subject to

the same penalties for disobedience." That's it. You can subpoena them and punish them if they don't honor the subpoena.

The federal rule does more than that, if Rule 183 does anything. I don't know how you can actually subpoena -- in San Antonio, it wouldn't be maybe too hard.

[Laughter]

CHAIRMAN SOULES: Just drop a subpoena over there on the --

MR. FULLER: Throw it out the window.

CHAIRMAN SOULES: You might be able to get an interpreter. But you see here what the federal rule does. It speaks to appointment of an interpreter and paying the interpreter and taxing it as cost.

MR. FULLER: Is there a proposal to amend 183 on the table?

CHAIRMAN SOULES: Yes. Right here at the bottom.

PROFESSOR EDGAR: Mr. Chairman, I'd like to speak not against the motion, but when you read Rule 183 and the proposal out of Federal Rule 43 (f), it really is talking in part about different things.

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: And it seems to me that

this is a matter which would go to the Rule 183 subcommittee so that it can be examined and analyzed and then we can then have some intelligent discussion about it. And therefore I move -- I'm really out of order, I suppose, but I'm speaking against the motion to adopt it at this point.

CHAIRMAN SOULES: Is the feeling that this is -- where I'm coming from right now, Hadley, is, we meet seldom. If this is something that's easily disposed of, we probably should do it. If it's not, we should assign it to a committee. And that's, I guess --

MR. FULLER: I move it be tabled and referred to committee.

CHAIRMAN SOULES: All right. The motion is it be tabled and referred to a committee. Those in favor say aye.

Opposed, no.

The ayes have it. But, again, we don't want to duck a responsibility if there's something we can do. Is there any change in anybody's feelings?

Okay. This is assigned to David Beck's committee. I'm sorry, it's not David Beck's committee.

PROFESSOR DORSANEO: It's me.

CHAIRMAN SOULES: It's to Bill Dorsaneo's committee.

Bill, let me ask you to consider this overnight and to tell us tomorrow whether this is something that you really need to study or whether it's something you feel like we can act on. Okay?

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: In this session.

PROFESSOR BLAKELY: Do you want to pass the evidence aspect of it?

CHAIRMAN SOULES: Doesn't it need to go together?

PROFESSOR BLAKELY: Yes. The evidence comment would go into effect only if you changed the civil procedure rule.

CHAIRMAN SOULES: Let's take them up together tomorrow. Is that all right?

PROFESSOR BLAKELY: Mr. Chairman, the next item is on Page 26. There is a statute described in Paragraph 1, Civil Practice and Remedies Code 18.031. Unless the interest rate of another state or country is alleged and proved, the rate is presumed to be the same as that established by law in this state and interest at that rate may be recovered without allegation or proof.

Harry didn't propose any changes, but he says "What do you think about that? Have you got any comments on it?" No subcommittee member had any

comments.

But trying to fathom what Harry had in mind, probably this is taken care of by our judicial notice provisions. We take judicial notice of the law of another state, we take judicial of the law of a foreign country, but somebody has got to request and somebody has got to furnish the information. If there's a failure of request and furnishing of information or furnishing of information, our common-law practice is to apply the law of Texas pretending it's the law of the other state.

I presume or assume that that's probably what we would do if the Texas Court were faced with a situation where the interest rate of a foreign country controlled in this Texas litigation. But I don't know of a case on it. There may be. We don't have the common-law background on that because previously the law of the foreign country was a fact that had to be proved up. And whoever was depending on that fact as a part of his case, if he didn't prove it up, he simply hadn't proved up his case. But I assume now that it's a matter for the Court that we would apply Texas law under those circumstances. But I don't know it to be so.

The subcommittee made no recommendation, because -- I think what Harry was saying, maybe our

judicial notice rules would suffice to take care of that. But this is another instance where I think he's just cleaning things up and trying to eliminate unnecessary rules. And it's another situation where probably nothing is broken. But this is personal speculation and not a subcommittee report. Or not a subcommittee position.

CHAIRMAN SOULES: All right.

Anyone have a motion on that?

MR. FULLER: I have a motion that we move to the next item. It will be canceled due to lack of interest.

CHAIRMAN SOULES: All right.

PROFESSOR BLAKELY: We're moving to the next item, Mr. Chairman?

CHAIRMAN SOULES: Yes, sir.

PROFESSOR BLAKELY: On Page 46, Paragraph 1 sets out the rule. And the issue is: Should "the rule" be applied to depositions? Jim Brister wrote, I guess, the Court or wrote someone -- anyway, it came to the evidence subcommittee. He did not make a specific recommendation, but it's just a problem that he raised.

And if you'll drop down to Paragraph 2, I composed the amendment underlined there that would make it applicable during the taking of an oral deposition,

1, by agreement of all parties, or, 2, by order of the Court on its own motion, or on motion of a party after notice to all parties and hearing.

Judge Hecht, I guess, raised the question with you, Luther, and you wrote me. So it's a problem that comes up, obviously, along. It ought to be dealt with.

Now, the subcommittee voted 4 to 2 for this amendment, with 3 members not voting. And I picked up some comments. If you'll look at Paragraph 6 on Page 47, Tom Ragland would apply the rule to written depositions as well as to oral depositions.

And Tony Sadberry says: Some form of additional protection, such as sealing the original, protective order against disclosure as in trade-secret situations, so forth, may be necessary. However, that could easily be incorporated in the court order, if necessary.

So one way to get at it is -- well, the subcommittee report approves this proposed amendment that's underlined here. And then if that language is acceptable as a basis, a working basis, and you want to make amendments relating to sealing or court order, protective order or something of that kind, that could be done.

So I move approval of the amendment as written on Page 46.

CHAIRMAN SOULES: Discussion?

PROFESSOR DORSANEO: I'm going to speak against it, basically for two reasons:

One is that I think the protective order provisions of 166b now encompass anything that could be written in line with this approach with respect to the conduct of any kind of a deposition.

Second, it seems to me in my practice and experience that the issue over the years has actually been whether Civil Procedural Rule 267 and now Evidence Rule 614 automatically apply to depositions. And that really has been the controversial point. I don't think that that's clearly settled at this juncture, especially given the scope of the Rules of Evidence as described in the very first rule of evidence, I believe, that they're applicable to all proceedings and in all courts of Texas.

If we wanted to address that second issue, that would make some sense to me. But simply doing in more specific terms in another place what is done more broadly elsewhere seems like not a good thing to do, to me.

CHAIRMAN SOULES: Are you saying that it's

your judgment that Rule 614 applies to deposition proceedings?

PROFESSOR DORSANEO: No. I said it's unclear to me whether it applies to deposition proceedings.

CHAIRMAN SOULES: And that's the problem. We need to say that it does or it doesn't. And I think that ought to be clarified. I don't know which way to go on it. I'm not saying which way, what I think it should be, but I do think we ought to resolve that.

John O'Quinn.

MR. O'QUINN: Mr. Chairman, I want to speak in favor of the rule. This is a real problem. We've sat here this morning and talked about things that have not touched on my practice or maybe anyone's practice, but this is a real problem, particularly when you've set up your depositions and blocked off your time and you walk in the room and the first thing you have is a big argument about who is going to get to sit there and listen to the deposition.

It's my experience under current practice of discovery that most cases are settled and most cases are settled based upon discovery, based upon the depositions. What we're about is to try to obtain the truth. I think it is definitely a cut against our efforts to obtain the truth when one side can show up

with all their witnesses and pack them in a deposition room and watch the first deposition, in effect, coach all their witnesses. I don't know which side of the docket is helped, but I find that to be totally contrary to what we're about and just guts the idea of cross-examination during a deposition. I think this is a very important subject and I think we ought to really spend a little time on it. Because this, to me, is a very important subject.

The fact that there are protective order provision opportunities, I don't find that to be helpful at all. You get down in front of some judge, you get met with argument that the rule on excluding the witnesses specifically doesn't cover depositions, so obviously the intent is not to apply this to depositions. You have to spend all day down there arguing trying to get on some judge's motion calendar, trying to call some judge on the phone, say, "We've got a problem. We have been bickering about who gets to sit in on the deposition. Can we come see you?" It is really impractical. Every lawyer, at the start of a deposition process, has got to go see the judge and get a protective order about how depositions are to be conducted. I really strongly favor this rule and think it would help a lot in the practice of law.

JUSTICE HECHT: This came up in conference, as I indicated to you. Frankly, in five years on the trial bench in Dallas, I always thought the rule applied in depositions as well as in the conduct of all discovery. And I think the rule by its terms, also read with the applicability of the Rules of Evidence, applies in depositions. However, the issue did come up a time or two. And the argument was made that it did not apply. And I guess the question in conference expressed some doubt as to whether it did or did not apply. So perhaps it should be clarified.

I'm a little concerned about the language that is suggested, however, because it simply says that the rule may be applicable by agreement of all parties. Well, of course, any rule may be applicable by agreement of all parties. I don't really know that we want to add that kind of language to the rule.

Or by order of the court on its own motion. I'm not sure that does the trick either. We're kind of killing a gnat with a tank, it looks like to me.

And we might want to say just up in the first sentence of it that they cannot hear the testimony of other witnesses in any proceeding, including discovery, or something, and treat it a little more incidentally than we are treating it this way.

CHAIRMAN SOULES: The problem with that may be, Judge, I think what John is getting at, in part, is that you want to know before we go to the deposition? You don't want to get to the deposition with a lot of people who have been prepared, are there for a reason, and then have someone say, "Okay, I invoke the rule." And then you don't have the deposition that a bunch of people have spent time and money getting ready for. And one thing this language does is require that a motion be filed in advance and a hearing be held.

MR. FULLER: Why don't you just turn it around and make the rule automatic in the absence of a court order or a written agreement to the contrary? Then it applies in every case unless you make arrangements ahead of time.

CHAIRMAN SOULES: But 614 says if it's raised, the witnesses are out.

PROFESSOR DORSANEO: Make it automatic.

MR. O'QUINN: But I think the spirit of what we're talking about is to give the lawyers an opportunity, either side, to say, "I want to invoke the rule at the depositions." Of course, the judge is not sitting there to say, "Okay, everybody get out of the room." It's just understood.

The problem you get into when you get these

kind of arguments, nobody knows what to do. In other words, one side doesn't know whether it's going to be subjected to sanctions, you don't know how to proceed. And so consequently it seems to me like if somebody can just say, "Look, I want to invoke the rule as to these depositions," we ought to have something in our rules that give them the right to do that. They can put it on the record at the start of the deposition.

MR. BEARD: Who's going to instruct the witnesses that they can't talk to anybody but the lawyers after that? What about observers? We have a lot of trouble with observers present who are not witnesses.

MR. FULLER: That's a major problem.

MR. BLACK: What about a witness who comes along later? Are they excluded from reading the deposition?

CHAIRMAN SOULES: Well, Part 3 is what's concerning me. I mean, if the rule is invoked in trial, the trial judge can decide whether the person's presence is essential to presentation of his or her case. If you have a nuclear expert who can sit and hear the other side's expert so that your expert can help you understand what the deposition is all about, that, to some extent, helps at a deposition. I mean, it helps

get at the truth you're talking about, because something may be so complicated that you can't continue the examination of the other side's expert unless your man is there to help you understand what's being said. So you get a ruling here.

But you show up at the deposition of this nuclear expert with your own and somebody invokes the rule and you're out time, money and travel. Should this rule be raised in advance of the commencement of the deposition proceeding or not? That's really what I'm getting at. I don't care as long as we have it fully discussed.

Gilbert. And then I'll get to John.

MR. ADAMS: I was going to suggest that the rule be automatic. If there's a need to have somebody else there, then you go to the court beforehand and tell them you're going to need to have your expert at this deposition and get leave to do that.

MR. O'QUINN: Or make an agreement.

MR. ADAMS: Or have an agreement to do that.

MR. BEARD: I don't like that.

MR. ADAMS: But otherwise the court would not have to enter an order. In other words, the way this rule is written, if we just adopt it as it is, you've still got to go to get an order of the court to invoke

the rule. I think for deposition purposes the rule ought to be in place. And if there needs to be an exception made to the rule, then that could be handled before the deposition.

CHAIRMAN SOULES: John.

MR. O'QUINN: Gilbert made my comment.

CHAIRMAN SOULES: Chief Justice Phillips.

CHIEF JUSTICE PHILLIPS: The problem has gotten so out of hand since I practiced law or was even on the trial bench I hardly recognize what we're talking about. But I think we're approaching this in the wrong place. I think a trial is supposed to be open and the presumption is it's open.

A deposition, I've never heard until just this moment the comment of an observer at a deposition. If this is a problem, let's put in the deposition rule that depositions are to be closed and only have the attorneys who are questioning and the attorneys for the party and the witness. And then if you want to open it up to anybody else, your own client, your own expert to help you ask the questions, you come in on motion.

MR. MCMAINS: A couple of comments:

1. One of the problems that I perceive with regards to just relying on the rule that we have that is "the rule," what do you do with designations? I mean,

you've got corporate officers there --

MR. O'QUINN: And they switch them on you.

MR. MCMAINS: You're going to have to do limitations of some kind. "I designate my corporate representative. He sits there." You do that with an expert. That kind of game stuff goes on anyway in the trial. But at least you've got a judge there who can see what's going on. But in the deposition, it's a deposition and, after all, the guy may get fired because of his testimony. He's gone. So the judge is going to let you appoint a new corporate representative. So any damage that you try to control can be played with and manipulated when you're dealing with corporate situations where you have designations of parties. And I'm not sure that just a general "the rule" works very well in the deposition stuff.

2. The other comment about the scope of what we're talking about, ordinarily when the judge invokes the rule he tells you not to discuss your testimony with the other witnesses. Now, I have some problem with the notion that when a guy takes a deposition, even if the other parties or other witnesses are not there, they can't communicate anymore, ever, about the subject of their testimony or whatever. Now, that actually is not what 614 says, but that's what is a common practice and

what usually happens when the rule is invoked.

MR. O'QUINN: After they give their testimony they can.

CHAIRMAN SOULES: Tom Davis.

MR. DAVIS: What I'm saying, in my opinion, we've got too much gamesmanship as it is in discovery. It's not who can get their evidence in but who can restrict the other side from getting their evidence in, whose depositions or whose experts have to be designated first and which ones are second and how long you have to do this. It's just gotten into nothing but that. And I think that it ought to be more open like it should be.

I would suggest that we amend whatever is here and add this: "This rule shall not be applicable to the taking of any deposition." If they want to load it up with their people, let them load it up, if there's room for them. And I can do the same thing. But the idea of having to run get a protective motion as to who can hear and who can't hear or whether they can read the deposition after it's been taken or they can't, it's just a bunch of baloney. Let's get to what we're after here and get away from all these restrictions.

JUDGE RIVERA: I don't see how we can ever work with a rule like that. If a judge does not give any instructions, there's not a court order that can be

enforced somehow, contempt or something. If there are some instructions that are agreed in writing or somehow, you still need a judge to preside over the proceeding. I get the questions coming up in my court that, "Wait a minute, these witnesses were talking over there. You shouldn't let them testify." And "I need this person to sit down with me to listen to this testimony." Then another witness comes on, "No, I need this other person to come and sit with me." And if the lawyers don't agree, you're gonna need a judge to rule on it. It's almost impossible to make it work unless it's done in the courtroom, in the jury room or something like that, where they can go talk to the judge. But that's not a very practical way of taking a deposition.

PROFESSOR DORSANEO: Well, from a technical standpoint, you could say that 267 doesn't apply to discovery because it's in the trial part of the rule book. It's very hard to say that about the Rules of Evidence 614, because they're not organized that way. I have gone to depositions to depose people and have had all kinds of animals show up. One counsel brought this great large dog.

Remember that, Ken?

MR. FULLER: My deposition. 180-pound Great Dane. Because my client had been mauled by a dog when

he was young and was deathly afraid of dogs. And this guy walks in with an 180-pound Great Dane.

[Laughter]

MR. MCMAINS: I don't think the rule covers that.

CHAIRMAN SOULES: It doesn't say dog. Maybe a talking dog.

PROFESSOR DORSANEO: If you've done any litigation with labor unions, you might find a whole bunch of extra people there for some purpose or another that amounts to -- it influences your behavior, put it that way.

MR. FULLER: Or their two former wives.

PROFESSOR DORSANEO: So I would suggest that we take the opposite approach, and that is to make the rule -- and there may be some difficulty applying it, but we do have an understanding and appreciation of what that means in terms of who's there and who's not there and who could be ordered to be there, if there's not going to be an agreement. Make that applicable and put the burden on the person who wants to bring his dog to get an order to that effect.

CHAIRMAN SOULES: We've had discussion on both sides of whether a deposition proceeding should or should not be one in which other witnesses should be

excluded. Let's just get a consensus on that.

MR. BEARD: Luke, there's a difference between applying the rule or excluding witnesses from the deposition. The rule is one that, you know, somebody has got to instruct them they can't talk.

CHAIRMAN SOULES: The rule as written is not really a good thing to work with in depositions. What I want to do is get a consensus where we are on exclusion from depositions or open depositions. And then maybe overnight somebody can figure out what to write and where to put it. If we can get that consensus done, then we'll know how to proceed. How many feel that depositions should be open? Show hands.

MR. BECK: What does that mean?

CHAIRMAN SOULES: No exclusion by anybody.

MR. FULLER: How about open in the absence of court order? How about open in the absence of a court order versus closed in the absence of a court order?

MR. DAVIS: That way, if anybody wants to put some restrictions on it, it's up to them to go get it before the deposition.

CHAIRMAN SOULES: I think Ken put it better than I was getting at it. We're going to vote on whether we feel depositions should be open in the absence of a court order or closed in the absence of a

court order. How many feel that the depositions should be open in the absence of a court order?

Eleven.

Wait a minute now. How many feel that a deposition should be closed in the absence of a court order?

Eleven.

[Laughter]

PROFESSOR DORSANEO: All the right people ought to be there, but the people who shouldn't be there shouldn't be allowed to be there.

MR. BECK: I'm going to propose a motion.

CHAIRMAN SOULES: All right.

MR. BECK: I move that Rule 200 be amended to provide that the only persons, in the absence of agreement or court order, who can be present at the deposition are the parties or, in the event of a corporation, a corporate representative, and the witness.

MR. FULLER: You've got a problem. Staff.

MR. BECK: And that the actual wording be drafted between now and tomorrow so we can look at that.

CHAIRMAN SOULES: Since we've got it really evenly divided, I think we ought to look at this two ways. I'm going to ask for you to do what you propose

there, to write what you are suggesting, David. Would you do that, please?

Bill, I'm going to ask you to write in 166b and 166b 5b, "ordering that discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court," add in there who may be present; in other words, "ordering that the discovery" -- that would cause it to be subject to protective order. That means it's open unless there's a protective order.

JUDGE RIVERA: I think that's the place to have it. We already have the rules, we already have the forms, we already have the hearings. I conduct those all the time. They come in and say, "Judge, we don't want to go to Houston, we want to go to Fort Worth." Or, "Judge, I don't want to take this box over there. It's too heavy. They ought to come over here." Whatever they need.

CHAIRMAN SOULES: David is going to write a rule that provides that it's closed in the absense of a court order. We'll take a look at both of them.

JUSTICE HECHT: But we've got one remaining problem that we haven't cured, and that is: Does 614 apply to depositions or not? So, before we get done with all this drafting, we need to be certain in our

minds whether 614 applies or does not apply.

CHAIRMAN SOULES: The product of this, as I'm understanding it, is that when we get through correcting these discovery rules, we're going to say 614 does not apply in depositions, because we're going to fix it someplace else. So we're going to make it clear here that you've got to go look at the discovery rules to determine who can be present at discovery proceedings.

PROFESSOR BLAKELY: "See, however" --

CHAIRMAN SOULES: "See, however," comment, so forth, to give people direction.

CHIEF JUSTICE PHILLIPS: I very strongly think you ought to do that. Because a deposition taken two weeks before trial, you may or may not know who your witnesses are going to be. Four weeks before trial, you won't know that. I think what you-all have hit on, to solve this through the deposition rule, is just critical.

CHAIRMAN SOULES: May I suggest on Page 46 an amendment to what the committee proposed, and that we would say this "rule is not applicable to the taking of discovery"?

PROFESSOR EDGAR: To discovery proceedings.

CHAIRMAN SOULES: To discovery proceedings. "This rule is not applicable to discovery proceedings."

Is that an acceptable amendment? And then we're going to get to fixing this problem?

PROFESSOR BLAKELY: Yes.

CHAIRMAN SOULES: Okay.

PROFESSOR BLAKELY: Or I'll withdraw, with the permission of the second, my motion, the committee motion, and then you can just move that this rule is not applicable to discovery proceedings.

CHAIRMAN SOULES: In favor, say aye.

MR. O'QUINN: Question. I feel so strongly about that there's a problem here that we ought to resolve. Is your motion, Luke, conditioned on the idea that we are going to do something in the discovery rules?

CHAIRMAN SOULES: We're going to vote tomorrow one way or the other on whether David or Bill --

MR. O'QUINN: Can we just table this and do it all together? Because, frankly, I'd rather have this rule available if we're not going to do anything about discovery. At least it gives me something to talk about when I go down to see the judge about why we ought to close these depositions down.

CHAIRMAN SOULES: Okay. The motion is to table this for now or we can vote on it now. Those in

favor of tabling it say aye.

Opposed?

Okay. It's tabled. And we'll pick it up tomorrow.

MR. RAGLAND: Luke, on this same subject, I want to say something else on it.

CHAIRMAN SOULES: Yes, sir.

MR. RAGLAND: If there's going to be a draft proposal to limit Rule 200, I want to ask that we also include the taking of depositions on written questions, not limit it just to oral depositions, to cover the situation where one side prepares deposition on written question to their employee in a distant state and then that employee/witness ends up having to --

PROFESSOR DORSANEO: 200 applies to both oral and written.

PROFESSOR EDGAR: Under Rule 165, it will apply.

MR. RAGLAND: We shouldn't leave written questions out there hanging by themselves.

PROFESSOR EDGAR: It ought to apply to all discovery.

CHAIRMAN SOULES: I don't think so to interrogatories. Depositions and depositions on written interrogatories, yes.

So, David, the point is that in your suggestion that you cover both oral and written depositions --

PROFESSOR DORSANEO: 200 does cover both oral and written depositions.

CHAIRMAN SOULES: It probably does, anyway.

MR. ADAMS: Use the term "deposition."

PROFESSOR BLAKELY: Mr. Chairman, the last item is on Page 54. The evidence subcommittee was not involved. This floated in this morning, I believe from Steve McConnico and perhaps Bill Dorsaneo. 703 -- and you can see the proposed change -- there is an error in the printing here. The line that reads "a type reasonably," begins there, the words "if of" are omitted. That should read "if of a type reasonably relied upon by experts." And then it may be that Bill wants to speak to that.

PROFESSOR DORSANEO: I'll say this. That the 166b proposed changes as voted through the Committee on Administration of Justice add this concept of review to the consulting expert area. And, really, this probably ought to all be taken up at the same time; otherwise, we would be just spending extra time on it.

CHAIRMAN SOULES: Okay. Well, why don't we just, I guess, table that till we get to 166b.

The point here, for the benefit of the members of the committee, is that there are several tests in here about when you look at a consulting expert's work product. There's "reviewed by," there's "made the basis of," there's "made known to." And we're going to use the same words everywhere, whatever those words are. And "reviewed by" seems to be what the cases are really driving at. But that's why we'll pass this till 166b. I'm not asking for positions on it right now.

If that's okay with you, Newell, we'll get back to this when we get to to the discovery rules. Is that acceptable?

PROFESSOR BLAKELY: Yes.

That's all, Mr. Chairman.

CHAIRMAN SOULES: Rusty, are you in a position to report on Rules of Appellate Procedure?

MR. MCMAINS: Some of them.

CHAIRMAN SOULES: The reason I would like to get to that -- well, that's the next item, and Judge Clinton is here, too, and I'm sure that he wants to hear that report and the consideration of these rules. They begin where?

MR. MCMAINS: Well, in the index it talks about 105 as being the start of the discussion.

CHAIRMAN SOULES: I believe they start on Page 84.

MR. MCMAINS: 84 is the miscellaneous stuff. I'm really more concerned with the substantive stuff. On 84, let me come back to those.

CHAIRMAN SOULES: Start at Page 105?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: I'm with you.

MR. MCMAINS: The first few that are after miscellaneous are fairly significant, although hopefully not perhaps overwhelmingly controversial. Let me go back to the miscellaneous rules after lunch. Some of those are highly technical stuff, there won't be anything to deal with. Some of them deal with affidavits or availability to pay costs, which may well affect the criminal side. I haven't looked at them for that purpose.

CHAIRMAN SOULES: All right.

MR. MCMAINS: Beginning on 105 is the COAJ recommendation regarding amendment to Rule 4. There is a related but slightly different issue on Rule 5. The problem which we thought we fixed last time with Dorsaneo's drafting, as will be verified by the committee notes, I think, was the wonderful language that this rule has had from the beginning, talking about

when the last night is the next day that is neither a Saturdays, a Sunday nor a legal holiday, talking about the mailing rule that gives you extensions.

The basic problem in the rule had occurred essentially when the most common practice in the two cases that had raised the issue at our last meeting that we thought we had resolved in one way was when the last day was extended to the Monday because it fell on a Saturday or a Sunday. But the rule required that you mail it one day ahead of time. So the question is: When's that day?

The courts had actually -- we had two cases, both of which were NRE'd, one holding that you had to do it the day before. You got to apply the extension rule. And since the day that you had to do something was also extended to Monday, you could actually mail it on Monday, even though that was not a day before. But it was a day before because of the extension rule.

Then we had another case which said: No, it's not a day before, so the extension rule doesn't apply to that.

Well, we changed that rule, but we didn't change "the day before" part of the rule. We did say "When the last day to do something, including mailing, is -- then you've got this." We thought we had fixed

that. And the Dallas Court of Appeals held that we fixed it the opposite way we thought we had and specifically held that the day before was a Sunday, on Monday, and therefore it had to be mailed on Sunday when the filing date was on Monday.

Now, the question, of course, arose, "There ain't no mail on Sunday." They said, "Well, but you can prove that by affidavit. And since it's undisputed that you mailed it on Monday, that's just too late. All you needed to do was put it in a postbox on Sunday and give an affidavit to that effect and you were timely."

So, at any rate --

CHAIRMAN SOULES: Vester Hughes is getting a lot out of this right now to cover his tax practice.

MR. MCMAINS: So, at any rate, the quick fix on 4 is essentially two-fold, one of which eliminates "the day before" on the mailing. If you've got to file it, then it's sufficient if you mail it on the day it's due. So that is the essential fix. And that's done in 4 (b) as shown on 105. It says "deposited in the mail on the last day for filing same." So that it eliminates the mailing it one day before and means that whatever your filing day is, that's your mailing day. If you mail it on the day it's due to be filed, and you have sufficient proof of mailing and whatever, then it's

filed.

CHAIRMAN SOULES: Do you move this change?

MR. MCMAINS: Yes. That is an accomplishment of what we attempted to accomplish before.

MR. FULLER: I second.

PROFESSOR DORSANEO: I have one friendly suggestion.

CHAIRMAN SOULES: Okay, Bill. What is it? I'm sorry. I didn't realize there was going to be much discussion.

MR. HATCHELL: I just want to ask why we don't go to the federal system and eliminate all this crap and just say mail it on the day it's due, that's fine.

PROFESSOR DORSANEO: That's what it says.

MR. MCMAINS: That's really what we are doing. I mean, that is what we're doing.

MR. HATCHELL: Everything relating to appeal. Remember, there is a parallel rule which we did not change the last time that we should have in the Rules of Civil Procedure. We didn't make that change there because we were focusing on it here.

CHAIRMAN SOULES: All right.

Bill Dorsaneo.

PROFESSOR DORSANEO: In light of suggestions

that have been made to me about this drafting process, I suggest that it should say "on or before the last day or filing same." I worry about the "if being received by the clerk not more than 10 days tardily" language, but I think "on or before" improves it from when it says "on." I suppose some court could say if it's mailed before that that's not right.

[Laughter]

CHAIRMAN SOULES: Do you accept that substitution?

MR. MCMAINS: Yes. I don't have any problem with that, expanding it.

CHAIRMAN SOULES: In response to Mike Hatchell's suggestion that we look at the Federal Rules, once this series of changes is made to the rules, whatever we do this time, we're going to undertake to at least take the Federal Rules numbering system and reorganize the Texas Rules. I don't know whether we can ever get that done, but we're going to be charged to try to do that. And to make our rules where there's no reason for a difference maybe read that way. I don't know, again, whether that can ever be done.

MR. MCMAINS: There are significant differences, however, on the things to be done in terms of -- because most of our rules, not all of them, most

of our rules deal with filing.

CHAIRMAN SOULES: Yes.

MR. MCMAINS: And mailing is a substitute for filing. Much of the Federal Rules deal with service. And your times are when it's to be served. And it's filed at a different time.

CHAIRMAN SOULES: We're going to get to that in the next biennium.

MR. MCMAINS: And that adds an entirely new spectrum under our rules that I think is unjustified.

And secondly, in the appellate rules area, as Mike well knows, the rule of mailing it on the day applies to briefs, but it doesn't apply to motions and a lot of other things. They actually have to be received before.

CHAIRMAN SOULES: We'll get to that in the next biennium.

MR. MCMAINS: I'm just saying I really am much more comfortable with the notion, as we continue to have these things on a filing motion, that you can either physically file it or you can mail it. Because the actual purpose of all of these rules, anyway, I think, was to acommodate out-of-town practitioners so it didn't necessarily put you at a disadvantage because you weren't in the vicinity of the courthouse.

MR. HATCHELL: As I read it, it essentially follows the federal practice.

MR. MCMAINS: Except it applies to all things.

CHAIRMAN SOULES: We're going to delete "one day or more before" where it's been stricken and insert "on or before," that insertion to come before where it says "the last day."

MR. FULLER: Move the question.

CHAIRMAN SOULES: Question. Those in favor say aye.

Opposed?

That's unanimously recommended for amendment by the Supreme Court.

Next item, Rusty.

MR. MCMAINS: Okay. Rule 5 is part of the same process, involving the legal-holiday rule.

PROFESSOR EDGAR: What page are you on?

MR. MCMAINS: That's what I'm trying to find. 135. That's the proposed change. And part of that is designed to deal with also the kind of companion next-day/last-day language. And it to that extent is what the first parts are intending to do. It talks about the time begins to run, it talks about the date not being included. This is just kind of a cleanup of the "is not

to be included."

The second sentence just talks about what is included.

And then this is the proposal recommended by the COAJ, is that the reference to the legal holiday statute, 4591, be deleted and that it still just refer to a legal holiday.

Now, the explanation for that in the COAJ is that there are legal holidays celebrated in some counties that are not celebrated in others. And let me say I have not done independently the research recently, but historically the rule, before we had the insertion of 4591, was to the effect that only the legal holidays in 4591 were included, that that's what legal holidays meant. And the fact that there were other people with other legal holidays or banking holidays didn't make any difference. And if the courthouse was closed, that didn't make any difference.

Now, so I'm not totally convinced that the mere deletion to the reference to 4591 is going to delete its inclusion in subsequent case adjudication, especially in Dallas, based on the reverse despite our change in the wording last time. I think the deletion of 4591 is just going to invite its reinversion by judicial pronouncement, except now nobody knows where

to go look.

CHAIRMAN SOULES: How many favor deletion of the statutory reference? Show hands.

How many favor leaving that in the rule?

Okay. We'll leave that in, Rusty. So that defines what legal holidays we're talking about. Okay.

Now, the rest of the changes are on a different topic.

MR. MCMAINS: Yes, the others are just grammatical to say that the period extends to the end of the next day which is not a Saturday, Sunday or legal holiday.

PROFESSOR DORSANEO: That copies the federal language.

MR. MCMAINS: Copies the federal language and eliminates our next-day/last-day type stuff.

CHAIRMAN SOULES: You recommend that change?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Discussion on the changes other than the deletion to the statutory reference. We're going to leave that in. But as to the other changes that are proposed on Page 135, any discussion?

Those in favor say aye.

Opposed?

That's unanimously recommended for amendment.

Next.

MR. MCMAINS: The next rule of note begins with a discussion on 164. And that's where the rule is.

This is the recusal rule.

CHAIRMAN SOULES: Hold it. Justice Hecht has an observation at this point.

JUSTICE HECHT: I think the Court would still like some direction on what, if anything, should be done to clarify the situation when a clerk's office is closed on a day which is not a legal holiday under 4591 and not a legal holiday under perhaps any statute or law but they just decided to take the day off.

We have had two cases that have come up in the last five months in which the lawyer went to file something on the last day in the clerk's office of the Court of Appeals. The clerk's office was closed, so he figured it was a holiday and he went in the next day. He didn't do it, but he sent somebody to file the material. The somebody came back and that was the end of that. More than 15 days later, the clerk's office says, "We're sorry, you filed this too late." He filed a motion for extension of time. The clerk's office said, "Well, you filed that too late, too." So now what does he do?

MR. FULLER: It seems to me a qualifier could

be put in "provided the office where such documents be filed is open for business." And you can prove that by affidavit. Extend it to the next business day.

MR. MCMAINS: Doesn't the federal rule, Bill, talk about in terms of the next business day the office is open?

PROFESSOR DORSANEO: It has some additional language that deals with this problem, I think, although I don't recall the specific language, and also deals with the problems of inclement weather and other practical difficulties. And I think that we should examine that to see if it will work. Because that part of the federal rule book is fairly well thought-out, well-done.

MR. HATCHELL: It really is. The unofficial holidays are going to be a real problem. Snow days.

MR. BLACK: It looks like to me what we need is a standard. And the reference to this statute is a standard. If somebody goes to the clerk's office and it is closed on a day not mentioned in the statute, they still are free to file a motion for extension of time. They know that they're late, they have 15 days. And presumably the court would grant it.

CHAIRMAN SOULES: But here a party was in error and thought that it wasn't timely on the day of

the closure.

MR. BLACK: But if the rule says the only time you're excused is if it's mentioned in this statute, otherwise you're going to have to file -- you never know. I know in San Antonio they close when they have the Battle of Flowers parade.

MR. FULLER: Makes sense to me.

MR. BEARD: Why don't we make the clerk notify the lawyers that they filed untimely and have time to file that motion for extension?

CHAIRMAN SOULES: It seems to me like if the Supreme Court is going to promulgate a rule like this and then cut off a party's rights because something is not filed when a courthouse is closed, that they ought to direct the clerks of the courts that they cannot close, cannot entirely close, except on these days. A clerk has to be in the clerk's office every day except these days, period. Otherwise they ought to give us a break.

MR. FULLER: Well, give a break. But I don't think -- you're killing flies with sledgehammers.

CHAIRMAN SOULES: The Court shouldn't have it both ways, shouldn't jurisdictionally terminate a party's rights because they permitted the clerk's office to close on a nonholiday.

MR. FULLER: What's the problem with just providing that it be filed on the next business day, accompanied by an affidavit that it was closed? That's no big deal.

PROFESSOR DORSANEO: Look at the federal rule.

CHAIRMAN SOULES: Rusty, overnight will you and your committee consider Federal Rule of Civil Procedure 6 (a)?

MR. MCMAINS: There should be a parallel rule in the Federal Rules of Appellate Procedure.

CHAIRMAN SOULES: And its counterpart in the Federal Rules of Appellate Procedure for inclusion in both the Rules of Civil Procedure and Appellate Procedure in Texas. And we'll take that up tomorrow.

MR. FULLER: You're going to make it apply to the Rules of Civil Procedure also?

CHAIRMAN SOULES: Right. Both ways. Where is it that you mail one day in advance in the civil rules?

PROFESSOR EDGAR: Let me just make a comment, Luke. Is it too much to ask of a lawyer to realize that if he can't file a paper on a day that he thought he could to go to the Revised Civil Statutes and see what day it is? And then if he realizes that the court is

closed on a day not prescribed as a holiday by the statute, to know that he has 15 days under Appellate Rule 4 to file a motion reasonably explaining late failure to file? I don't understand the problem, actually.

MR. MCMAINS: It's actually even more limited than that, because under the provision we just voted he can also go to the post office and mail it. And so the only time that there will be any hiatus at all in compliance is the occasion in which there is a federal postal holiday and he can't get it done, when the state should be open, but ain't. And there are some designated holidays in 4591 that are not postal holidays and vice versa. So it is possible for that to happen.

But then, under the Dallas court's interpretation of the mailing rule anyway, you can deposit it in the mails whether they're open or not and still be in compliance with the rule. So, technically speaking, I'm not sure that if you were to adopt that construction that if you mailed it it didn't matter whether the post office was closed. You can provide an affidavit that you mailed it on that date. And so you have the mechanism to do all of that. The problem, I guess, is that not everybody knows that.

Now, the real problem that you have addressed

and that Judge Hecht has addressed, it seems to me, is the problem of the Court of Appeals not notifying you timely that they think you didn't do something right. And I'm inclined to be more in favor, actually, of looking to see if there isn't some way that we can basically provide that when a paper is tendered to the Court of Appeals that it shall be deemed to be filed unless the court notifies otherwise. And your time for filing the motions for extension don't run until you receive some notification that there is a problem. Because now the problem comes in.

And it happened also in another Dallas Court of Appeals opinion in which there was a motion for extension filed that was within the 15 days, an objection to that motion as not being in proper form or whatever, or even substance, was filed, but not ruled upon until outside the 15 days, and then the court goes and rules on it and this party tries to tender something in response to it and the court says, "It's too late. You had to make it right within the 15-day period," even though he didn't know that the court had ruled it was wrong within that period. And that, to me, is a more reasonable approach to a general problem.

Do you agree, Mike?

MR. HATCHELL: Yes and no. I just don't see

any reason why we don't fix the rule, because I just don't think that lawyers pay that much attention to things. And particularly out in the smaller counties that are just closing and opening just willy-nilly and people really don't know what they're supposed to do, I think, when it comes time --

MR. FULLER: Get something printed that tells them what to do.

CHAIRMAN SOULES: Let's work on that over-night and we'll get back to it.

Those of you who have your rule book, if you will turn to Rule 5 with me, Rules of Civil Procedure.

MR. DAVIS: Luke, may I comment on what we just passed by?

CHAIRMAN SOULES: Yes.

MR. DAVIS: Have we given any thought to whether we might want to go back and think about doing away with these jurisdictional traps where it's final and, instead of being able to extend it for good cause like you can on other things, you get out of their what I call jurisdictional trap?

CHAIRMAN SOULES: Tom, I thought that. And what happened, the rules that the Supreme Court in the Calvert years and before applied to all these jurisdictional concepts came out of statute. And back

when they were statutes, they were thought by the appellate courts to be jurisdictional, that that's where the court got its jurisdiction, was from these statutes. And that reasoning, then, followed that if something didn't happen during a statutory period then the court didn't have jurisdiction. That, then, when the rules came out of those statutes into rules, the courts continued to say that because it violated the court's rules, the court didn't have jurisdiction. And that kind of confused me when I thought about that. How can the court, you know, by rule eliminate jurisdiction? It's only when you go back and see that they're rooted in statutes that you can see kind of where that came from. I agree with you. I think we've got entirely too much "jurisdictional stuff." But there are a lot of appellate lawyers who think that's the way it should be.

MR. DAVIS: I wondered whether we should consider that along with this rule change.

CHAIRMAN SOULES: I think the federal rule is more lenient. Again, in the next biennium I think we're going to get a chance to look at it. But if we can get an escape from this filing problem now, maybe that will take care of the problem.

MR. BEARD: You've got to get a judgment final sometime.

CHAIRMAN SOULES: That's the point.

MR. BEARD: That's the whole conflict.

CHAIRMAN SOULES: That's the age-old difficulty.

MR. BEARD: As long as you leave it for good cause shown, it's never final.

CHAIRMAN SOULES: That's what Judge Barrera said in Click. You are in just as much trouble as you used to be when you didn't have 15 days.

JUDGE PEMBERTON: The reason we left reference to the statute out, the little old statute has about a half dozen dates and also suggests we stop and observe Sam Rayburn's birthday. But we didn't know of any illegal holidays. So we were just saying that any legal holiday would save a guy's rights. If he showed up and it was a holiday, it was closed, that was the day behind it.

MR. MCMAINS: We could rewrite the rule and say any day that the courthouse was not open for business or that the court clerk's office was not open for business.

MR. FULLER: The office in which such has to be filed.

MR. HATCHELL: There are cases that say legal holiday means 4591.

CHAIRMAN SOULES: 4591?

MR. FULLER: You might just go any day it's closed, period.

CHAIRMAN SOULES: We're going to get to that tomorrow. That's been sent to committee for a report again tomorrow. I've noted it on mine.

Now, if you will turn with me, in order to do the same thing in the Rules of Civil Procedure that we did in the Rules of Appellate Procedure on this "mailed a day ahead of time" concept, turn with me to Rule 5 of the Texas Rules of Civil Procedure. In the gray book it's on Page 24. The only time that I see that that comes up is in connection with motion for new trial. It's not elsewhere in the Rules of Civil Procedure.

MR. MCMAINS: That's right.

CHAIRMAN SOULES: So down here in Rule 5, about two-thirds of the way down, you see the words --

PROFESSOR EDGAR: What if the court orders you to do something on discovery by a certain date? Wouldn't that be covered by Rule 5?

CHAIRMAN SOULES: No.

PROFESSOR EDGAR: By notice given thereunder or by order of a court requiring it to be done.

MR. FULLER: The first sentence.

PROFESSOR EDGAR: The first sentence of Rule

5.

MR. FULLER: Sure does.

CHAIRMAN SOULES: Okay, Hadley, go with me, now, if you will, down to "However, if a motion for new trial is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or before." That whole thing only deals with motion for new trial. Everything else --

MR. FULLER: Deals with everything else.

CHAIRMAN SOULES: There isn't anything for that.

MR. MCMAINS: All of our discovery rules were revised, as you recall, regarding service being the critical thing. And service is complete upon mailing. To that extent, we're consistent with the federal courts with regard to the provisions because we don't file a lot of discovery things anymore.

CHAIRMAN SOULES: If there's language elsewhere where we've got to mail on the day before, call it to my attention and we'll try to fix it.

Is the committee in agreement to make this change? After the words "United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail," delete "one day" and replace

that with the word "on"?

MR. FULLER: We used "on or before" in the other one, Luke.

CHAIRMAN SOULES: Be patient with me.

Then leave the word "or" and strike the word "more" and pick up "before"?

PROFESSOR DORSANEO: Just like you dictated, huh?

CHAIRMAN SOULES: All in favor say aye.

Opposed?

Okay. That's unanimously recommended also. Rule 5. Okay.

Next item, Rusty?

MR. MCMAINS: 164, another recommendation by the COAJ with regard to the recusal rule. Now, this rule, of course, is kind of modeled after the recusal rule that applies to trial judges as well. There is the appellate judge part of it. And the question that was attempted to be addressed was: What happens if the court is evenly divided on the decision to recuse? The actual letter raising this issue, which I think, Tom Black, didn't you communicate on that?

MR. BLACK: I guess so.

MR. MCMAINS: Or there's a letter to you, I guess. You sent it on.

MR. BLACK: Judge Fender sent me a letter.

MR. MCMAINS: Judge Fender says he doesn't care whether it's presumed granted or presumed denied, but he's just concerned about having to appoint another judge that will obviously be the swing vote, somehow he's going to be embarrassed.

MR. BEARD: I think anytime the court's evenly divided the motion is denied. I don't see any reason to write a special rule.

MR. FULLER: I thought that was the rule everywhere.

MR. MORRIS: You can't say "Let's let a biased person sit."

MR. MCMAINS: The problem I have, I suppose, the way the proposal comes out, it's that the motion to recuse will be refused if you're evenly divided as to whether there should be recusal, which means that at least one of those judges thinks that the judge who has been moved to disqualify is biased and/or prejudiced or interested, or whatever. I'm not sure that will be well received.

CHAIRMAN SOULES: Pat says that's the way it is. If you file a motion and the court's evenly divided, you don't get the relief.

MR. MCMAINS: Well, no. You obviously have

the ability to go get you another judge. Request a judge. You know, be it a visiting or retired judge.

CHAIRMAN SOULES: What do you recommend, Rusty? Then we'll get to debate.

MR. BEARD: Rusty, why do you have the right? If the court's evenly divided in any appellate proceeding --

CHAIRMAN SOULES: Judge Pemberton, as a member of the COAJ, will you recommend that this be adopted? Then we'll get to debate. It's on Page 164.

JUDGE PEMBERTON: So be it.

CHAIRMAN SOULES: Judge Pemberton has moved that Rule 15a be amended as shown on Page 164. Any discussion?

Tom Davis.

MR. DAVIS: Is the option that we go the other way, that if at least one judge thinks he ought to recuse himself, then maybe he ought to recuse himself? That's more of a public relations move.

CHAIRMAN SOULES: The judge can just do that. He's got the right to step down if he's challenged.

MR. MCMAINS: It's left to the other members.

MR. DAVIS: You've got two of them, one of them thinks he ought to, one thinks he shouldn't. The question is: Which way do you move?

MR. MCMAINS: What will happen in most courts of appeals, they will then go to an en banc determination. But then you also have the determination en banc. But if you've got it evenly divided en banc, which is really the thrust of the reason for the rule as reported by the COAJ, then you've got three or four judges who think that this judge ought not to sit, which seems to me kind of increases the weight on maybe he ought not to sit, if you've got three or four judges that are saying that this judge ought not to sit.

MR. DAVIS: Is what you are saying, the Supreme Court is saying if there's any doubt about it he shouldn't sit?

MR. MCMAINS: That's all I raised.

MR. DAVIS: It's a judgment call.

MR. FULLER: I think what he's saying, just turn it around, if it's a tie, then there's a recusal.

MR. MCMAINS: Judge Fender, who wrote the letter, said he didn't care which way it was. He just thought that, rather than appointing another judge who was going to be faced with another judge, whichever way it was decided, he was going to be appointed as casting the deciding vote. Because he wouldn't have been appointed at all if they hadn't been evenly divided.

MR. BECK: Rusty, the proposed change, am I

correct that if an appellate judge thinks, for whatever reason, that he cannot be impartial --

MR. MCMAINS: Then --

MR. BECK: -- the result is that you end up with an evenly-divided Court, that the motion to recuse is denied and he's got to sit on the case?

PROFESSOR DORSANEO: No, no, no.

MR. BEARD: No, no, no.

MR. MCMAINS: No, no, no. The way the procedure works, if the judge thinks he's recused, he doesn't sit.

MR. BECK: He can do it on his own?

MR. MCMAINS: Yes. He can do it on his own, with or without motion or whatever else. If, however, he is challenged and decides not to recuse, then it's up to the other members of the panel and/or court to decide. And this is the question of what happens in that decision if you come up with an evenly-divided decision on whether he is recused.

MR. BEARD: Rusty, the trouble with letting one judge decide it, we do have rogue judges on the Court of Appeals. I don't think one judge ought to make that decision.

MR. MCMAINS: What that means is, if you get one vote for nonrecusal, then you will have that judge

who voted not to reduce plus the judge who was challenged that will be the majority on your panel.

PROFESSOR EDGAR: Rusty, what happens when you have a panel, one judge says, "I'm not going to recuse myself," the other members of the panel split? Then do you go to the en banc and make that --

MR. MCMAINS: Probably, yes. I don't think it's required, but that's basically what is contemplated by the statutory provisions regarding recusal.

CHAIRMAN SOULES: What I want to do, I think, Rusty, what I'm inclined to do as chair is to assign this to your committee, not overnight, obviously, to try to generate a counterpart to 18a. Because 18a in the civil rules gives a procedure that's to be followed.

18b gives the substantive grounds for recusal and disqualification.

In the appellate courts, there is no procedure for a motion for recusal, by which a motion for recusal is to be considered. Whether the judge that's been challenged participates. You can seek a three-judge court. Just like Rusty said, it's the judge that is challenged. He may be able to vote. It doesn't say he can't. It doesn't say who makes the decision. Or even how it's raised.

We really need to put that into the Rules of

Appellate Procedure, how a challenge should be handled, I think. And putting this one sentence in there raises more questions than it answers, does it not? I think we're probably going to have another meeting in the early fall.

MR. MCMAINS: I think there's more here than this sentence fixes and it may cause more problems than it solves.

CHAIRMAN SOULES: Then I would like to assign to you, unless I hear objection, that you move what is now TRAP Rule 15a into TRAP Rule 15b and create a new TRAP Rule 15a that will be the procedure for determination of appellate court recusal motions.

MR. BEARD: I just think we open up a big bag of worms if you have a procedure of a trial on appellate judges. Because that reaches the Supreme Court of Texas. And you know we've been through a lot of things. And you open up where, you know, you say "So-and-so got a contribution from this lawyer" and now we're going to have a trial over that? I think we ought to leave it alone. Just in passing.

CHAIRMAN SOULES: But leaving it alone, the substantive law is already there. A judge should recuse himself.

MR. BEARD: I understand that.

CHAIRMAN SOULES: But the procedure of the mechanism is not established. All we're saying is: Okay, if you are going to revoke that substantive law, here's a procedure by which you do it.

MR. BEARD: But that means you go through that procedure. When you file that motion in the trial court, you assign another judge to go hear it. Now are we going to have all these hearings going on in the appellate court?

CHAIRMAN SOULES: Are there any three-judge courts of appeal left?

CHIEF JUSTICE PHILLIPS: Five.

JUSTICE HECHT: You've got some procedure in 15c already. So this doesn't really need to be in Rule 15a. It could be in Rule 15, Subsection c.

CHAIRMAN SOULES: Why don't I have that? Is that TRAP Rule 15c, Judge?

JUSTICE HECHT: Yes. There's not enough procedure there to address what we're talking about, but there's some procedure.

MR. MCMAINS: There is some procedure.

CHAIRMAN SOULES: Let me see where that is. Let me look at it with you.

Rusty, consider whether or not this sentence could be added to TRAP Rule 15, Paragraph c, and take

care of the problem. Because there are procedures.

MR. MCMAINS: Yes. We have a section that we weren't --

CHAIRMAN SOULES: I couldn't see them.

JUDGE CLINTON: They're there.

PROFESSOR DORSANEO: This needs to be reorganized, anyway.

CHAIRMAN SOULES: Okay. Then can you do that and report on that tomorrow?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: I know it sounds like I'm picking on Dallas, and I'm really not. Judge Hecht had no role in this.

As a point of information, I will say this next issue begins on Page 170. In terms of a proposal. And there's much discussion that follows. And I don't frankly know -- I have heard rumors to the effect that these issues are before the Supreme Court right now. I'm certainly not trying to influence the Court.

JUSTICE HECHT: Where are we?

MR. MCMAINS: 170. This is on the question of limiting the scope of an appeal. I frankly just don't know and haven't been able to confirm whether they are --

JUSTICE HECHT: It is an issue in cases.

MR. MCMAINS: And I am not a party to any of those, thank God, at the moment.

CHIEF JUSTICE PHILLIPS: We've got about six.

JUSTICE HECHT: Five or six cases.

MR. MCMAINS: I kind of figured that was the case. All I'm saying is, I don't know whether or not anybody is going to consider this to be -- it can't be ex parte, because we're in open court here under the open records deal. But this discussion is going to obviously deal with the merits of what the appellate courts are in fact now doing and trying to fix it. Now, the "trying to fix it" part, we obviously want your input in it.

CHAIRMAN SOULES: This is a public hearing. There's no way for anybody to be excluded from it.

CHIEF JUSTICE PHILLIPS: And it wouldn't affect these cases.

MR. HATCHELL: If they read the Appellate Advocate, they're not going to get any more information than they get today. Theoretically, it's up before you.

MR. MCMAINS: The issue quite simply is whether or not a party who is more or less -- and this is one of the iffy questions -- satisfied with a judgment as rendered has any obligation to perfect an

appeal independently in order to preserve complaints or modifications in the judgment that in the event that the judgment changes or actually is appealed by the other side then he wants to ask for some more relief than he got in the trial court, even though he is willing to settle for what it is he got in the trial court.

Now, notice of limitation of appeal rule was the only rule that has ever dealt with this issue and has essentially, to most of the committee members, I think, who worked on it in the past, you only limited an appeal if, No. 1, you filed the notice of limitation of appeal within the prescribed times, which gives the other side an opportunity to perfect an appeal if they choose to do so; and No. 2, the requirement that it can only be limited with respect to a severable portion of the judgment, such as a totally different claim, like claim, counterclaim, et cetera. That's what the rule says.

Now, the courts for a long time have been in disagreement on whether it really means that, frankly. Even after our changes. And some of those older disagreements have now been imported into the rule and requirements have been imposed in Dallas specifically, and I think several other courts -- Beaumont has also followed suit -- several courts have rejected the

limitation urge that if there is not an independent perfection of the appeal by a party, then he cannot raise by cross-point only an issue, even if no notice of limitation of appeal has been filed.

That's the essence of the holding of the Dallas courts and has even been extended to two-party cases, where one party appeals with no notice of limitation of appeal, the other party says, "I want to raise by cross-point, request for more relief, for revision of the judgment," and at that point the Court of Appeals in Dallas has disposed of it as a jurisdictional matter by saying that they don't have any right to raise that because they did not appeal the judgment.

That is not a result, I think, that we ever intended, but which is the whole reason why we have a rule that talks about how it is you go about limiting the appeal. But since the courts are looking at this rule, the question was: How it is that we go about drafting a rule that makes it absolutely clear that if there's an appeal anybody that's connected with the case can raise any complaints or points they have on the judgment by cross-point rather than by filing their own bond and doing all of the other things incidental to perfecting their own appeal?

PROFESSOR EDGAR: You are are presuming there's some trial motion that deserves that.

MR. MCMAINS: Yes, yes. And a classic example of what may happen is, for instance, you might have a claim as a plaintiff for prejudgment interest which the trial court denies, but he gives you the bulk of your money and it doesn't involve that much money. The defendant appeals. The effect of the Dallas court holding is that unless you independently perfect your appeal, you cannot seek the addition of that interest by mere cross-filing, you must independently perfect your own appeal in order to do that. That's what those cases are coming down to and being expanded to say.

Now, they started out with a more esoteric problem of what happens when you have three parties and the one party is appealing and he is primarily concerned, if not exclusively concerned, with only one party and the other party is kind of an ancillary to that particular dispute, but it may be because of the Court of Appeals action or whatever, or because of the way the appeal is going, that all of a sudden he becomes re-embroiled in the controversy. Does that give the party the right to appeal as against the third party? Now, that's the second scenario and is the one which has been most confusing historically in Texas.

And a classic situation is: Plaintiff sues two defendants, recovers against one, doesn't recover against the other. That defendant has a claim for contribution or whatever as against the other defendant. Does the appeal of the plaintiff carry forward the right of the defendant to assert claims or for contribution or whatever against the defendant that won at trial without independently perfecting his appeal when that defendant really is kind of extraneous to the appeal issues between the initial plaintiff and that defendant? Now, that's caused a lot of problems in the past. And we're trying to wrestle with all of these in one issue.

I think that there would be a consensus on the commitee that in a two-party situation any issue between the parties ought to be up on appeal unless there's a notice of limitation of the appeal. And I strongly recommend that we make the revisions to do that.

The second problem is a more esoteric problem and, in my judgment, is not frankly handled by the amendment that is proposed in the sense that the amendment as proposed says that if you want to cross-point any aggrieved party can do so, but what that requires is that you be an aggrieved party. And it creates a lot of room for disagreement as to whether you

are really aggrieved under the judgment when you may have actually won, you may be aggrieved at the appellate level. I mean, it may be that what happens to you happens for the first time when the judgment gets changed. And this says that you can't cross-point. I mean, the implication of the rule change as provided is that if your being aggrieved happens for the first time in the appellate level, all of a sudden maybe you did have to perfect an appeal, which is even more absurd.

PROFESSOR DORSANEO: That can't happen.

MR. MCMAINS: Shouldn't happen. But read the rule as it's proposed. Because the only people that are authorized to cross-point, to raise issues on appeal, are the people who are aggrieved.

MR. FULLER: Can't you cure that by just dropping the word "aggrieved" and just say "any party"?

MR. MCMAINS: Yes. But then you have the policy question, and that's what I'm saying, we really had the policy issue of A sues -- and it just came up in a motion which was overruled, so we don't have to worry about that, in which they say, "Okay, Plaintiff sues 1 and 2, wins as to Defendant 1, loses as to Defendant 2."

And Defendant 1 comes in and says, "Okay, I want to relitigate." First of all, I want to win as to the plaintiff, which he does, in terms of reverse and

remand.

And the Plaintiff says, "Well, I'd like to try my entire case over again."

And they say, "No, you can't do that."

So here's the plaintiff who's actually the appealing party and he didn't get aggrieved either until he got reversed in the Court of Appeals. He had no reason to raise his good points at that juncture. But those are questions that I don't know that we can answer under the existing state of the precedence. Because we just don't really have a lot of provisions for what happens if you just blew it and didn't complain about him from the beginning even though you knew you had a basis for complaint.

JUSTICE HECHT: I want to add another wrinkle to the problem. It seems to me that there are two fundamental philosophies here. One of them is, whatever rule we come up with ought to be simple. And it's easy to come up with a simple rule when you've got two parties. And then it's easy to say, "Well, they just appeal the whole thing unless there's a limitation of appeal." And that's pretty easy to deal with. But it's complicated by multiparties. And it's further complicated by the inconsistent method of appealing to the Supreme Court. Because if you want to complain of

error in the Court of Appeals, then anyone who is complaining there must perfect his own application for writ of error to the Supreme Court. So that makes that rule different from the rule appealing from the trial court if appeal by cross-point is allowed. So I think there's some virtue in consistency one way or the other, whichever way is simplest and easiest for the parties to take advantage of.

MR. MCMAINS: In actuality, of course, in the application of writ of error practice, the way we handle it in our rules, you do have the obligation to perfect your own application, but you also have additional time. I mean, you can sit back and wait, see if the other side goes up. You do have to file your motion for rehearing all in the same time. But once you file the motion for rehearing to protect it, you can wait 10 days after anybody else files an application and file your own. But you do have to do that. That's true.

MR. FULLER: It seems to me somebody needs to go back to the drawing board and try to draft -- I mean, you know, this is the kind of thing we can debate all week. We've got a volume and a half to go. Somebody needs to draft a proposal and then let us look at it and see if it cures the problem.

CHAIRMAN SOULES: Is there any reason why --

MR. MCMAINS: There is a drafted proposal. All I was suggesting is that it does not cure every problem. Not that we can cure every problem, but --

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: With respect to this draft proposal on 184, which I drafted, and it's a hard thing to draft, because it is a hard problem, I think I have been convinced by what Rusty has said and by what Ken has said that it would be an improvement to take out who has been aggrieved by the judgment from 4 (c).

Now, that causes some interpretive problems. In my view, you have to evaluate whether those problems are worse than the problems we have now. And I think that they are not worse, that they are relatively simple problems in comparison to the problems we have now.

In the multiparty context, the question had been raised about somebody closing their file when they hadn't been aware that anybody was going to seek some relief, an appellee's brief by cross-point against them. In other words, this situation: You have a three-party case, Mr. A is the appellant, Mr. B has a cross-point seeking relief from Mr. C.

Now, I've thought about that. And it struck me that Mr. C should be on the watch-out for that from the start, since he was a party to this proceeding all

along. And doesn't he get notice that there's been an appeal? And isn't that just the bond? And that doesn't say squeeze, anyway, about anything other than there's an appeal here. And, frankly, under our bond law, it's hard to have a bond that's unsatisfactory, regardless of what it says.

So I don't worry so much about this three-party thing as I worried about it last week when somebody said, "It's a big problem." I don't think it's a big problem. If there's any kind of problem at all, it could be dealt with in the part of the rule book that talks about who gets notice of appeal bonds. Which I can't find now.

MR. HATCHELL: It's there.

PROFESSOR DORSANEO: It's there. I know it's there.

MR. HATCHELL: One case has already held that an appeal can be dismissed if that notice is not given.

PROFESSOR DORSANEO: I know. So I think everybody who was a party in the trial court who could be in jeopardy gets notice. Suppose they don't. If they don't, then the one who didn't perfect the appeal to begin with can't cross-point against them? Is that the problem? Help me, appellate specialists.

MR. HATCHELL: I don't have any problem in

saying in that instance you have two two-party appeals, frankly. I just don't see any reason to allow the appeal by A to give B the right to appeal against C. That just makes no sense to me at all.

PROFESSOR DORSANEO: Well, we could do that. We could do that. Just leave the problem.

MR. MCMAINS: Then you don't need a motion of limitation. Because, I mean, just the problem is the notice of limitation of appeal rule implies that unless you do it the appeal is unlimited. And that's at least what we thought that it implied, not just in two-party cases but across the board.

PROFESSOR DORSANEO: Roger drafted a proposal that would work in two-party cases. It's not in this book. I don't have it in my possession. Another appellate specialist who is on the Committee for Administration of Justice, Roger Townsend, he drafted a proposal.

MR. MCMAINS: Frankly, I think now that the biggest issues are in the more-than-two-party cases.

CHAIRMAN SOULES: What would be wrong if an appeal is effected for appeal, it would be for all parties?

PROFESSOR DORSANEO: You could conceive of a case where somebody didn't get notice. The first notice

they would get would be the appellee's brief.

MS. DUNCAN: Which you also might not get.

PROFESSOR DORSANEO: I would think if you don't get anything, they would have a pretty sound argument that would prevail.

JUDGE CLINTON: Bill, you're looking for 46 (d), Notice of Filing?

CHAIRMAN SOULES: It says notice of filing shall be given to all other counsel of record. That's counsel of record in the trial court.

PROFESSOR DORSANEO: The problem is that filing an appeal by filing a bond is stupid. It doesn't apprise anybody of anything.

MR. HATCHELL: Also, giving the notice doesn't allow you to do anything.

MR. MCMAINS: Of course, the problem is, too, what's really happening --

CHAIRMAN SOULES: All right. Let's recess. We have sandwiches in the foyer. Then we'll get back to this.

[Noon recess]

CHAIRMAN SOULES: Okay, Rusty. For now I'm going to table this question of perfection of appeal and refer it back to your committee. If you may want to make another report on it tomorrow with some firm

written rules or pose just a direct question "Should a perfection by one party perfect for everybody else," something along those lines. If you need some guidelines, we'll get back to you tomorrow. Just let me know that you need that raised. But should we pass on 40 (a) 4 with the rest of this being put back into your committee? Or should that wait until you deal with the rest of it?

MR. MCMAINS: I think it's all embraced in the same issue.

THE COURT: All right.

Then, besides this perfection of appeal series of problems, what remains in the appellate rules for review here today?

MR. MCMAINS: Well, there are several of these again that are hypertechnical that I want to look at but I don't think we'll have to spend very much time on. But we could move to some of the ones that have been considered by the COAJ and kind of vote it down. I don't think anybody is going to have any real great disagreements.

Rule 79, which is at 288, the actual change that was proposed by this particular rule was to kind of broaden the basis for securing en banc hearings in the courts of appeal. Or, being a little bit more explicit,

just saying they shouldn't be done except in extra-ordinary circumstances. And all they did is amplify that, which doesn't to me amplify much of anything.

It says the proposal recommends "when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or when the proceeding involves a question of exceptional importance." Both of those seem to be sufficiently extraordinary circumstances that they might be arguably covered by the first one. I don't think there's any real reason to add that language encouraging people to -- or giving some hope for en banc reconsideration. COAJ voted it down. I would concur.

CHAIRMAN SOULES: Without identifying the source, which is pretty much self-evident, this came up. The courts that have multiple panels or a court that has multiple panels, one panel will write a case, published. Another panel will then write a case on all fours factually, legally postured with the first case, decided differently, not cite the first published case and not publish the opinion in the second case. So now those parties who have a published case from the same court believe they can rely on the published case from the same court, and later parties still looking at that published case from the same court don't know that that

same court is actually deciding its cases contrary to that first case. And they may decide several cases. But they don't want to deal with the fact that their brethren on a different panel published an opinion that they disagree with. So they just decide the case their way and don't publish the opinion.

That's the problem that at least the first part of this -- these words "when consideration by the full court is necessary to secure or maintain uniformity of its decisions" are aimed at. That's so that a party in that shape can have a little bit more muscle trying to get an en banc decision.

Now, one judge who has presented in COAJ, I believe, said that his court had never met en banc and didn't have any plans to do so.

I just want to be sure that this is fully heard by our committee. These are problems that this judge has disclosed, without disclosing --

MR. MCMAINS: But the problem that you have, first of all, is, where this proposal is done, where the actual written language is done, it follows that they won't have en banc except in extraordinary circumstances. It identifies this. It does have these "when necessary," et cetera, qualifiers.

I think you can make all the arguments you

want to make, if you're moving for an en banc consideration, that that's an extraordinary circumstance anyway. I don't think it adds anything to it. And unless your intent by this is somehow to give some mandamus relief or something to the party, I don't think -- if a court's intent on doing that to you, they're going to have an easy way to find that it ain't necessary or that they are being uniform, it's just that you can't see it.

CHAIRMAN SOULES: But if the Supreme Court puts these words in, forget the No. 2 business. "When consideration by the full court is necessary to secure or maintain uniformity of its decisions," that sounds to me like a mandate from the Supreme Court that the decisions of the Court of Appeals should have some uniformity, which I think the Supreme Court perhaps should mandate.

MR. MCMAINS: The other problem I have, though, it's kind of "the first one on base wins," you know, in a sense. Because the only reason for uniformity is if there is prior precedent in that area. The fact of the matter is that theoretically the decision by a panel of another court of appeals in another jurisdiction or in another district is actually the auspices of the court to maintain uniformity among

all the courts of appeal, for that matter. To look on it just with regards to a particular court --

CHAIRMAN SOULES: But this court is keeping a hidden agenda. And I mean it's hidden. It is not published. And what this is saying is -- of course, it still may not be published, but you're going to have the three judges that decide the case the other way, if they're still on the court, on a panel en banc with the three judges that decided the case differently. So now you've got six judges, depending on how it's split up, but you've got them all up there looking at the same question and faced with having to resolve that question. Are we going to stick with our prior decision en banc or are we going to go with a new panel en banc?

PROFESSOR EDGAR: Isn't that a matter, maybe, that the Supreme Court ought to address on application for writ of error?

CHAIRMAN SOULES: They've got writ denied jurisdiction, they've got sister jurisdiction. The only people who may find this important is the parties who are losing the case.

MR. MCMAINS: Additional jurisdiction created by the same court conflicting with itself.

CHAIRMAN SOULES: It's not even jurisdictional. Same court. That's not even a

jurisdictional problem. I just want to be sure that everybody here understands what this problem is. Because this is unfair, I think, to litigants to have courts of appeals keeping hidden agendas because they don't want to disagree with their brethren and they won't have differences en banc.

MR. FULLER: That's like Adam and Eve. We're going back to the original sin now. They ought to have to publish every damned one of them.

CHAIRMAN SOULES: We can't get that done. Maybe we can have this Court, the Supreme Court, tell them, "If you guys are disagreeing, you need to get together and resolve it among yourselves." That's what the focus of this proposal is. We're going to get a consensus of this committee whether it's a good or bad idea, but at least the focus is now exposed fully, I think.

Anybody else have any comments about Justice Michol O'Connor's proposal that we at least add the first part of this underscored language on Page 289? Frankly, I think the second part is redundant.

JUDGE CLINTON: I missed a part of it, but I'm told over here that the offenders are criminal cases. Is that --

CHAIRMAN SOULES: Not always.

MR. HATCHELL: The particular incident that prompted this are two criminal cases. Justice Clinton says he thinks his court has had to deal with that.

JUDGE CLINTON: One of them or two of them at least came up.

CHAIRMAN SOULES: This change --

JUDGE CLINTON: Unless I'm off base entirely, just recently we had one from -- I don't know where it was from, but not only were they not uniform, but they involved codefendants who were brothers. And one panel reached one result and the other panel reached a completely opposite result on the same issue. Now, in that case, they need some kind of second look at it. Right?

CHAIRMAN SOULES: I would think so, Judge.

JUDGE CLINTON: Otherwise, we might not even get it, if they had taken a second look. So, to the extent that you write a general rule based upon one specific situation, there's a bad one.

MR. HATCHELL: I understand the other overlay is that the way the rule is written now the Court of Appeals doesn't perceive that this is even the office of an en banc hearing. We just don't do that. It's just not necessary.

CHAIRMAN SOULES: That's correct.

MR. HATCHELL: It seems to me like that is the office of the en banc hearing, the highest office.

CHAIRMAN SOULES: Now, a judge on the San Antonio Court that I had a chance to visit with informally about this said that he didn't favor this because you don't have any idea how full the record is that the first case is written on and you don't have any idea how full the record is that the second case is written on, and it may be that the court just isn't ready to decide precedent and they want to keep this hidden agenda till they get ready. They didn't use my last words there, but that's the bottom line. And that, to me, didn't seem to be a very good reason not to resolve it while the cases were there. But I don't know.

Justice Hecht.

JUSTICE HECHT: As I recall, the federal circuit courts of appeal have, if not a rule, a tradition that they will not disagree with a prior panel's decision on the law without an en banc consideration of the case. A subsequent panel is not free to --

MR. HATCHELL: They can not overrule a panel, and they are reluctant to hold to the contrary without informal inquiry of the other panel. Otherwise it will

go to en banc.

MR. LOW: That's what they say. But they don't do it that way.

CHAIRMAN SOULES: But isn't this a nudge in the right direction?

MR. FULLER: It's a start.

CHAIRMAN SOULES: What's your feeling about it, Justice Hecht? Just the No. 1 on 289, not the No. 2.

JUSTICE HECHT: I think it may have some positive effect. Having been on the largest court of appeals in the state, I know that there is a good bit of territorialism in courts that have, I guess, more than six or seven members. And that feeling translates into "The three of us can do what we want and the three of you can do what you want and you just do your thing and we'll do our thing and we don't have to worry about it." And that's not a good way for the law to proceed, whether it's published or unpublished.

MR. LOW: Luke, what you're proposing, then, is that we just add this first sentence and leave off "or when the proceeding," so forth? I move we do that.

PROFESSOR EDGAR: You need to change the language just a little bit. "A hearing or rehearing en banc is not favored and should not be ordered except

when consideration by the full court is necessary to secure or maintain uniformity or other extraordinary circumstances." You don't want to put the extraordinary circumstances before the "when consideration," that's all I'm saying.

MR. LOW: My motion is so modified.

MR. BECK: I'll second it.

CHAIRMAN SOULES: Paragraph (e) would then read in the first sentence: "A hearing or rehearing en banc is not favored and should not be ordered except when consideration by the full court is necessary to secure or maintain uniformity of its decisions or" --

PROFESSOR EDGAR: Rather than say "when," why don't we just say "unless"?

CHAIRMAN SOULES: With that change, any further discussion?

All in favor say aye.

Opposed?

That's recommended for amendment, then.

Next item, Rusty?

MR. MCMAINS: Okay. Page 292 is a letter actually by Justice Hecht. The question being proposed does not require significant alteration. There's a question whether the frivolous appeal sanction may be assessed against the counsel for a party to which the

sanction would apply as well as or perhaps, I guess, in lieu of the party, either one. The question posed by Justice Hecht in his letter. It regards Rule 84. I said 292. It's Justice Hecht's letter. It would be an amendment to Rule 84 and the application-for-writ rule.

We debated this when we did it the first time and I think essentially had concluded not to vote to sanction counsel directly. I must confess that we did that before, of course, we had the Rule 13 stuff and discussions and stuff where we kind of introduced the sanctioning of counsel in the practice.

I have a number of problems with the notion of sanctioning the lawyer at the appellate court level, in the sense that all of a sudden there may be a division of interests between the lawyer and the client with regards to any further proceedings; and, second, that I believe it creates a certain anomaly with regards to how it is one goes about appealing the imposition of such a sanction, if it is done, for instance, at the intermediate-court level. Is the lawyer who is now aggrieved by the judgment of the court of appeals a legitimate appealing party even though he is not a party at any time prior in the proceedings? May he file his own separate motion for rehearing and application for writ? Is it docketed separately? I mean, these are

concerns to me as it happens, if it's done, as to what the remedy of a lawyer is and how that may put him on a different course than the party. And it's Judge Hecht's suggestion or inquiry, so --

CHAIRMAN SOULES: Judge Hecht.

JUSTICE HECHT: Let me give you the context in which this question can arise. I don't remember the specific cases. I know that the discussion has arisen at least two or three times recently. But a good example is a case where an appellant appeals and one of the points raised is the sufficiency of the evidence, but no statement of facts is filed in the case. The court of appeals writes an opinion that says, "There's no statement of facts in this case; therefore, we have to presume that everything is in favor of the judgment. And since there's no other error asserted, we affirm."

Then there's an application for writ of error filed in that case that it's pretty obvious that the party has nothing to do with or it's a technical legal matter as opposed to something that the party might have some specific interest or involvement in. The issue is quite plain, the law is quite plain, and there's just no justification at all for an application of writ of error. And at least it can be arguably said that it's pretty clearly the lawyer doing it.

Query: In those circumstances it is a completely frivolous application for error, but it seems unjust in those circumstances to impose a penalty on the party who probably has no realization of what's happening to him, as opposed to a party who says to his lawyer, "I want you to take this position," and his lawyer says, "I don't think that's a winnable position," and he says, "I want you to take it anyway."

Now, obviously in these circumstances that could be the case. But it seems more likely in those circumstances that the fault is attributable to the lawyer rather than the party.

MR. LOW: Sometimes you get these cases where you really know you're wrong, but you never know exactly what the court's gonna do with the law or something, and lo and behold, the law changes, the lawyer didn't file it and gets sued for malpractice. Same thing where you raise all kinds of points in a criminal case and, you know, the Fifth Circuit had a half-day discussion for that. Because of potential for malpractice, man, you just do it if there's just -- unless it's just -- you just do it. I mean, I hate to see you sanction the lawyer for taking something like that. I mean, the court can rule on it pretty quickly, but the lawyer never knows, the court may change the law or something

and then he hasn't done it. Within a year, they come back and sue him for malpractice. "Well, I didn't think I had a leg to stand on." I don't know. If it's that simple and that quick, it won't take much time for the Supreme Court to take care of it and you're out.

JUSTICE HECHT: Then why should sanctions be permitted against parties?

MR. LOW: In a situation like that, they shouldn't be unless he's done something really wrong. And we don't hold something frivolous because you ask to change the law or something like that. So I'm not much of a sanctions man. But that's just my feeling.

MR. MCMAINS: Again, you know, the whole issue of "Did the lawyer do it, did the party make him do it," whatever, is probably best litigated between the lawyer and the party, which means that you have created a divergence between the lawyer and his client by sanctions against the counsel. And all I'm saying is that I think in a circumstance where there is clear authority to impose sanctions on the party appealing, then if in fact the lawyer did it on his own he's likely to get sued for the sanctions anyway. And that's where they need to be litigating that, as to whether he has liability for having exposed the party to taking positions that are stupid or unprecedented or whatever.

I would prefer to see his liability litigated in a malpractice action, frankly, than summarily adjudicated in a situation where you don't really have any fact-finding inquiry power or record developed at the Supreme Court or appellate court level, from my own personal perspective. That's one of the reasons why we did not, when we imposed the sanction practice into the application-for-writ practice and everything else, why we focused on parties and didn't put the lawyers in there.

CHAIRMAN SOULES: Does anyone want to speak in favor of sanctioning lawyers?

[Laughter]

MR. FULLER: This will be a nonrecord vote.

[Laughter]

MR. MCMAINS: The question is: Do any judges want to speak to sanctions against lawyers?

CHAIRMAN SOULES: Shall we take this vote judges first and then lawyers?

[Laughter]

CHAIRMAN SOULES: I don't mean that it's a matter of humor, but I think we probably --

Does anyone have anything new to put on the table?

MR. FULLER: I think you have a major problem

if you're gonna go this way. I'm not trying to plow the same ground, but I see all kinds of privilege problems that would have to be answered prior to a determination of whether or not the lawyer gave rise to this frivolous appeal or the client did. And as a conflict between the two of them, it's no problem. But until they're offset against each other, I see a real privilege problem of communication and all this. Seems to me like it's opening a real bucket of worms.

CHAIRMAN SOULES: Maybe the only additional thought that I would see is that, of course, the trial court is a fact-finder and maybe before the trial court decides to sanction a lawyer or party there can be some inquiry done at a hearing with notice, even in chambers. And I don't know whether that same procedure is available on appeal, to decide whether it was the lawyer or the party. That would perhaps make a difference between appellate and trial --

MR. FULLER: You know, there's a lot of intermediate courts that refer things back to the trial court for further fact-finding. That's not unheard of.

CHAIRMAN SOULES: Maybe that's the way to handle it.

MR. MCMAINS: But, Judge, again assuming the court of appeals did it, what would the lawyer's rights

be if they wanted to complain about it? I mean, there isn't a cause involving him. He's just kind of drug into the judgment of the court of appeals. And he wasn't a party at any time, wasn't served, anything else. I mean, all he's got is what's in the bare-bones record. He's appearing as counsel. And all of a sudden he's a judgment debtor.

It just, to me, creates very serious conflict problems between the client and the lawyer. He's going to be appealing from the same judgment that he might be appealing on behalf of the client. And it may be not in the client's interest to take a further risk for that matter.

JUSTICE HECHT: Well, it does come up only incidentally. It's before you because the Court asked me to bring it before you.

MR. MCMAINS: I understand that.

JUSTICE HECHT: Lest you think I'm to blame for this.

MR. MCMAINS: No, I'm not --

[Laughter]

JUSTICE HECHT: As I see the faces around the table, I feel constrained to add that comment. But I think the most cogent argument I hear is that it does not come up very often and perhaps the answer is, when

it does come up, it's the burden of the unfortunate litigant who secured those services. But there is the feeling, I know, both on the Supreme Court and the Court of Criminal Appeals, that some cases are patently frivolous, there is the conviction in the minds of the judges that the client is not at fault, this is a clear case of sanctions, but it just does not seem right to sanction the party. But that does not happen very often. It's an unusual case, like the one I cited.

JUDGE ROBERTSON: Nathan, I can remember several years ago, when I first came on the Court, we had a matter similar to this and we referred it to the Grievance Committee.

JUSTICE HECHT: That's an alternative, too. Perhaps that has the advantage that the hearing will develop and the lawyer can make his position known at that time, to the extent that he is able to do that.

MR. LOW: The new canons also make it clear -- I don't know if they're going to pass or not -- that the lawyer is supposed to explain his actions and the consequences and so forth. It goes into pretty much detail. So, if a lawyer follows his ethics, then fine; if he doesn't, then the Grievance Committee ought to bust him.

CHAIRMAN SOULES: Should TRAP Rules 184 and

182 (b) be amended to permit sanctions against lawyers for frivolous appeals? Would those in favor of such change say aye?

Opposed?

I believe the no's have it.

Do you want a show of hands on that?

JUSTICE HECHT: No.

CHAIRMAN SOULES: Seemed pretty one-sided.

JUSTICE HECHT: Clear enough.

CHAIRMAN SOULES: Rusty, the next item.

MR. MCMAINS: In the same letter, really, basically is the inquiry that also was raised, I assume, at the request of the Court, sponsored by Justice Hecht, but --

JUSTICE HECHT: Previously of the Dallas Court of Appeals.

[Laughter]

MR. MCMAINS: Will you entertain a motion to recuse?

[Laughter]

MR. MCMAINS: Which is a question that we wrestled with last time, too, about Rule 90, which is the judgment of the courts of appeals, whether they should be required to deal with factual-sufficiency complaints. As we are consistently bombarded by cases

in which the Court will reverse and not decide those points and the cases get sent back, there is an actual proposed rule on it. We wrestled with proposing the rule. In fact, you may recall that we wrote that rule in at Justice Wallace's request, more or less in his language, and passed it, and it was revoked by the Supreme Court after pressure at the Judicial Conference in Corpus Christi by the appellate judges, I assume, inundating the Supreme Court, saying this was an unwise practice.

CHAIRMAN SOULES: The Supreme Court adopted a rule that takes care of this problem. If they want to go back and adopt it again, it takes care of the problem.

JUSTICE HECHT: I think the Court would like to know from the perception of the committee, without requesting you to do it or not requesting you to do it, lawyers who practice in the appellate courts, do you perceive this to be a problem?

Here's the problem: Generally speaking, the review of the factual sufficiency of the evidence by the Court of Appeals takes some time by that court. And for that reason, if they find a legal reason to adjudicate the case, they sometimes do that rather than pass on this specific point. But the difficulty that presents

is that when the case comes to the Supreme Court, the Court has no choice but to remand that case to the Court of Appeals for further proceedings.

Now, if there were other legal questions that were raised in the Court of Appeals and not ruled on, the Supreme Court can rule on those. Now, it may not be well-advised to if they've not been briefed and argued and presented, but at least it can do so.

And so, query: Is it better-off for the litigants and the lawyers for the Court of Appeals to review the evidence anytime factual sufficiency is raised and say, "Yes, whatever the Supreme Court thinks about our legal basis, this evidence is factually sufficient" or "No, in addition to the other reasons we've given why this case should be reversed, we don't agree with the assessment"?

MR. LOW: Why should the Court of Appeals go through a 4,000-page record when the limitation finding is pretty clear on the law and --

JUSTICE HECHT: Well, Rusty is right. It is very clear from the judges on the Court of Appeals that they don't want to do that. And so I think the question that the Court is seeking counsel on from the committee is: Do the lawyers feel like they ought to do it anyway to save the time and the expense of going back to the

Court of Appeals after --

MR. MCMAINS: Let me amplify another concern I have just from a tactical question of being occasionally aggrieved by courts of appeals and seeking further relief. This can actually cut either way. So long as we have, and I realize it's under reconsideration again, but so long as we have Poole requiring at least in those cases where the Court is going to reverse on factual sufficiency to identify why the evidence is insufficient, explain it and all, that is a fairly arduous process.

On the other hand, I'm absolutely convinced, as I think most appellate practitioners are, that if they could resort to the old practice, they would just throw in the kitchen sink to bolster up their other points for reversal on legal grounds.

So, in truth, the thrust of Poole was to make them go through a lot of hoops if they're going to sustain a factual deficiency, whereas not to have to go through so many if they're going to overrule.

I can see arguments for both sides as to whether or not I want to put that kind of pressure on the Court of Appeals. If they're going to reverse the case anyway, they would like to bolster the reasons they want to do so. They might also be sufficiently

convinced that they're right or just not want to have to go through the process and therefore overrule the factual-sufficiency points summarily, thinking, "I've already given him a reversal, so it doesn't make any difference," and then turn out later on that they are wrong on that point and you've really never gotten very much factual sufficiency review.

CHAIRMAN SOULES: The problem I see with having that requirement, we have a couple of former Court of Appeals briefing attorneys that are now lawyers in our law firm, and our Court of Appeals judges, if you get a chance to talk to them about their business from time to time, they talk about how many appeals they have that are really just poor work products, the briefs are poorly written, the case is hardly even understood, it seems, by the lawyers or the parties. But, you know, they've got to decide the case. They don't have writ-denied power. And, of course, that's a justification for there being a lot of unpublished opinions, which some of us really don't want anyway. And it's a high percentage if you hear it discussed, maybe as high as one in three that's that kind of an appeal. So now we're going to tell the Court, "In that one in three you've got to spend the time to decide factual sufficiency."

And then you've got this other two-thirds that may be more quality-type appeals, but half of those go off on law points. And they really seem plainly to go off on law points. But we tell them, "No, you've got to decide the factual sufficiency in those cases, too."

So now in two out of three cases where factual sufficiency is not under consideration, never should be placed under consideration, we've told all this body of judges that are already, many of them, overworked, "You've got to decide factual sufficiency in those cases." That seems to me to make work that they don't need when balanced against the number of cases that do get remanded from the Supreme Court back to the Court of Appeals for factual-sufficiency findings.

Hadley.

PROFESSOR EDGAR: I'm just trying to sit here and think. Probably over the course of a year, just going through my head, there are probably four or five cases maybe that the Court sends back to the Court of Appeals for unresolved factual-sufficiency points. And it just seems to me that because of that few number counterbalanced against the number of cases in which the courts of appeals would otherwise have to make these sometime laborious decisions, it's really not judicially

efficient. Am I just missing something there or not?

JUSTICE HECHT: I think all the conference wanted to know was what the feeling of lawyers whose cases do have to go back is. Do they feel on balance that the expense to them and the parties ought to be given more consideration in reconsidering this rule that Rusty is quite right was put in last time and the appellate judges screamed, and I was one who screamed, frankly, and the Supreme Court took it out?

PROFESSOR EDGAR: We're only talking about what, maybe four or five cases a year?

JUSTICE HECHT: Yes.

MR. MCMAINS: There are probably what, a thousand applications that are filed?

CHIEF JUSTICE PHILLIPS: Probably 1300.

MR. MCMAINS: Yes. And there are a hundred or so granted or acted upon.

CHAIRMAN SOULES: I can't get decisions out of my court of appeals fast enough, anyway. I don't want to give them extra work. I'm a lawyer who I may get my case remanded back to the court of appeals once in a lifetime, but I have a lot of cases that I need decided in the court of appeals, and I would rather get on with those. Even though one party may suffer some additional expense, a lot of other parties are going to

get their rights determined. Does anyone want to speak contra to that?

MR. HATCHELL: I need a definition of the problem. Because as I read Justice Hecht's letter, we're not debating the problem stated in there. Are we debating the problem of whether or not we force courts of appeals to decide factual sufficiency when factual sufficiency is not material to the judgment or, as stated in the letter, whether or not they need to address it only when they find it is legally sufficient?

Now, on the latter, I'm concerned that I don't know how I raise a standards question if we require them to write on the matter only when they rule one way and not the other.

The second problem is more difficult. And there's bound to be enough people here who remember that the Supreme Court handled this by its own internal operating procedures back in the pre-1970s through, I think, Barber v. Intracoastal Jobbers, in which they merely presumed how the Court of Appeals would rule when they disposed of certain points on appeal. That may not be a satisfactory solution --

MR. FULLER: It's really not.

MR. HATCHELL: -- but that's how it was handled previously. There were, quite frankly, in my

opinion, very good reasons as to why that rule was cast aside. Because the opinion of the Supreme Court may well determine the standards or determine how the facts fit into a legal framework.

MR. MCMAINS: Well, at any rate, my sense of the discussion is such I think that I would move that we not require the consideration of factual sufficiency that is not dispositive of the other issues of the appeal.

CHAIRMAN SOULES: How many agree? Hold your hand.

How many disagree?

Next item.

MR. MCMAINS: Rule 100, which should be about 314 in the book, is a revision -- I assume it's kind of a companion of yours, Luke. I may be wrong.

CHAIRMAN SOULES: Where is it?

MR. MCMAINS: Page 314.

CHAIRMAN SOULES: Thank you.

MR. DAVIS: Luke, could we cover something else on this letter just briefly?

MR. MCMAINS: May be covered later on, but go ahead.

MR. DAVIS: The last request about the Supreme Court fostering rules of professional conduct,

right quickly, y'all may or may not be aware, most everybody knows the Dallas Bar Association has done it, the Houston Bar Association has done it, the Travis County Bar Association is in the process of doing it and whatever they do will be approved by the local trial judges and the Texas Trial Lawyers, and the DRC are in the process of coming out with a professional code of conduct. I would think that if the Supreme Court would do one it would certainly be one, instead of having five or six or seven of them. And having been put out by the Supreme Court, it has a little impetus behind it and it would cover the entire state instead of just various segments of it. I would move that we encourage the Supreme Court to do that.

JUSTICE HECHT: There's been one update since I wrote this letter, and that is that this week, I believe it was, or last week the Supreme Court approved the appointment of a committee on professionalism, the formation of a committee to study the development of guidelines and then just the professionalism problem generally and what are good ways to attack it.

The burden of this question is: Does the committee feel that such guidelines should be incorporated into the Texas Rules of Civil Procedure and perhaps the Appellate Rules or should they be in some

other area, like the Code of Professional Responsibility or just someplace else?

Then the ancillary question is: If they're going to be in the rules, what is the consequence of the breach? Which I think is heavy on the mind of every court that has come to grips with this problem.

As the Northern District of Texas was first concerned with it, they don't want this to just engender more sanctions litigation. We've got too much of that as it is. And while we want to crack down on the perceived problems, we don't want to encourage lawyers to put in every single motion that they file, "and besides that, the other side is being unprofessional" and move for sanctions.

So those are the two issues. Should they go in the rules? Should they provide some sanction power?

As to what rules they should be, hopefully this committee will be working with the various other groups that are considering the guidelines and will come up with maybe some cohesive group of them. But the question here that we need a response to is: Put them in the rules? What power to enforce?

CHAIRMAN SOULES: Ken Fuller.

MR. FULLER: Well, the logical place is not in the rules. I would think in the Code of Professional

Responsibility or Conduct or something. When you're talking about what a lawyer should do ethically and all, that's where people are gonna look for it to begin with. And I think exactly what you're afraid of is going to happen. If you put it in the rules, it's going to be the basis of motions for sanctions and you're going to almost be guilty of malpractice if you don't put it in there and see if you've got a shot at it.

MR. DAVIS: The trial lawyers and the defense lawyers, one of our first problems mentioned was, yes, everybody agreed we ought to have them, everybody agreed we ought to have a joint thing, it would be a good thing to do. But the question was: How do we enforce them?

And I think at least ours were certainly not the final study, but you can't enforce this anyway. You've got to rely on the individual lawyers, you've got to rely on their integrity. And it's kind of a little reminder that you can point out that you didn't do this or didn't do that and therefore we decided just to come out with a code without any attempt or any rules or any regulations of how you reported somebody or how you objected or how you complained, that maybe that could be entertained in the future. But basically you're going to have a hard time enforcing it with rules or sanctions or things of that kind without, as you say, just

generating further and further work.

But the mere fact that the Supreme Court of Texas says to all the lawyers in this room that you should do this or you shouldn't do that, I think, is going to have some force and effect just because that's what the Supreme Court says we ought to do.

CHAIRMAN SOULES: On the question of where, if we put it in the Rules of Civil Procedure, we're going to have to put it in the Rules of Appellate Procedure. We can put it in one place. Criminal cases or whatever. If we write it once and then say that it applies broadly, is that better?

MR. BECK: I think Ken's suggestion is a very good one, because that applies to all lawyers, regardless of the type of practice you have.

CHAIRMAN SOULES: Put it in the Code of Professional Responsibility?

MR. BECK: Exactly.

CHAIRMAN SOULES: All right. How many feel that this, whatever this document is, should be made a part of the Code of Professional Conduct?

PROFESSOR EDGAR: Because it's more than just lawyers trying lawsuits.

CHAIRMAN SOULES: This thing is either going to pass or its predecessor if it doesn't pass. How many

vote for that? All right.

Should there be sanctions beyond the grievance procedures that are there now? I guess all the sanctions there are in that code is the grievance process. How many feel there should be something more? Or who wants to propose?

MR. BECK: I'm not sure what the answer to that question is. My initial inclination is that the grievance procedure ought to be the place to address that. What concerns me is, in this day of increasing legal malpractice cases I'd hate to see allegation after allegation in those kind of cases alleging professional misconduct, because what one lawyer thinks is good advocacy another lawyer thinks is, you know, unprofessional. But I do think that we need some kind of teeth. You cannot just simply encourage lawyers to be professional. The lawyers that are professional, they don't need any encouragement. The ones that need the encouragement are the ones that are going to ignore it unless you have some kind of teeth that you apply. So, whether it's the grievance procedures or something more than that, I submit we've got to have some kind of teeth to get a handle on this lack of professionalism.

CHAIRMAN SOULES: How many at this time, without seeing the text, do you feel prepared to vote on

whether there should be something besides grievance procedures? Who's got a suggestion?

MR. BEARD: What else can you have?

CHAIRMAN SOULES: Are you on this subject, Tom?

MR. DAVIS: Yes.

CHAIRMAN SOULES: Okay. What is it?

MR. DAVIS: I would say first the Supreme Court should come up with a Code of Professional Conduct. I think most of this professional conduct is a step above ethics. I mean, we've got ethics, which is the bottom line. I don't know how many of you have read the substance of these codes, but to me they're a little higher level than what I would say --

CHAIRMAN SOULES: Okay. But we've got to get this agenda going.

MR. DAVIS: What I'm saying is to get the code and get it by the Supreme Court and then worry and consider and think about whether you wanted to put some enforcement proceedings in it other than just the fact the Supreme Court says this is what you ought to do.

CHAIRMAN SOULES: Are you on this point, Buddy?

MR. LOW: On this point, we tried that. When we had the disciplinary rules and then ethical

considerations, that was supposed to be what lawyers ought to be, had no sanctions, nothing. The new code doesn't even have that. It gets nowhere unless it's got some teeth in it. That's what we had that was ideal. Had the canons and the DR, then the ethical situations. The ethical situations meant nothing.

JUSTICE HECHT: Luke, why don't we let the various groups looking at the codes worry about that. Perhaps this group will get a chance to look at it, too.

CHAIRMAN SOULES: How many want to take a look at this whenever there's a draft, hopefully in advance of its being promulgated?

Could we request that, Judge? If it works out, we would like to do it.

Okay, Rusty, I think we're ready for your next item.

MR. MCMAINS: Rule 100 is the motion for rehearing rule that's got the en banc part in it. On Page 314, our current rule has the X'd out portions. All this is is merely an authorization to reconsider en banc the closed amendment, merely authorizes a reconsideration of en banc anytime while there is plenary jurisdiction in the court of appeals, as opposed to within the first 15 days of when the motion is due, and after that it's all school is out. I personally

think the court could probably do it anyway and probably has. There are probably courts of appeals that have done it anyway as an inherent power. And I don't see any reason why we shouldn't conform the rules to what is probably the power of the court of appeals. I would move the adoption of that.

CHAIRMAN SOULES: Any discussion?

All in favor say aye.

Opposed?

Okay. That's unanimously recommended for amendment.

Next item, Rusty.

MR. MCMAINS: All right.

The next one is Rule 121, which is our original proceedings rule. And it's at 319, I believe. Once again the committee is petitioned to change the classification of original proceedings so that the judge's name does not appear to be the party that is under attack, that he is only a nominal party, and that the real parties in interest should be the ones that are bearing the brunt of the caption. Obviously for fear of political reprisal or whatever, the judges do not like the fact that they appear to be parties in Supreme Court cases or courts of appeals cases, either one. The rule accomplishes that. It's fine. I mean, I have no

problem with the rule itself if that's what the committee wants to do. We've voted on that five or six times I can recollect. We've always voted it down.

JUSTICE HECHT: We should ask David Peeples what he thinks about that.

CHAIRMAN SOULES: The discussion that came wasn't just from -- as I recall our discussion previously, it was not only that the judges didn't want to get sued as such but there was some discussion by lawyers that they would be more comfortable if they were taking mandamus proceedings up, you know, Exxon v. IBM instead of Exxon v. Judge Lawrence. And so they're not really suing the judge in an original proceeding on appeal. And that got some interest. But it never did get enough interest to change the rule. The fact that we haven't done it before doesn't mean we shouldn't do it now.

MR. MCMAINS: I understand. We've had hot and heated discussions about it before.

CHAIRMAN SOULES: Why don't we give this a few minutes. If anybody has got a position on it, let's hear it.

MR. FULLER: Theoretically, you know, you're mandamusing for a nonjudicial function. For myself, I don't have a problem. My judges, we love each other

and all that, but I'm in favor of keeping it like it is. Due to the theory of the thing on mandamus, you're not mandamusing them to carry out a judicial function, you're mandamusing them to do something they should have done sort of slam dunk, dead meat. If you're wrong, you're wrong.

MR. BEARD: The sheriff, the district attorney --

JUDGE RIVERA: I really don't have an opinion one way or the other, but I can show you an example of some confusion. I got an order from the Supreme Court. It wasn't me, but the judge didn't give them a jury. It was less than 30 days, they mandamused him. He's not a judge anymore. But it was in my court. They sent me a letter saying, "We obeyed everything; don't do anything." And we didn't know what case they were talking about because it said "Against Judge So-and-so." We were going to try, but we didn't know which one.

CHAIRMAN SOULES: Had to call the parties to find out who was suing you, huh?

MR. MCMAINS: Just as an observation, frankly, because of the fact that the district judges don't like being named has a tendency, in my judgment, by and large, to discourage litigants from doing it. And so I really think that to the extent that you have

any idea that you want to keep mandamus litigation down when you take the judge's name out, you encourage the litigants to take it up. And just from a pure pragmatic standpoint, I think the fact that it is distasteful to the judges is somewhat of a control over the lawyers' use of it, as a totally independent reason.

PROFESSOR DORSANEO: Well, at the COAJ level -- and Judge Pemberton asked me to make some COAJ points in his absence -- there was considerable discussion about the misperception by the community and the press as to what really is going on in some communities. And part of the idea was not so much to protect judges from having their feelings hurt but just to make sure that the people in the community don't really think that there's something else going on other than a controversy about whether or not there's been a wrong legal ruling that amounts to an abuse of discretion.

CHAIRMAN SOULES: Anyone else?

How many feel that these Rule 121 changes should be recommended as amendments to the Supreme Court?

How many feel they should not be?

Okay. Unanimously no change there.

Next, Rusty.

MR. MCMAINS: The next one is Rule 123, which is on Page 324. Actually, the rule itself is on Page 326. This is simply a rule for frivolous original proceedings, which we don't exactly cover. It's a proposal to add a rule for original frivolous proceedings that we don't currently have any ostensible jurisdiction for. And my personal opinion is, if we're going to have frivolous appeals, we ought to be able to have frivolous original proceedings as well.

[Laughter]

CHAIRMAN SOULES: And sanction them both?

MR. MCMAINS: Yeah. If you're going to sanction the one, you might as well sanction the other.

CHAIRMAN SOULES: Look, this is 20 times filing fees. This is not going to sting anybody very bad anyway, what's being proposed here.

Judge Brown wants to at least be able to say something to people that keep kicking mandamuses into the courts of appeals, break a trial and that sort of thing.

Broadus Spivey.

MR. SPIVEY: Can anybody tell us what level of problem this rises to?

JUSTICE HECHT: About the same level as frivolous appeals. I mean, maybe not quite as high.

CHIEF JUSTICE PHILLIPS: Well, I don't know.

JUSTICE HECHT: I'd say about the same. You get about as many, percentagewise. I don't mean number-wise. But I would say the percentages of original proceedings where you're tempted to impose sanctions is about the same as the percentage of appeals. That's my own view of it. I haven't studied it.

CHAIRMAN SOULES: How many favor 123? Hands up.

How many are opposed? Nine are opposed.

PROFESSOR EDGAR: Three not voting.

CHAIRMAN SOULES: How many in favor? We ought to vote on this. Everybody ought to vote.

Nine opposed, nine for.

The chair votes to have a Rule 123.

PROFESSOR EDGAR: We've rejected it?

MR. BEARD: Luke, I want a recount. Because I didn't get what you were doing last time. I'm voting against that and I didn't have my hand up.

CHAIRMAN SOULES: Okay. Let's take a recount.

Is there anybody who did vote -- if you don't vote, you can't move for a recount. What the hell?

[Laughter]

CHAIRMAN SOULES: Come on!

MR. BEARD: I misunderstood how you were doing it. Restate it.

CHAIRMAN SOULES: Okay. This is to provide for some sanction against a party who takes a frivolous mandamus or files a frivolous original proceeding in appellate courts. Because that's not a frivolous appeal. And the frivolous appeal rule is there but it doesn't reach original proceedings on appeal. That's what this is for.

How many are in favor of such sanctions as those provided in Rule 123, this proposal on 326? Those in favor show hands.

Ten for.

How many are opposed to this change?

Twelve against. So it is recommended against, 12 to 10.

Next item, Rusty.

MR. MCMAINS: The next rule that's listed, again there is not per se a proposal. This arises out of the same letter we talked about earlier that's reproduced at Page 327. This talks about the problem that came up recently in the Supreme Court with regards to whether or not there was anything that needed to be done with regards to a motion for rehearing that is pending, in the meantime an application for writ is

filed by another party who has already gotten his motion for rehearing acted upon, and whether or not there's anything that needs to be fixed in the rule about that.

The Court didn't have any problem, frankly, in that -- I say didn't have any problem. I mean they had to go through a mandamus procedure. But the Court found that the Court of Appeals had to act on the motion for rehearing, because it was necessary for that party in order to pursue its application for writ, and so they essentially abated the proceedings in the Supreme Court while the Court of Appeals was supposed to be acting on motion for rehearing, the problem coming, of course, in the fact that there's a time spread in these things.

My personal judgment is that the rule itself doesn't need fixing, because it says that your time for filing an application is 30 days after a motion for rehearing by any party, you know, by all parties, is overruled.

JUSTICE HECHT: The problem is, the Court of Appeals granted it.

MR. MCMAINS: This Court of Appeals sent it on, I understand.

JUSTICE HECHT: No, they granted it. The Court of Appeals granted the motion for rehearing. Now you've got an application for writ of error pending,

then the Court of Appeals saying, "We're going to grant this motion for rehearing."

MR. MCMAINS: I understand that. The point is, if the Court of Appeals has jurisdiction, which I think they probably do, they have jurisdiction probably of the whole case. It's a substantive question of what the Court of Appeals -- if they have jurisdiction to rule, they have jurisdiction to rule either way. And that does have the problem, then, of: Where are you with regard to the other parties when you have already granted writ on the other party?

Now, all I was going to say is that it seems to me that a lot of that problem to some extent can be solved if we can draft a rule that the clerk not forward any applications for writ of error, if you choose to file one within your own time period, until all motions are disposed of. That should solve the problem of getting there at different times, at least. And they'll have already done everything. It's not that jurisdiction won't have attached, but you won't see it physically, it won't be docketed until they've done something.

CHAIRMAN SOULES: Okay, Rusty. We'll table this till tomorrow. Let me just get something in writing.

PROFESSOR EDGAR: It seems to me, as I recall, this problem has only arisen three or four times within the history of jurisprudence in this state. I think the Court has already handled this substantively by the writ of prohibition and mandamus that had issued in that case after that. I might be wrong. But I don't know why we need a rule of procedure on this.

CHAIRMAN SOULES: Well, except that two justices on the Supreme Court were nodding favorably towards and there may be something that Rusty may bring in --

JUSTICE HECHT: The majority of the Court would like to have a rule to keep this from happening, because while it has only happened a couple of times, there's no assurance it's not going to keep happening. It has not been handled well when it happened.

MR. HATCHELL: It's a much larger problem out there which I don't want to address that this is merely a part of the whole concept of premature applications for writ of error which is impacted by a number of decisions. It desperately needs to be taken care of.

CHAIRMAN SOULES: This particular problem right here?

MR. HATCHELL: Yes.

CHAIRMAN SOULES: Mike, will you get with

Rusty overnight to try to get something up? If it can be fixed easily, we'll take care of it. If not, we'll put it off till another meeting. We'll take a look at TRAP Rule 130 tomorrow.

Next item, Rusty.

MR. MCMAINS: The next proposal is at 338, I believe, which, frankly, I didn't have this in my own stuff. It says "take out." I'm not sure what. That's what is written on our agenda book.

CHAIRMAN SOULES: That's my handwriting, but --

[Laughter]

MR. MCMAINS: It didn't get taken out, so -- Basically all this is is trying to reword the writ-denied practice. And frankly what we did when we wrote this rule the first time, 131, we copied the statute. So that's probably the reason you may have said "take it out." I'm reluctant to write a rule that is different from the statute.

PROFESSOR DORSANEO: I just copied the statute the last time around.

MR. MCMAINS: There's really no substantive difference anyway.

JUSTICE HECHT: This change has already been made, I think.

MR. MCMAINS: Some of the changes I think grammatically were made.

CHAIRMAN SOULES: Maybe that's why I said "take it out."

JUSTICE HECHT: All these changes have been made, I think.

MR. HUGHES: Go to the next one.

MR. MCMAINS: Moot point. Okay.

The next one is with regards to Rule 136, appears on Page 342. That is the burning question among prevailing parties in the courts of appeals as to whether or not they're going to have the time limits imposed about filing an answer to an application for a writ of error. That is, they've only got a 15-day leeway within which to file a motion. And whether or not otherwise they just don't have a right to file an answer after that period of time. At least, that's the implication from the proposed amendment.

Historically -- and the Court can correct me if I'm wrong -- basically the Court accepts an answer to an application for writ frequently without motion and without regard to whether or not there is any reason or it's just that nobody got around to doing it until a later time. And so they are kind of briefing in a vacuum.

We wrote the rule for the first time and basically suggested that there was even a motion practice available the last time and thus implied, at least, that maybe they ought to get them on file on time. But it still had been a practice for a long time that they still accept them late without really even ruling on motions.

I have no problem with recommending this rule and applying it to answers the same way it applies to any other brief unless the Court thinks that the filing of those motions is going to take up an awful lot of its time, you know, ruling on the motions. That's my only real question.

CHAIRMAN SOULES: This says (c). Why is that (c)?

MR. MCMAINS: Meant to be (g).

CHAIRMAN SOULES: What would it be, a new (g)? And old (g) would become (h)?

MR. BEARD: Unless the court wants it that way, why shouldn't they take a brief from the appellee anytime?

CHAIRMAN SOULES: I remember a long time ago when that was what they said, if they could get a respondent's brief, it would help them. There's no requirement to respond. And the feeling of the Court

some years ago was: If they got it, it was helpful. And they would just take it when they got it, since nobody had to file one anyway.

MR. BEARD: Why shouldn't we continue that practice?

CHAIRMAN SOULES: Motion is: No change.

MR. HATCHELL: Wait, wait. I am all for the Court continuing its practice of receiving responses anytime anybody wants to send them in. But after City of Austin v. Davis, the response is much, much more important in terms of these idiotic cross-points that you have to raise to raise theories and not points. If somebody is going to all of a sudden complain in the Supreme Court that "I can't bring forth a City of Austin v. Davis thing unless I've institutionalized it in here, then we need to know that. City of Austin v. Davis just creates havoc.

PROFESSOR DORSANEO: The thing that strikes me is that this "not later than 15 days after the last date of filing" is a limitation that doesn't need to be there. Lawyers have asked me can they get an extension of time for briefs in response? And I've told them, "Well, you probably don't even need to," et cetera. But they're uncomfortable without having some guidance in the rules suggesting that there's some sort of

lenient practice in the law. So I would be in favor of some kind of a (g), but I don't see why there has to be any kind of arguably subject to interpretation of the jurisdictional limitation like the Click limitation built into it. That's not the case in the briefs that are filed in the courts of appeals. There's no time frame required for motions to extend with respect to them.

MR. MCMAINS: But there is already, though, the requirement in the rules. I mean, it does already have a time requirement and does not --

PROFESSOR DORSANEO: But this is another time requirement on getting an extension.

MR. MCMAINS: I understand that. The point is that there's no teeth in the current rule. That's the point. As you say, there's nothing jurisdictional about it. The court always takes it, doesn't deny anybody the right to argue.

Now, the other alternative is that you could just kind of leave it open-ended in terms of requesting the extension. But you could say, "If you don't file it timely, you don't have a right to argue." That might be enough to encourage people, which is what happens in the court of appeals.

MR. BEARD: My motion is to leave it like it

is.

CHAIRMAN SOULES: State your concern in response to that. Then we'll vote.

MR. HATCHELL: Now a response can become a jurisdictional document.

MR. BEARD: I don't understand that.

MR. HATCHELL: It's a long story.

PROFESSOR DORSANEO: It's hard to explain.

CHAIRMAN SOULES: All right.

The motion is that we not change Rule 136. Is there any further discussion?

How many for not changing it?

How many want the change?

Okay. "No change" is the majority.

Next item, Rusty.

MR. MCMAINS: We've actually already dealt with Rule 182. That was the same imposition that we did in 184.

The last one is Rule 190, Page 359. It addresses the point that there really isn't or arguably isn't a rule allowing extension for time to file a motion for rehearing in the Supreme Court. And this is a proposal to supply such a rule. I don't see, really, any reason why we don't have an extension of time there. We have it everywhere else, including the motions for

rehearing in the courts of appeal. I see no reason not to go ahead and incorporate it. I think the court in fact has on occasion entertained such, but they've just kind of done it on an inherent powers kind of theory.

CHAIRMAN SOULES: This takes Click to the Supreme Court as well as the courts of appeal?

MR. MCMAINS: Really there is no affirmative authorization.

MR. HATCHELL: There's no rule right now.

MR. MCMAINS: There isn't any rule right now authorizing an extension of time. This is one that we didn't have.

CHAIRMAN SOULES: You recommend this be passed by the Supreme Court?

MR. MCMAINS: I recommend at least the 15 days, something authorizing at least 15 days.

CHAIRMAN SOULES: Any discussion?

Those recommending amendment say aye.

Opposed?

Unanimously recommended for amendment. That's on Page 359.

MR. MCMAINS: Okay. That's it.

CHAIRMAN SOULES: Okay.

I passed out some handouts. These may go fast or they may go slow, but they're cosmetic. We had

the Bar make 40 sets. I hope we've got enough of them out. You may have to share. Here are some more. It's a handout that was just passed out. This size.

The first one says "When an appeal or original proceeding is filed, copies of the court's local rules" -- the Court of Appeals' local rules -- "shall be provided to all counsel of record."

Any problem with that? All in favor say aye.

JUSTICE HECHT: There is a technical matter there, Luke.

CHAIRMAN SOULES: All right.

JUSTICE HECHT: The caption of that rule has never been adopted.

MR. FULLER: There's another problem also.

JUSTICE HECHT: Supplied by the West editors.

CHAIRMAN SOULES: I'll add it in.

MR. FULLER: My question is this. You file it and it gets transferred to Waco. How about Waco's local rules?

CHAIRMAN SOULES: How about when an appeal or original proceeding is docketed?

MR. FULLER: You need something to cure the transfer to the new court.

CHAIRMAN SOULES: Then it would be docketed in the new court when an appeal or original proceeding

is docketed.

CHIEF JUSTICE PHILLIPS: Can I make a comment about this? What happens when you've finished with your book and you want to sell it? Your 20,000 potential purchasers. Isn't that going to cut into that?

CHAIRMAN SOULES: This is courts of appeal.

CHIEF JUSTICE PHILLIPS: Oh. I shouldn't have spoken.

CHAIRMAN SOULES: We need to get that straightened out. Then we can probably take this out again.

MR. FULLER: Those Volume 2.

[Laughter]

CHAIRMAN SOULES: I want to say that "When an appeal or original proceeding is docketed, the clerk shall" --

MR. FULLER: "Of the court in which such case is docketed."

CHAIRMAN SOULES: -- "shall mail" --

PROFESSOR DORSANEO: What other clerk would do it?

CHAIRMAN SOULES: Okay. "The clerk shall mail a copy of the court's local rules to all counsel of record." Any objection to those changes?

Next --

PROFESSOR DORSANEO: Looks like you took the stuff out of (a) that was already in (g).

CHAIRMAN SOULES: That's a redundancy that was taken out of (a). It's already in (g). And the "on or before" thing is getting fixed.

PROFESSOR DORSANEO: And unless I'm losing my mind here, this is an alternative proposal on the third page. Once you do "on or before," you don't need "when the date of filing falls on a Saturday, Sunday or legal holiday."

CHAIRMAN SOULES: "Last day for filing same is extended."

PROFESSOR DORSANEO: It's not necessary. Right?

CHAIRMAN SOULES: It's not necessary. So take "as extended" and so forth out.

PROFESSOR DORSANEO: Take the whole thing out. You don't need it. That's what's the beauty of that other change. It makes that complexity unnecessary.

CHAIRMAN SOULES: So after the "on" in brackets on the first page of this TRAP 4, four lines up, we would also put in "on or before." Then this underscored language on the second page would not be necessary. And delete that redundancy. All in favor

say aye.

Next is to TRAP 17. It's just a typo that has been in the rule, but the only way you can get it out is to amend the rule.

All in favor say aye.

JUDGE RIVERA: On the second line, the middle word, "teste," is that our typo?

CHAIRMAN SOULES: Where the hell did that come from? I don't know. The Chief may want to comment on that.

Well, if you don't like it, we're going to have to change it, because that's the way it is in the rule right now.

Next is TRAP 20. Just sets the number of pages on the amicus brief.

PROFESSOR EDGAR: Wait. I don't mean to be facetious, but what are you going to do with this teste here on Appellate Rule 17?

CHAIRMAN SOULES: Why don't you give us something tomorrow on it? It's in the rule right now.

PROFESSOR EDGAR: That's what it says in the rule right now.

PROFESSOR DORSANEO: It means stamp.

CHAIRMAN SOULES: It means stamp.

MR. BECK: Maybe we ought to get a dictionary

and find out what it means.

CHAIRMAN SOULES: It means stamp. Anybody wants to change that, give us a word overnight and explain it and we'll go back to it.

TRAP 20 sets the limit on the brief pages of amicus. Any objection to that?

Hearing none, TRAP 20 is unanimously approved.

TRAP 41. This was just nonsense. "Deemed to have been filed on the date of but subsequent to the date of." You can't have it on the date of and subsequent to the date of, so we changed "date" to "time." Any objection?

There being none, it stands unanimously approved.

TRAP 43. That's to pick up 47 and 49 at the point where they should be.

MR. FULLER: You added an "s," too, did you not?

CHAIRMAN SOULES: To "order," that's right. Any objection?

There being none --

PROFESSOR DORSANEO: 43?

CHAIRMAN SOULES: 43.

PROFESSOR DORSANEO: I'm wondering about

"proceedings." I don't know if I have a better word. "Protected by supersedeas or other" --

CHAIRMAN SOULES: We'll take "proceedings" out and add "orders pursuant to Rules 47 or 49." Any objection?

Being none, it stands unanimously approved.

TRAP 47. "Child" to "minor," which I think is a word with more legal meaning. Any objection?

Being none, it stands unanimously approved.

Rule 56. Just grammatical changes. "The clerk." Some gender correction.

MR. MCMAINS: You're on 56?

CHAIRMAN SOULES: Yes.

MR. MCMAINS: The last change on the page is opposite of what it should be.

CHAIRMAN SOULES: "It is not amended." All right. With that insertion, is there any objection?

Being none, it is approved.

Rusty, I might get you to proof these overnight, too, just in case there's something like that elsewhere.

Now, Rule 57 --

PROFESSOR EDGAR: In the second line of (b), you say "he." That should be "he or she." You forgot to add the feminine gender to the "he" there, if that's

what you're trying to do.

CHAIRMAN SOULES: Okay.

Any objection to 57?

JUDGE CLINTON: Why do you do all that? Isn't there a general rule that says "his" means "hers"?

PROFESSOR DORSANEO: But it's very unpopular in certain quarters.

JUDGE CLINTON: It also gets very handy, though, when you do this sort of thing.

CHAIRMAN SOULES: 59 is again a gender correction. Any objection?

Being none, it stands unanimously approved.

72. Any objection to that?

82a.

PROFESSOR DORSANEO: The third line from the bottom, "ordering the clerk of the court of appeals to notify."

CHAIRMAN SOULES: Yes. "Ordering the clerk of the court of appeals to notify."

PROFESSOR EDGAR: I haven't had time to read this whole rule. You just added something to it. What did you add?

CHAIRMAN SOULES: In the third from the bottom line, "court of appeals shall," change "shall," and substitute "to."

MR. FULLER: 82a is totally a new rule. He's asking why.

CHAIRMAN SOULES: The reason for this is that if a plaintiff wins a verdict and gets a judgment, then that plaintiff can abstract and execute in the absence of supersedeas. The plaintiff wins a verdict, gets NOV'd. The court of appeals reverses and renders on the verdict. The plaintiff is in limbo. Can't abstract, can't execute. No supersedeas is necessary. But the plaintiff has got the judgment that the plaintiff should have gotten from the trial court and has no protections whatsoever.

Now, we've got 47 and 49 for crafting supersedeas relief to somebody who may be entitled to it. What this does is it gives that judgment rendered by the court of appeals the same protection that it would have had if it had been given by the trial court in terms of abstract -- you can't even abstract. When the court of appeals renders judgment, the trial clerk, the district clerk, won't even abstract that judgment.

MR. MCMAINS: The problem I have with it, Luke, this changes the entire notion of what the function of the mandate is. Because the entire motion in appellate procedure is the judgment of the trial court always remains until the mandate issues. The only

judgment that is ever enforceable is the trial-court judgment until the mandate issues by the appellate court that substitutes its judgment for the trial-court judgment.

CHAIRMAN SOULES: Exactly. This changes it.

MR. MCMAINS: I know. What you're doing is you are saying mandate practice is irrelevant. And one of the problems is that this rule arguably, on its face, requires that while the court of appeals still has jurisdiction even to change its own judgment, you can go out and start collecting on the judgment, whereas we had those protections in the trial court. As long as the trial court has got plenary jurisdiction, you don't start enforcing judgments, because it's subject to modification and review at least at that level. And there isn't any protection in this rule at all. This rule says the court gives notice to the clerk and you can go out and start abstracting. Then where do you go for supersedeas of that if you want to try and take advantage of the supersedeas rule?

CHAIRMAN SOULES: 47 and 49 take care of that. The trial court maintains jurisdiction of that supersedeas all along.

MR. MCMAINS: But that forces problems on the appellate courts to start enforcing --

PROFESSOR EDGAR: This is a substantive change in the practice.

CHAIRMAN SOULES: This changes the practice.

PROFESSOR EDGAR: It's a big change, though, because observance of mandate by the appellate court is what the clerk has to obey.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: That's the way it is now. And I'm not sure that that isn't a good practice.

CHAIRMAN SOULES: Well, how is the judgment holder protected, the winning party protected, without this?

PROFESSOR EDGAR: Well, he's not protected until mandate issues. And mandate may not issue until -- assume this case then goes to the Supreme Court.

CHAIRMAN SOULES: In the past, we didn't have any way to get supersedeas at this stage. We have a way to get supersedeas at this stage now.

MR. MCMAINS: But that's not the reason that it was there. That's not the sole reason. The lack of supersedeas is not the sole reason it was there. I mean, judgment at the trial court at the philosophical level has always remained the judgment until such time as the mandate of the court issues. That's the federal

practice, it's our practice. There isn't anything that happens in between. Nobody enforces an intermediate judgment.

CHAIRMAN SOULES: Should it be that way?

PROFESSOR EDGAR: I don't think so. I think the present practice is adequate.

CHAIRMAN SOULES: How is it adequate to protect the judgment winner in the court of appeals? It's not.

PROFESSOR EDGAR: I'm not sure that's all bad. That's what I'm saying. That mandate is what gives life to that trial-court judgment in the event of a reversal on appeal. And it's the trial-court judgment upon which you levy execution.

CHAIRMAN SOULES: That's the way it is right now.

PROFESSOR EDGAR: I understand.

CHAIRMAN SOULES: But that judgment creditor -- now he's a judgment creditor as a result of the court of appeals signing a judgment -- has no protection when the rules would give it if this rule is passed.

MR. HATCHELL: Luke, if I'm a defendant that's successful in a $50 million lawsuit in the court of appeals, do I get off my supersedeas bond?

MR. MCMAINS: I don't think there's any provision at all in the rule for that. It's not contemplated.

MR. HATCHELL: It's got to work both ways under your theory.

MR. FULLER: If you get affirmed, you're protected. But if you get a reversal, you're not.

CHAIRMAN SOULES: That's right.

MR. FULLER: Let's say you had a cross-action below and you got poured out in the trial level but you come along at the appellate level and they said, "Shoot, he should have won." You sit there and watch your assets waste while you're going up on appeal.

JUSTICE HECHT: Isn't this covered in 87 (a)?

CHAIRMAN SOULES: TRAP 87 (a)?

JUSTICE HECHT: "When the judgment of the appellate court affirms the judgment of the trial court or modifies the judgment of the trial court as is contemplated by Rule 80 (b), or renders such judgment as the court below should have rendered as contemplated by Rule 81 (c), the trial court need not make any further order or decree and the clerk of the trial court shall proceed to issue execution thereon as in other cases."

CHAIRMAN SOULES: That's affirms.

JUSTICE HECHT: No. That's if it modifies or renders such as should have been rendered.

MR. MCMAINS: But that's enforcement after the mandate. The point is that you never issue a mandate until it's all over. He's trying to change that.

JUSTICE HECHT: Changing it to be broader than that. All right.

CHAIRMAN SOULES: To provide that whatever the court of appeals -- the plenary aspect of it is not -- I haven't got that covered here. But what is covered is that if there's a, say, favorable verdict to a plaintiff NOV, the court of appeals comes and grants judgment on that verdict, then we can write that in and it becomes final. Plenary jurisdiction of the court of appeals is concluded. Then that judgment in the court of appeals in favor of the plaintiff on the verdict is a judgment and it must be either superseded or the plaintiff can start collecting on it. At his peril. Just like he had gotten a judgment in the trial court. That's what this does.

MR. FULLER: He ought to be able to protect the collectability of his judgment.

CHAIRMAN SOULES: Right now the winner in the court of appeals cannot protect the collectability of

his judgment. They can waste all the assets while it's going up on appeal, do anything they want to do. You can't capture anything. That's what this is aimed at.

MR. FULLER: You need a remedy.

PROFESSOR DORSANEO: Let's pass it.

CHAIRMAN SOULES: Let's pass this until tomorrow.

MR. FULLER: You had a suggestion down here, Luke. Somebody might have had a solution.

PROFESSOR CARLSON: I think there's a split of authority on whether the appellate courts can issue injunction to protect the jurisdiction if there's a wasting under that scenario, some of their effort to undermine jurisdiction.

MR. FULLER: That's to protect the jurisdiction, though.

CHAIRMAN SOULES: That's right. Let's look at that again tomorrow, because that is a substantive change, not cosmetic like the rest of these, I think.

90. Brief memorandum opinion. "Mandated" which should be "published." I don't know whether that needs to be mandatory or not. The standards to publish are in (c), they don't need to be in (a), as Sarah is pointing out here, and in (d).

And the changes in (h) conform the rule to

the writ denied.

MR. SPIVEY: I know you don't have anything noted on 90 (c), but have you not heard any complaints around the state about selection of cases for nonpublishing?

CHAIRMAN SOULES: Oh, yes.

MR. SPIVEY: I've heard a tremendous amount of complaints. And I'm surprised we haven't gotten letters. At least, I haven't gotten copies of letters.

CHAIRMAN SOULES: Everybody has given up on it, Broadus.

MR. SPIVEY: Is it not on the table for consideration?

CHAIRMAN SOULES: If you'll let me put it at the bottom of the agenda -- we've discussed it, I guess, at every one of these meetings that I've been to in several years, and we've never been able to get anywhere with it. To cause all to be published?

MR. SPIVEY: Yes. I wish you would put it at the end of the agenda. As fast as you're moving, we'll get to it.

CHAIRMAN SOULES: Okay.

JUDGE ROBERTSON: Can you amend that also when you have a partial publication and a partial not publication of an opinion on the end of your agenda?

CHAIRMAN SOULES: Okay. I've never heard of that. I'm anxious to see that.

MR. MCMAINS: Why don't we give the Supreme Court editorial power?

CHAIRMAN SOULES: We'll make a note to discuss that at the end of the agenda.

CHIEF JUSTICE PHILLIPS: These standards are as detailed as you can make them. And they're clearly not being consistently followed by the Court of Appeals. I don't know any solution other than to order everything published, which would vastly increase the expenses of the reporter. Or have some central committee like the chief justices of the courts of appeal meet once a month and decide whether to publish or not. Our Court does not want that responsibility, I don't think.

CHAIRMAN SOULES: That's the problem, is making it work. That's why we spent a lot of time, Judge, and why I'm not getting into it now. If we've got time, we can do it at the end.

MR. FULLER: The lawyers are getting unhappy. They're going to go to the Legislature and get a statute that says you publish if you don't get something that will satisfy them.

JUDGE CLINTON: Says you do publish it?

MR. FULLER: If they can't get satisfaction

through the rule-making authority to get these opinions published, something to screen them better, something to keep them happy, they're going to go to the Legislature. It's going to happen.

CHIEF JUSTICE PHILLIPS: It was Judge Robertson's suggestion that if you publish any of them, you've got to publish all. Would you put whether or not the Supreme Court should publish an opinion ---

CHAIRMAN SOULES: Should order an unpublished opinion published --

CHIEF JUSTICE PHILLIPS: When we grant writ of error.

CHAIRMAN SOULES: The granting of a writ of error shall cause.

CHIEF JUSTICE PHILLIPS: We would like your advice on it. The Court has no consistent policy.

PROFESSOR EDGAR: Judge Phillips, when you grant a writ, you're normally going to change the court of appeals opinion anyway.

CHIEF JUSTICE PHILLIPS: Frequently those opinions have a broader discussion of history. Frequently they have some points discussed we don't reach.

PROFESSOR EDGAR: You're right.

CHIEF JUSTICE PHILLIPS: And somebody who

wants to trace the history of the case has a big missing gap there.

CHAIRMAN SOULES: Is the consensus of this committee that the granting of a writ of error on a case should cause the case to be published?

MR. SPIVEY: I would request the chair to reserve that until we discuss (c) itself.

CHIEF JUSTICE PHILLIPS: That was my request, that we put it at the end.

MR. SPIVEY: I would really like to discuss this in depth.

CHAIRMAN SOULES: Good idea. Thank you.

Rule 91. Any opposition?

Being none, it's unanimously recommended.

Rule 90. Is there any opposition to that?

Being none, it's approved.

130. Twelve copies of the application. Any opposition to that?

CHIEF JUSTICE PHILLIPS: What's in effect? Are you going from 12 to 1?

CHAIRMAN SOULES: It's Rule 130. Apparently it doesn't say how many copies to file.

CHIEF JUSTICE PHILLIPS: Okay. We're adding to make it clear?

CHAIRMAN SOULES: To make it clear that you

file 12 copies.

MS. DUNCAN: It's in the preliminary rules.

PROFESSOR EDGAR: It's somewhere, Luke.

JUDGE CLINTON: Doesn't Rule 4 tell you the number of copies?

MR. FULLER: But they're saying "Say it here, too," Judge, so people will pick it up.

JUDGE CLINTON: That's exactly why Rule 4 was written, so it would cover everything.

CHAIRMAN SOULES: Any opposition to Rule 130?

Being none, it stands changed.

Grammatical change in 133. Any opposition?

It's approved.

134. Again trying to get the denial rather than NRE. Any opposition?

Rule 134 changes are approved.

135, the same. No opposition?

It's approved.

Section 10 just changes the caption. Any opposition?

It's approved.

1160. Twelve copies again.

PROFESSOR DORSANEO: 160.

CHAIRMAN SOULES: It's 160. Any opposition?

It's approved.

And then the captions in 12, 13, 14 and 18. Any opposition?

They're all approved.

I believe that takes care of the appellate rules.

Does anyone else have anything?

JUDGE ROBERTSON: Luke, on 135, notify the parties of record by letter?

CHAIRMAN SOULES: Let me catch up with my bookkeeping, Judge, and I'll get right to you.

135?

JUDGE ROBERTSON: Yes. By letter. Would that mean they can't notify you by postcard?

PROFESSOR DORSANEO: Yes, it does.

CHAIRMAN SOULES: Where is it, Judge? 135. The parties or their attorneys of record by mail?

JUDGE ROBERTSON: Yes.

PROFESSOR DORSANEO: We have voted on this lots of times. Many appellate lawyers say they want to get a letter because the postcard gets thrown in the trash.

MR. FULLER: They get lost. They really do.

PROFESSOR DORSANEO: I don't throw my postcards away, but there's substantial sentiment for putting it "by letter." It's not just a different way

of saying "by mail."

CHAIRMAN SOULES: Okay. Any opposition to just leaving that alone the way it is now?

Okay. Leave it alone.

PROFESSOR EDGAR: Luke, I want to go back to Rule 130, talking about the number of copies, 12 copies.

Now look at Rule 4 (c) (2). That tells us 12 copies. Do you want it in two places?

MR. HUGHES: Call attention to it.

PROFESSOR EDGAR: I was just asking: Did you want it in two places?

CHAIRMAN SOULES: Yes. This is repeated through the Court of Appeals rules, but not through the Supreme Court rules. We added it so somebody doesn't slip up.

David Beck.

MR. BECK: Rule 54 (b) of the Rules of Appellate Procedure appears to be a housekeeping matter. Although I don't do criminal work, it appears that the Court of Criminal Appeals changed the timetable under 54 (b), but the Supreme Court has a different rule. One says 100 days, another says 120. So I think we need to straighten it out.

CHAIRMAN SOULES: What page?

MR. BECK: 593.

JUDGE CLINTON: Let me explain that. The Supreme Court changed its rule, so we got caught up. We said, "All right, we don't want 120 days, or whatever it is, because that just further delays the processing of these criminal cases and that's what the press and the public is bitching about." But in the interest of uniformity, we changed ours. And then you folks now have to change your version of ours, is what it boils down to. And I've said to Justice Hecht, "I hope that we can do these things side by side rather than 'you first; no, me first, Alfonse, Gaston,' that sort of thing." We're going to try to do that.

CHAIRMAN SOULES: The January 1, 1988, rule changes to the Texas Rules of Appellate Procedure were the first rules changes made to the Texas Rules of Appellate Procedure after they were jointly adopted by both courts. And there was no mechanism for putting the two courts together to get uniformity. And it just didn't happen. And my apologies to you and your court for not making that happen. I just didn't get to you as I should have.

JUDGE CLINTON: Let me tell you why it didn't happen. My months may be a little off, but your Court came out with one set of changes which we got. We worked on those and we sent those out. Then you came

out with a modification of both those and you added some other changes and published them. And for other reasons, it took us a longer time to pick up on that second batch. If that hadn't happened that way, we would have been together. But we didn't get your notification of the second modifications and additions until ours had already been published.

CHAIRMAN SOULES: Judge, I certainly intend to work better with you than I did last time. And I apologize that that happened.

JUDGE CLINTON: I must say I don't believe it was you. I think it was more or less the nature of things that that's the way it worked.

Is there any objection to changing that Court of Appeals rule from 100 to 120 days? We did that for reasons the record had to be filed before the trial court lost its plenary powers after a new trial was -- if a motion for new trial was filed under the old 100-day rule. That's why we changed it to 120. We needed to get that fixed on the civil side. Now, then, it conforms on the other side. Any opposition?

That stands approved.

Holly tells me we missed some appellate rules.

MR. MCMAINS: I told you there was some

technical stuff I haven't had a chance to look at.

CHAIRMAN SOULES: Where does this all begin?

MS. HALFACRE: On Page 204.

MR. FULLER: 204?

MS. HALFACRE: Yes.

CHAIRMAN SOULES: Okay. On Page 204, there's a correction here that Rule 40 should be Rule 41. Any objection?

Unanimously approved.

That's the same thing on 205, 206. The COAJ disapproved these changes to Rule 47.

Is that your recommendation also, Rusty?

MR. MCMAINS: Well, so far as I could tell. I mean, there's a lot of technical stuff in there. But it's a pretty massive revision of our supersedeas rules.

CHAIRMAN SOULES: Would you take a look at that and report on it tomorrow?

MR. MCMAINS: Yeah. The same thing with the so-called miscellaneous rules, which are the miscellaneous letters that we had. There are a couple on the affidavit of inability to pay cost we probably need to look at. They're very technical.

CHAIRMAN SOULES: And would you confer with Elaine about that? Apparently this arises out of some of her scrutiny of 47 and 49. 47, at least.

Can you confer, Elaine, with Rusty about that for tomorrow?

PROFESSOR CARLSON: Yes. That was before we changed the rule.

MR. MCMAINS: All this memo stuff is before we changed the rule the last time. That's why I was trying to figure out to what extent we did need to fix it.

CHAIRMAN SOULES: Okay. It may not need anything.

What about 222? The Court of Appeals is the only court that can review that, isn't it?

I thought that Rule 29, review for excessiveness because of the fact-finding limitation on the Supreme Court, did stop at the Court of Appeals. It had to.

PROFESSOR DORSANEO: That's what I thought, too.

CHAIRMAN SOULES: That's why the COAJ recommended no change. Can't give the Supreme Court review under the --

MR. MCMAINS: Remember there's an integral relationship. If you are going to start interim enforcing judgments, that may change. But you can pretty well tell on the face of a bond that it's for

more than the judgment of the Court of Appeals without having to go through any factual scrutiny.

CHAIRMAN SOULES: But now the Supreme Court doesn't render the order to cause a bond increase whenever the interest is used up. That has to be done by the Court of Appeals, doesn't it, even after its plenary power?

MR. MCMAINS: We've filed such motions in the Supreme Court. And they've granted them, too.

JUDGE ROBERTSON: We've granted them. The Supreme Court has authority to do anything it wants to do.

CHAIRMAN SOULES: That's why we talked about those jurisdictional questions while ago, Judge.

Elaine, why don't you and Rusty also look at 49 tomorrow and see if that's something that needs to be done or can be done? It's apparently more complicated than we've thought about yet. And that's all 49 still going on past page 230. This is in here twice, looks like, which sometimes happens.

And then this is Justice Hecht's letter again. Is there anything here?

MR. MCMAINS: We've covered all of that.

CHAIRMAN SOULES: That's the end of it. Is that right? We've got those things pending over

till tomorrow.

PROFESSOR DORSANEO: There's another appellate rule, 182, I don't think has been covered. Page 859. That's gotten into the trial rules, hasn't it?

MS. HALFACRE: Yes.

MR. MCMAINS: That's in the other one, as well. It's on Page 345.

CHAIRMAN SOULES: So we've already acted on that to approve it?

MR. MCMAINS: No, I think we missed it. All it is is a question of whether or not you include as part of the judgment the delay damages.

CHAIRMAN SOULES: And this would just let the court do it however?

MR. MCMAINS: No. I think the reason it was taken out is because there isn't a judgment of the court on the denial of an application.

PROFESSOR DORSANEO: I think that's right. Unless it's this judgment.

CHAIRMAN SOULES: All right. Is there any opposition to this change?

There being none, it's approved.

PROFESSOR EDGAR: You want to do the one on 345, because the one on 859 also includes the language

as part of the judgment. So, if you are going to adopt the one on 859, you want to delete that objectionable phrase in both places.

CHAIRMAN SOULES: Okay. Let's go back to Page 345. I've got that down -- oh, I see.

PROFESSOR EDGAR: It's the same one. They just didn't delete the objectional phrase on 859 they did on 345.

CHAIRMAN SOULES: Let's just use the 345. We'll unanimously approve that?

PROFESSOR EDGAR: Yes.

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Does anyone see anything else in these appellate rules?

Okay, Rusty, will you also sort of take inventory tonight and see if we've got these things covered?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Thank you.

Rusty, thank you for that report.

Next Judge Robertson has this report, we don't have too many copies of it, on amendments to Rule 3a. Let me pass these out. Page 418 is the page number. This is some preliminary work in anticipation of the local rules. I drafted these. And they arise

somewhat from a collection of local rules. The local rules, many of them provide times for things to be done that conflict with the Rules of Civil Procedure. For example, the rules now say that you can file amended pleadings without leave of court up to seven days ahead of trial. There are some local rules that say you have to do that 30 days ahead of trial or you can't do it. And, of course, that's somewhat inconsistent with a bunch of case law about how lenient you're supposed to be to permit amended pleadings. But what this 2 under 3a is for is to say that local rules can give more leniency than the Rules of Civil Procedure, but not less, period. That tells Elaine if there's a period of time that cuts off somebody's rights in a local rule where those rights would not be cut off under the Rules of Civil Procedure, that can't stand. Any opposition to that?

[Justice Cook entered the room]

MR. MCMAINS: I've got a problem with your wording generally. What do you do with, for instance, the designation of experts? Are you saying that by local rule that they can allow you -- you use the word "enlarged." But what does that mean? I mean, does that mean that they can by local rule require you to designate 60 days?

CHAIRMAN SOULES: No.

MR. MCMAINS: That's what it says. If on the other hand you intend to make it more lenient, are you really going to give the local rules the power to --

PROFESSOR DORSANEO: Says it can't be reduced.

MR. FULLER: Less restrictive.

JUSTICE HECHT: Both ways.

CHAIRMAN SOULES: Well, here's the way I see that. Maybe it's not -- obviously it's not clear, because I've worried with this in my office. But if you've got a seven-day fuse on amended pleadings, you don't enlarge that by making it five, you enlarge it by making it ten. You reduce it by making it five. If you've got 30 days to designate experts, I see what you're saying. Sixty days would be an enlargement. We've got to write this somehow so we can get the local rules --

MR. BECK: Doesn't Paragraph 1 take care of that? Basically what this rule says is that any of these courts can develop their own rules but they can't be inconsistent with the Texas Rules of Civil Procedure.

MR. FULLER: It would be inconsistent even if it were less restricted.

MR. BECK: But if it's inconsistent, then

these rules become dominant.

JUSTICE HECHT: We just need to finish this project.

CHAIRMAN SOULES: Can we say no period can be altered by local rules?

MR. HUGHES: No.

PROFESSOR EDGAR: Is it your intention here, Luke, to say that the rules may be made less restrictive but not more restrictive?

CHAIRMAN SOULES: Yes. That's the concept.

MR. MCMAINS: It depends on what the context is and what you want to argue.

MR. O'QUINN: Another problem there about designating experts, how can local courts say, "Our rule is 15 days within trial"?

MR. MCMAINS: Within one week. That's less restrictive --

MR. O'QUINN: You can't do it.

JUDGE RIVERA: Anytime you do something for one side, you do the opposite for the other side.

MR. FULLER: Any time or time period provided by these rules may be made less restrictive but may not by rules of other courts be made more restrictive.

JUDGE RIVERA: I get the objections on both sides. Anytime you give somebody more time, the other

side complains, "Wait a minute, Judge; the rules don't provide for that," and they prevail. But if you give them less time, the person that gets less time will say, "Wait a minute, Judge; the rules give us more time." There's no way you can restrict or enlarge without hurting the one on the other side.

CHAIRMAN SOULES: We have spent a lot of time in the past years deciding what on a routine basis, except for good cause, ought to be the practice. Why don't we just say that no time period provided by these rules may be altered by rules of other courts? Then we know what they are. They're in the Rules of Civil Procedure and the trial judge can change them.

MR. FULLER: Really, that's the best solution.

MR. BECK: Why doesn't Paragraph 1 already say that?

CHAIRMAN SOULES: Paragraph 1 has been in the Rules of Civil Procedure probably from 1939. And there are local rules all over the place that are being enforced in the face of that. And this is a statement by this court now that that practice is disapproved, even though it's existed for a long time.

MR. FULLER: Let me tell you something. That's the biggest problem with local rules is time

periods anyway. I think we ought to just kill that snake right now.

PROFESSOR DORSANEO: I don't know if it's opposition, but we have a Rule 5 on enlargement of time. I'm going to get myself all balled up here in this process. To say that no deadline can be changed or that no time period can be changed when the rules themselves provide for enlargement of the time screws me up. And then when you have a pretrial order that gives the judge to authority to do things, I wonder how that combines with this. I'm thinking it's an overall problem that doesn't get resolved.

CHAIRMAN SOULES: I'm in the firing line. You can keep me there. But let me tell you what my problem is. I'm in the firing line of 300 district judges and 200 county trial judges, many of whom have set their own time periods up in their own kingdoms. And they think they've got the right to do that in the face of this first part. And Elaine and I and Bill are fixing to take all those time periods out of those local rules. As I understand it, we've got Justice Hecht's and Justice Phillips' concurrence that we can do that. I would like to have a rule that says that I can do that so that I can say, "Judge, this is why I did it." Because if we don't, the local rules effort has a lot

of problems and baggage with it anyway, a lot of it has been overcome, but this snake, this biggest problem with the local rules, I need some help to work that out.

MR. LOW: Luke, what you're doing, you're not saying they can't set time limits. Because they talk about docket calls. You're saying that time limits addressed by these rules shall be governed -- those shall govern the time limits set by these rules. In other words, they can't have anything inconsistent with that. But some time limits aren't addressed in these rules, like how many days you have docket call. But any time limit that is addressed by these rules, these rules shall govern, not local rules.

CHAIRMAN SOULES: That's right. Then the trial judge does it on a case-by-case basis. That's provided all through these rules. Good cause, Rule 166, all kinds of things. But then you're the lawyer in the case and presumably you're on notice that your case is controlled by a different set of time periods and not just some broad local rule that's out in Loving County that you're lucky if you could get a copy of and it's hard enough, if you can't get a copy, to get the clerk to tell you about it. You've been there.

MR. BECK: Let me ask you a question. Is part of the problem because Section 2 of this rule says

that before a district court, for example, can adopt any of these rules with lesser or more restrictive time periods they have to submit it to the Supreme Court and get it approved by the Supreme Court? Are they just not doing that? Or are you saying that they're adopting time periods that are inconsistent with our rules and the Supreme Court is letting them do it? Is that what you are saying?

CHAIRMAN SOULES: No. Well, there's been a lot of activity in local rules in the past year as a result of what's been going on. But the Supreme Court adopted this business about approving local rules and publishing them and that sort of thing recently, and a lot of these local rules have been there long since. I mean, they preceded that approval mandate of the Supreme Court and they're just there. Now, they're going to have to all be rewritten.

What I need is help to say whenever they send in something that says "You've got to make a jury demand 60 days ahead of trial," we can just change that and say, "This is what it says in the Rules of Civil Procedure."

The better thing would be to just strike the whole business and not even have a local rule that says you can amend your petition in a certain amount of time.

You can't change it, so you don't need a rule. And there's quite a bit of agitation even among the district judges: "Tell us if we don't need a local rule, let's just don't have one if it's covered by the Rules of Civil Procedure." That came up in the local district judges. So this will help us.

MR. FULLER: You're going to cure more problems with this if you'll just give it a try. Please give it a try. Just say, "The hell with the rest of those rules. All of them are in this book right here."

CHAIRMAN SOULES: No time period provided by these rules may be altered by local rules of other courts. Any opposition to that? Okay. Being none --

PROFESSOR EDGAR: Just read that over again so I can make the change.

CHAIRMAN SOULES: Hadley, strike from what's on there the first three words, "any time or." Then, on the next line, strike the words "enlarged, but not reduced." Take those out.

I'll read it: You insert "no," then pick up "time period provided by these rules may be," insert "altered," pick up "by," insert "local," then pick up "rules of other courts."

PROFESSOR DORSANEO: I think ultimately we're going to need to do something to say that there can't be

standing pretrial orders. Because that's a ruse that's used to --

CHAIRMAN SOULES: Now we get to 6. That's what 6 is designed to do. "No rule or practice of any other court shall ever be applied so as to determine the merits of any matter unless the rule complies fully with all the requirements of this Rule 3a."

MR. FULLER: Seems to me like that takes care of the standing pretrial order.

CHAIRMAN SOULES: That's right. Because what happens is now they adopt practices. And then they say --

Judge, I saw one of your brethren on the Houston court hear a motion, unfortunately, I wasn't in the case, but I was in the courtroom watching it happen, and the judge ruled for the lawyer that made the motion and said, "Let me have your order."

The lawyer says, "I don't have an order prepared, Judge."

The judge says, "Our local rules require that you have an order, when you come to court, that would grant the relief you seek in your motion. Accordingly, I overrule your motion and I grant the other side relief. Do you have an order?"

"Yes, I do."

He signed that order.

That's what this 6 is getting at. You can't determine a matter on the merits. You can put it off, you can call it dropped from the docket, you can let them reurge it, but you can't determine a matter on the merits based on a practice or rule unless it's published, approved by the Supreme Court and everybody knows what it is.

MR. SPIVEY: Luke, you're taking all the innovation out of the trial bench.

[Laughter]

CHAIRMAN SOULES: And hopefully the ambush, too, Broadus.

JUDGE ROBERTSON: Did you get the geographical changes that I suggested on No. 6?

CHAIRMAN SOULES: I'm sorry.

JUDGE ROBERTSON: There are some changes on Item No. 6 that I proposed.

CHAIRMAN SOULES: Okay, Judge. Tell me what they are so I can get them in here.

JUDGE ROBERTSON: I suggest that you read "No rule or practice of any court"; leave out "other court."

CHAIRMAN SOULES: Okay. Leave out "other court"? Judge, I need "or practice," because "practice"

is what they're substituting for "local rules."

JUDGE ROBERTSON: Okay. But leave out "other court."

CHAIRMAN SOULES: All right.

JUDGE ROBERTSON: Then leave out, on the next line, "so as."

CHAIRMAN SOULES: Okay.

JUDGE ROBERTSON: That would be "applied so as to determine the merits of any matter unless the rule fully complies," not "complies fully."

CHAIRMAN SOULES: I certainly will accept that substitute.

MR. MCMAINS: Luke, how do you apply a practice?

CHAIRMAN SOULES: I don't. But they do.

MR. MCMAINS: But, I mean, is what you're trying to get at that if something is recurring then you treat it like it was a rule?

MR. LOW: Local practice, not a local rule.

MR. MCMAINS: I understand. But the point is, for instance, in Corpus they have standard pretrial orders that the blanks vary depending on the case, but I could see how they could easily determine this as being -- they require designations ahead of time, they require amendments ahead of time, do all these things at

a prefixed time period, but it's all basically signed onto by the lawyers. Under the 166 rule.

MR. FULLER: Why don't you, rather than "practice," say "or order"?

CHAIRMAN SOULES: Because the 53 courts that don't have local written rules have local practices.

MR. FULLER: Let's say "no rule" --

MR. MCMAINS: Is that going to take out pretrial orders? Because 166 authorizes pretrial orders to do things differently, doesn't it? So that doesn't conflict with the rules.

MR. FULLER: You can have pretrial order that doesn't conflict with these rules. We're just saying we don't care what you call it, you can't abrogate these rules. These are the orders of the Supreme Court.

MR. ADAMS: But apparently what Rusty is talking about is a standard pretrial order that's altering -- that's, in effect, a local rule because the court signs it in every case.

CHAIRMAN SOULES: It's really not a local rule, it's an order in that case.

MR. MCMAINS: It is when it's filled out. But they're on a God damned preprinted form. You could hardly argue that it's not a practice since it's in every case.

CHAIRMAN SOULES: What if we put in --

MR. MCMAINS: Don't get me wrong. I'm not trying to necessarily prohibit it, I'm just saying: Are we trying to prohibit pretrial orders?

CHAIRMAN SOULES: No. 166 permits that.

MR. MCMAINS: But that's precisely my point. If you're not trying to do that, I don't see how you've accomplished anything.

MR. FULLER: We're just trying to do away with pretrial orders that conflict with these rules. There's a difference.

MR. MCMAINS: But the pretrial rule itself authorizes deviation from the rules. Now, that's part of these rules. And the point is, you can't write something that says no conflict with these rules when the rules authorize a conflict!

MR. FULLER: I think that's a wrong interpretation.

MR. MCMAINS: That is absolutely right under the rule!

CHAIRMAN SOULES: I've got your point, Rusty. Let's look at it and see what can be done about it. We've got a problem that needs fixing.

CHIEF JUSTICE PHILLIPS: I gather everybody would agree that there are cases where the Supreme

Court's rules need to be modified. There are cases where witnesses need to be designated and exchanged more than 30 days before, there are cases where your pleadings need to be amended more than seven days before trial. But everybody in the room -- the sense I get is that nobody thinks that needs to done in every case and that these form orders that cut off your discovery a year before trial in every case are a diversion of the state rules.

MR. MCMAIN: Oh, I agree.

CHIEF JUSTICE PHILLIPS: And the trick is, I think Rule 3a should say you can't have any rule that can conflict with the state rule. And something needs to be done with Rule 166, if we can get there, that would say that it has to truly be something extra-ordinary, can't be done in every case, but if we can get there, I would rather leave the trial judge with the discretion rather than trying to put all 300,000 civil cases into a trial each year in a straightjacket with one set of rules.

JUDGE RIVERA: Luke, I think we can do both. Because in a pretrial, all of the lawyers know ahead of time what those dates are, they have input into it, they ask for this, they ask for that, they hear the arguments from the other side, we make the ruling on it, and

everybody knows well ahead of time what we're going to do. They approve the order. So that will not affect this rule here.

CHAIRMAN SOULES: It will not. That's right. How about if we put --

CHIEF JUSTICE PHILLIPS: Do you read Rule 166 as requiring people to appear? Judge Hecht pointed to me how it's worded. It says they must appear.

CHAIRMAN SOULES: Rule 166 is really restrictive, but it's not --

CHIEF JUSTICE PHILLIPS: If it's already in the rules --

CHAIRMAN SOULES: Again, though, I'm trying to say, "Judges, you've got to publish your rules. You can't have a practice, you can't have an order if it's not consistent with the rules."

PROFESSOR DORSANEO: Can't be a standing pretrial order. The difference between an order made in an individual case and an order that's made in all the cases is pretty easy to identify. When it's on a preprinted form and it says you disclose all of the witnesses you're gonna call at trial regardless of what the discovery rules say because this is a pretrial order and do whatever you like, if that's done that way all the time then that, to me, is different from

conscientiously making a determination that this particular case needs different procedures from normal.

The way Rusty is describing the practice in Corpus Christi is similar to the practice in some of the Dallas courts where the attitude was: "All right, if you won't approve our local rules, we will just do it in a pretrial order all the time."

CHAIRMAN SOULES: We can fix this in a comment, it seems to me, to make the Texas Rules of Civil Procedure timetables mandatory and to preclude the use of local rules or practices from determining issues of substantive merit. These changes do not alter the trial court's ability to make orders in individual cases under the Texas Rules of Civil Procedure.

MR. FULLER: On a case-by-case basis.

PROFESSOR DORSANEO: They'll just be rolling them out.

CHAIRMAN SOULES: That's okay, so long as they write an order in an individual case.

Some people have had their hands up. I haven't called on Lefty and Gilbert and David. You all had your hands up.

Go ahead, Gilbert.

MR. ADAMS: Well, I had a question. Under Rule 166, is it necessary to personally appear?

CHAIRMAN SOULES: Yes.

MR. ADAMS: For the court to enter an order?

CHAIRMAN SOULES: Well, it says that.

MR. ADAMS: Then would this rule you're talking about, would that prohibit a court from, in effect, having its own local rules by using a set form or a set procedure for every case, say every negligence case, have, in effect, a practice where the same pretrial order would be entered that, say, cuts off pleadings, cuts off discovery, and so on, in every case as a matter of practice in that particular court?

CHAIRMAN SOULES: Yes, it would. I think it would. And that's something that needs to be addressed in 166, really. The trial court could sign a pretrial order in individual cases setting up time periods. We've never gotten a good look at that out of this committee.

MR. BECK: This Subsection 6 is so broad that I'm not sure I know what it means. For example, if you have a local court that adopts a rule, let's say, for example, dealing with continuances, doesn't in any way tamper with or is not inconsistent with the Texas Rules of Civil Procedure, but just have some additional requisites in it, and the basis of it is your client is unavailable, you can't go to trial, you say, "Judge, if

you don't grant my continuance, I don't have any evidence to put on." Because you've denied the local rule, you have no evidence. That affects the merits of the case the way this thing is worded. It's going to determine the merits of the case. Is it intended, this language, to apply to that situation? We've taken care of the time periods. But now we're dealing with requisites in addition to what the Texas Rules of Civil Procedure provide.

CHAIRMAN SOULES: That are not published. This only goes to rules, practices and orders that are not published as this rule requires. This rule requires that --

MR. BECK: How does your version read right now? You've been making some changes.

CHAIRMAN SOULES: "No local rule, order or practice of any court shall ever be applied to determine the merits of any matter unless the rule fully complies with all requirements of this Rule 3a." And that goes back, it's got to be submitted and approved by the Supreme Court, it's got to have been published 30 days ahead of time. 3 and 4 and 5, it's available upon request. If all that is there, then that local rule is just like any of these rules as far as being able to determine a matter on the merits. But if it's a hidden

agenda, you don't walk into that. The only thing a judge can do is give time to comply, drop your setting, reset you, do whatever it takes. But you don't lose the merits of the motion or the merits -- now, you're talking about a continuance. If there were some local rule that put baggage on continuances that was unpublished, they could not cut your rights off.

MR. BECK: But if it's published --

CHAIRMAN SOULES: They could.

MR. BECK: -- this rule would cover?

CHAIRMAN SOULES: Because local rules can do that to you. But they've got to be published, approved by the Supreme Court, have 30 days notice to the Bar before they can cut off your rights.

MR. MCMAINS: Does this suggest that the practice or order has to be submitted to the Court?

CHAIRMAN SOULES: No. What it basically says is, you can't have practices and orders that determine the merits of a matter, period, because that won't be approved by the Supreme Court. We've discussed here where these judges just have hidden agendas out there and nobody knows what they are. If you don't have a local lawyer, you're in deep trouble in some of these places, because you don't know what the rules of the game are. And at least on this when you come in and you

get subjected to one of those you don't leave with the merits of your client's controversy decided. At least you get a chance to learn what the rules are before you have to play by them.

MR. HATCHELL: I don't understand how you answered Rusty's question no. He wanted to know if you have to submit practices for Supreme Court approval.

CHAIRMAN SOULES: You do not.

MR. FULLER: So you call them a practice rather than a rule?

CHAIRMAN SOULES: They have to be elevated to a local-rule status before they can be brought to the Supreme Court.

MR. HATCHELL: Okay. I think that answers his question yes.

CHAIRMAN SOULES: Well, however you see it.

MR. ADAMS: I think on our latest draft on 3a, Subparagraph 2, the words "of other courts" doesn't add anything but possibly some confusion. If we put a semicolon after "local rules," it seems like it would make a little clearer.

CHAIRMAN SOULES: I agree with that.

PROFESSOR EDGAR: Rule 3a also applies to other courts, though, Gilbert, courts of appeal, so on and so forth.

MR. MCMAINS: That's right.

PROFESSOR EDGAR: And it's really talking about local rules of these other courts.

CHAIRMAN SOULES: Either way is fine with me.

PROFESSOR EDGAR: In fact, "local rules" is really somewhat confusing, because are you talking about local rules of district courts or local rules of the courts of appeal or administrative judicial regions? I'm just looking here at the list in the first paragraph of 3a.

MR. ADAMS: What's the other courts?

PROFESSOR EDGAR: It's the above courts. Read the very first paragraph.

CHAIRMAN SOULES: We ought to say make or amend local rules before such courts. If we just start with the first part of the rule, each court of appeals, administrative judicial region, district court, county court, county court at law, and probate court may make and amend local rules governing practice before such courts, then we pick that term up in the heading.

No time period can be changed by local rules.

Any proposed local rule or amendment.

Same in 4. Any proposed local rule or amendment.

All local rules and amendments.

MR. BECK: Luke, could you read 6 again as you have it?

CHAIRMAN SOULES: Yes. "No local rule, order or practice of any court shall ever be applied to determine the merits of any matter unless the rule fully complies with all requirements of this Rule 3a."

MR. BECK: Okay. Let me tell you what may be a problem. The introductory phrase talks about "local rule, order or practice," and then the last phrase talks about "unless the rule." So you're talking in the first part of the rule -- for example, let me just pose the question --

MR. FULLER: You can say "unless same."

MR. BECK: Then you look what Rule 3a says. And Rule 3a just talks about rules. I mean it's almost like you have to reword the whole rule. I'm concerned that we're going to pass something in a fit of haste that is just going to cause more problems than we're trying to solve. Can't we look at this tomorrow?

CHAIRMAN SOULES: Yes, we can. We can pass on that tomorrow. David, what I'm getting at is, I want to exclude these orders and practices.

MR. BECK: I understand.

CHAIRMAN SOULES: And that's what's being discussed by the district judges now.

MR. BECK: The undisclosed or unpublished practices and so on. But, by the same token, we want to give the trial judges the latitude --

CHAIRMAN SOULES: That's right. We can work on that this evening.

Is that all right with you, Judge Robertson?

JUDGE ROBERTSON: [Moving head up and down]

CHAIRMAN SOULES: Okay.

Now, David, I believe your report is next on --

Is there a Rule 5? Where is it? Page 422. We changed "on or before," but there are some other changes here on Page 422. That's also a part of Frank's agenda. Let's look at Page 422, see what this is.

Bill, will you look at this one overnight? It looks to me like it's just better words for the same thing we were doing.

PROFESSOR EDGAR: Rule 5 also made some changes. Are you talking about Page 422?

CHAIRMAN SOULES: Yes. Will you look at that, too, Hadley, overnight?

Judge Robertson, were you planning a report on this?

JUDGE ROBERTSON: No. I hadn't seen it.

CHAIRMAN SOULES: Okay. We'll let Hadley or

Bill Dorsaneo, maybe, report on that.

Are there any other rules changes in this group, Holly? Or does that get us to David's report?

MS. HALFACRE: It goes to David's.

CHAIRMAN SOULES: Okay.

David.

MR. BECK: A lot of the report of our committee or subcommittee consists of housekeeping matters, but I do think that you are going to see three or four instances where we raise issues that are relevant to this professionalism problem that we talked about earlier.

The first one is Rule 21, which deals with motions. And the Committee on Administration of Justice of the State Bar has recommended that -- excuse me, that's Page 441. This change is recommended by the Committee on Administration of Justice. Whatever application, motion, plea of the court or to the court is filed, it shall be served on all parties, which seems like an imminently reasonable and fair provision. Apparently what was happening is that if somebody files a motion they think is only relevant to one party in a multiparty case, they don't serve other parties. As we all know, depending upon how the court rules, the other parties may have a real direct interest in what happens.

So our committee recommends these changes be made.

CHAIRMAN SOULES: Any opposition?

That stands approved.

MR. BECK: The next one is Rule 21a, Page 446. This is our general notice provision. Basically the major proposed change adds language allowing for service by courier-receipted delivery or by telephonic transfer to the party's current Telecopier number. Basically what this does is acknowledge the modern methods of providing notice and information to other parties. So it's an effort to try to change the rule to acknowledge the presence of more modern ways to serve people. Our committee recommends these changes.

MR. BEARD: I understand the word Telecopier is trademarked by Xerox. So we better use another word, hadn't we?

CHAIRMAN SOULES: Tom Davis.

MR. DAVIS: This service by telecopy, I think we need to give that some thought. There are some instances where you come in on Monday morning and find that you were telexed a bunch of stuff about 5:30 on Friday afternoon. You've eliminated about three days that you had time to do something. I'm not sure that I'm in favor of service by faxing over the telephone. I think that can be abused unless we put some restrictions

on it.

MR. BECK: Tom, I have the same problem with people slipping things under the door at 8:00 on Friday night.

MR. DAVIS: You can put it under the door, but that ain't exactly delivery to you.

MR. BECK: Isn't it as much delivery as --

MR. DAVIS: That should be addressed, too, where it's personal delivery, I agree with you. They come in and slip it under the door. That's happened.

MR. ADAMS: But they could have hand-delivered it at 4:45 or they could have faxed it, either one, but it would have gotten to you at 4:45 on Friday afternoon.

MR. DAVIS: At 4:45 they could have hand-delivered it.

MR. O'QUINN: Tom, turn your fax machine off at night.

MR. DAVIS: I'm not ready to authorize service by that method.

CHAIRMAN SOULES: Any other debate on this? Those in favor of these changes say aye.

Opposed?

Let me see a show of hands on that. Those in favor show your hands.

Those opposed?

That's approved by a vote of 11 to 7.

MR. BECK: Okay.

The next proposal is Rule 72, which may be found at 387 of your book. This has to do again with serving your opposition with copies of what you're filing. This is recommended by the Committee on Administration of Justice. And Sarah Duncan, I think, also had some concerns about this rule. Basically, what these changes do is request that service be on all parties and that there be a certificate of compliance, which I think most lawyers do anyway. But this particular provision -- let me make sure I've got the right provision. There are two of them. Look at the one on 601. This is the one that's recommended by the Committee on Administration of Justice. The basic changes are that it provides for service on all parties to the litigation, again to allow for multi-party disputes. It also provides for a certificate of compliance. It eliminates the limitation in the rule that only four copies of any pleading need to be issued and it also adds the requirement that a second copy of a pleading can be obtained by a lawyer, but you've got to offer to pay for it. And our committee recommends that this proposal be adopted.

MR. BEARD: Would you contemplate that where you have conceivably 50 defendants that the court might enter some order as to how you would serve parties? Like in bankruptcy, you know, they can enter an order that limits who you have to serve when you have literally thousands of parties. Would you contemplate some method that the court could limit who you serve, where it's not necessary to serve everybody?

MR. BECK: Isn't that something that could be handled by the pretrial rule?

MR. BEARD: Well, if you can do that. I think you've got to have something like that.

MR. BECK: For example, if you've got a thousand defendants, or let's say a hundred, you don't have a class-action situation, my experience has been that liaison counsel is designated, copies of pleadings are filed with liaison counsel and then counsel for the parties work out an agreement as to how those are shared. That's kind of an unusual case, I think. I think the judge can handle that on an ad hoc basis.

MR. BEARD: As long as the rule doesn't say serve everybody.

CHAIRMAN SOULES: He can do it under Rule 166.

Any opposition?

JUSTICE HECHT: Is there some reason why we need four rules in the Rules of Civil Procedure governing notice to counsel?

MR. BECK: Judge, we're going to have more than that by the time we're through today, because Hadley has got one, there's another one dealing with the judgment rule. I think it would really be a good project for this committee to analyze all of our rules and see if we can put notice under one rule and make it very simple.

JUSTICE HECHT: Just serve everybody?

MR. BECK: Exactly.

CHAIRMAN SOULES: We'll work on that, Judge. The reason we can't do that now, I guess, is we had to fix all these rules to get them uniform. And we do need to boil that down to a single rule, no doubt about it.

Gilbert.

MR. ADAMS: I was just going to say if you look at the amendment history of this rule, it looks like it's being amended every time we meet. That's another thing. We certainly ought to really do an evaluation and see if we come up with something we don't have to amend every time we meet.

MR. DAVIS: What item are we on now?

CHAIRMAN SOULES: Rule 72, Page 601.

MR. DAVIS: When it becomes appropriate, I'd like to offer an amendment to Rule 21a that we just voted on 11 to 7 or something.

CHAIRMAN SOULES: Okay.

Any opposition to these changes to Rule 72? None. They're unanimously approved.

Okay, Tom.

MR. DAVIS: Okay. On 21a, down towards the bottom --

CHAIRMAN SOULES: What page?

MR. DAVIS: 446. When you talk about served by mail, notice or other paper served by mail, three days shall be added to the prescribed period, that's the mail I would like -- if you are going to serve by fax, add three days to it. Can't hurt anybody.

MR. ADAMS: Do you want to do that on hand-delivery, too?

MR. DAVIS: I don't mind.

JUDGE RIVERA: Luke, we've got to do something. We probably ought to put "Saturdays, Sundays and holidays don't count" or apply to all of them, mail, personal, fax, whatever. I know that got rid of a problem in Bexar County. We didn't have the number of motions on Monday that we used to have when we said "Saturday and Sunday don't count."

MR. ADAMS: Or you could set a time limit, like 3:00 in the afternoon. If it's hand-delivered or faxed after 3 PM or some time, that that's counted the next day rather than that day.

CHAIRMAN SOULES: Well, let's vote on that, extending fax delivery. Actually, are we now going to just say six-day notice instead of three-day notice?

MR. HUGHES: While you're thinking about this, confirmation or something should be required. Because the machines are out of whack enough times that just saying that it goes to their last Telecopier number doesn't mean at all that they got it. The statement of service is prima facie evidence of service. And that's in a different rule. It can be overcome by evidence to the contrary that you didn't get it. That's been the built-in safe harbor on all service, mail and every-thing. Of course, the problem with that has always been, too, the proof of a negative is impossible.

CHAIRMAN SOULES: That's a major change in the scheme which we could work on and may need to work on.

MR. HUGHES: But this is a more sensitive problem than mail or handing something to somebody or whatever, because you have a returned receipt in mail, you have somebody's testimony that they handed somebody

something.

MR. DAVIS: The cleanup crew was there when they handed it to them.

CHAIRMAN SOULES: How many are in favor of three-day extension if service is by fax?

How many oppose that?

Let me count them. Tom's motion is that we have a three-day extension of deadlines, response times, what have you, if the service is by Telecopier.

How many favor that?

MR. RAGLAND: Three days for a fax machine?

CHAIRMAN SOULES: How many are in favor of that?

Nine.

How many are opposed to that?

Six.

Okay. That will be included, then.

PROFESSOR DORSANEO: Runners on Friday.

CHAIRMAN SOULES: What's the next item, David?

MR. BECK: Rule 73.

CHAIRMAN SOULES: What page?

MR. BECK: 645. This deals with failure to furnish pleadings to the other side. I would say these are housekeeping changes. It's been recommended by the

Committee on Administration of Justice.

CHAIRMAN SOULES: Any objection?

That stands approved.

MR. BECK: All right.

The next one is on Page 473. It's the proposal by the Bexar County District Clerk.

CHAIRMAN SOULES: Oh, yes. It's Rule 26.

MS. HALFACRE: Page 478.

MR. BECK: This is the proposal by the Bexar County District Clerk. Our current rule says that the district clerk must keep a court docket in a "well-bound book." And he says that they've got all this on computer, they've got all these other modern methods of keeping records, and the proposal that he makes is that we strike "well-bound book" because he says it's just duplicative and creates unnecessary wording, just say "permanent record." Our committee recommends this change be made.

CHAIRMAN SOULES: Any opposition?

PROFESSOR EDGAR: The clerk shall also keep a court docket in a permanent record which shall include the number of the case, so on, so forth. Will that do it?

CHAIRMAN SOULES: Okay.

JUDGE RIVERA: I think we have that somewhere

else already. He's got some statutes of what he has to do as his duties or his responsibilities. Then, when the Court Administration Act came out, it said the administrative judge will direct how those things will be done. But it has a reference to what is now in the Government Code as to what he's going to do. So it's all there, except some of the wording in the district clerk's statutes said it had to be a bound book. And it was one of those big things you can't lift. We got rid of them.

CHAIRMAN SOULES: David, would you accept the change in Line 2, which says a permanent record which shall include the number of the case?

MR. BECK: Yes.

CHAIRMAN SOULES: Any opposition to that, then, with those changes?

Okay. This stands approved for Rule 26.

MR. RAGLAND: Luke, back to Rule 73 on Page 645, as I read it, we just adopted a rule that allowed the court to strike pleadings without a hearing or anything else.

JUSTICE HECHT: You've got it right.

MR. RAGLAND: I don't see any provision for any hearing when the judge starts striking pleadings.

MR. BECK: That's the way the rule is now.

JUSTICE HECHT: On motion.

PROFESSOR CARLSON: On motion. Hearing on motion.

CHAIRMAN SOULES: Your amendment, then, Tom, to what we did before is that we not delete the words "on motion" on the fourth line, that we leave those in?

MR. RAGLAND: I didn't try to redraft it, I was just observing there was no hearing required.

MR. BECK: After hearing? What about after hearing, Tom?

MR. RAGLAND: Motion, hearing, order.

CHAIRMAN SOULES: May in its discretion on notice and hearing. Any opposition to that?

PROFESSOR EDGAR: What did you just say?

CHAIRMAN SOULES: The court may in its discretion, on notice and hearing, order all or any part of such. Any opposition to that?

Okay. That stands approved.

MR. BECK: All right.

The next one is Rule 74, which is on Page 621. This is a problem that Wendell Loomis of Houston has raised, but it's a much broader problem than just Rule 74, as his letter indicates. Rule 74 as it's presently drafted talks about how pleadings, other papers and exhibits required to be filed with the court,

that certain provisions of the rule must be satisfied. What Wendell was upset about is that he didn't get notice of a proposed judgment, as well as other things, and as a consequence there was certainly a risk that severe problems were going to be suffered by his client.

So I think the question is, for example, should Rule 74 include a reference to judgments or proposed judgments or should that be treated in Rule 306a (4) which deals with the subject of judgments or, as Justice Hecht said, should we come up with a new rule that deals with giving notice of all things filed with the court to all parties? That's the question. And we didn't really come up with a recommendation on the proposal.

CHAIRMAN SOULES: He suggested Rule 72 be amended to include all documents. Let's see. Rule 72 is at Page 598.

MR. BECK: He just mentions the problem. That's why we didn't specifically recommend any proposed change. But it's the age-old problem of lawyers filing things with the court and it's incomprehensible if they don't serve the other lawyers.

MR. BEARD: It's a kind of routine practice for lawyers to submit proposed judgments the day after they get their verdict.

MR. BECK: I guess my personal view, and I don't speak for our subcommittee, is that this problem shouldn't be addressed in Rule 74, because what this does is really define what a filing is. It seems to me that it's really more properly dealt with either under our general notice rule or under the judgment rule.

CHAIRMAN SOULES: Is 306a part of the material? That's on Page 1048.

MR. BEARD: The question is: Must a proposed judgment submitted by counsel be served on the other side?

MR. BECK: That's the specific problem he had.

MR. BEARD: Of course, the court can write his own judgment.

CHAIRMAN SOULES: Look at Page 1048. That is the response, I think, to this letter probably.

PROFESSOR EDGAR: Yes, we dealt with that.

CHAIRMAN SOULES: Says: "Either party may submit a proposed judgment to the court for signature. Each person who submits a proposed judgment for signature shall certify thereon that a true copy has been delivered to each attorney or pro se party in the suit and indicate thereon the date and manner of delivery," so forth. It doesn't affect finality, which

I guess we probably need to say.

MR. BECK: Let me just make a motion that we not change Rule 74 to deal with this problem, because Hadley's subcommittee, I think, has already addressed the precise problem.

CHAIRMAN SOULES: Okay. While we're there, why don't we let Hadley speak to it on Page 1048, since our minds are on it.

PROFESSOR EDGAR: Now I have to get my mind together.

MR. COLLINS: Why don't we take a five-minute break.

CHAIRMAN SOULES: Yes, sir. Five-minute break.

[Recess]

CHAIRMAN SOULES: We can reconvene now. I do want to welcome Justice Cook. I didn't see him come in.

JUSTICE COOK: I'm leaving.

CHAIRMAN SOULES: You're leaving now?

MR. SPIVEY: Luke, we may have gotten some correspondence about who all the current members are, but I don't have a list. Can we get a copy of that?

CHAIRMAN SOULES: Do you need it now?

MR. SPIVEY: No, no.

CHAIRMAN SOULES: We'll mail you a current

list when we get back.

Hadley, have you got your mind on it?

PROFESSOR EDGAR: Yes.

MR. SPIVEY: Before you get to Hadley, I do want to pass a resolution. I've had such a privilege of smelling these two fine cigars back here, I'm embarrassed that the rest of you are not getting to share this with me. I would move that everybody has to sit back here a few minutes.

[Laughter]

CHAIRMAN SOULES: Just for aromatic purposes, huh?

Hadley, your report.

PROFESSOR EDGAR: At first I thought that the reason for our recommendation on Page 1048 was more than just Wendell Loomis' material which is included just behind it, but I find that it's not. But, in any event, our subcommittee thought that -- we frankly could not visualize anybody submitting a proposed judgment to the court without submitting a copy to opposing counsel. But, anyhow, apparently that does happen. And hence we recommend that Rule 305 be changed as proposed. And I so move.

CHAIRMAN SOULES: Discussion?

Any opposition?

That stands approved.

PROFESSOR EDGAR: As a matter of fact, this is really part of a larger proposal when we talk about findings of fact and conclusions of law. And as I recall, this is basically a recommendation that Tom made.

Tom, I think this was basically your recommendation to the committee earlier.

MR. SPIVEY: We can take care of that. It seems to me that every type of document filed ought to be furnished.

CHAIRMAN SOULES: We just passed that. The problem is, this doesn't get filed. That's why the filing rule doesn't pick it up.

MR. FULLER: We have a filing rule, is what he's saying. We've got a special on judgments because judgments aren't filed.

PROFESSOR EDGAR: Is this approved?

CHAIRMAN SOULES: Yes.

MR. BECK: The next one we didn't quite understand. Rule 85c. There is no Rule 85c.

CHAIRMAN SOULES: What page?

MR. BECK: It's on page --

CHAIRMAN SOULES: Or is it even on a page?

MR. BECK: Anyway, it's a letter by Judge Joe

Kelly from Victoria, who refers to Rule 85c. And he may be talking about the remittitur rule from the appellate rules, but there wasn't any proposal submitted, so we don't have any recommendation at all.

CHAIRMAN SOULES: Page 649.

PROFESSOR EDGAR: Let me make a suggestion. Back on Page 1048, Tom just pointed out, rather than saying "Either party may submit a proposed judgment," why don't we say "Any party may submit"? Because that implies that there are only two parties. If we can do that.

CHAIRMAN SOULES: Okay. The first "either" is changed to "any." Any opposition?

Being no opposition, that stands approved.

MR. BECK: The 85c reference is on Page 649, but there's no proposal, there's no Rule 85c, and therefore our committee wisely has no recommendation.

MR. MCMAINS: I move we table the no recommendation.

MR. BECK: They may be talking about the remittitur rule, Rule 85c of the appellate rules.

PROFESSOR DORSANEO: Talking about venue over here.

CHAIRMAN SOULES: See where it says 85 sub "c" on the next page? I miscued Holly. That meant

subcommittee. So it's really 85. It's supposed to go to 85.

MR. BECK: But that has to do with the original answer.

CHAIRMAN SOULES: It may be TRAP Rule 85.

MR. BECK: Shall we move along, Mr. Chairman?

CHAIRMAN SOULES: I guess.

JUDGE RIVERA: Nothing to vote on.

JUSTICE HECHT: The letter is on 651, isn't it?

CHAIRMAN SOULES: Go forward, David.

MR. BECK: The next one is Rule 87, the venue rule. Turn to Page 652. The proposed change, there are two major changes. One is in Section 2 (b) and it requires that when the claimant's venue allegations are specifically denied, the pleader is required by prima facie proof as provided in Paragraph 3 to support his pleading. And then if the defendant seeks to transfer to another county where a cause of action or part thereof arose, his pleading must be supported by prima facie proof.

So, as I understand the purpose of this rule, it's an effort to try to make a party who is putting in issue a particular venue provision or fact to support that allegation by prima facie proof, which I believe

is essentially the custom anyway.

CHAIRMAN SOULES: It's not exactly.

MR. MCMAINS: Not as to a cause of action.

MR. BECK: Not as to a cause of action.

CHAIRMAN SOULES: Prima facie proof is used three lines from the bottom as to defendants. But it's not said what a plaintiff has to do in response to a motion to transfer. So the prima facie proof was put in both places.

MR. BECK: So that once a plaintiff sets forth venue allegations, if they are specifically denied by the defendant, then the plaintiff has got to come forward with prima facie proof to support the venue allegation, but not as to the merits of the cause of action.

MR. SPIVEY: Doesn't that fly in the face of the intention for changing the venue rules?

CHAIRMAN SOULES: No. It supports it. I wrote this. And it was in response to a problem we were having with a judge in Cuero, actually. And that judge felt that -- okay, it's easier to start with what the defendant has to do. The defendant, in order to move venue, has to support by prima facie proof that if the cause of action occurred, therefore, you assume it occurred, it occurred elsewhere than the county of

venue. But the plaintiff, who was challenged, this judge held, had to support by prima facie proof the existence of a cause of action. The plaintiff didn't get the benefit of "If the cause of action occurred, it occurred where I filed suit," he had to prove by prima facie proof that it did occur, not, "if it occurred, where." And it was really going against the spirit of what the venue rule tried to eliminate.

Now, what this rule as written now, I believe it does, both sides get the benefit of "if the cause of action occurred." The plaintiff says, "If it occurred, it occurred in my county." The defendant says, "No, if it occurred, it occurred in the other county." And the prima facie proof that the two have to put forth is just "where," not "whether."

And on the back page, Page 653, if that's not made plain by the writing on the first page, it says it. "Provided, however, that no party shall ever be required to support by prima facie proof the existence or absence of a cause of action, or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of" -- not if -- "of existence of a cause of action." So it's just "where" and not "whether." And I believe that was the spirit of the whole thing to begin with.

MR. FULLER: This may be persnickety, but that's a pretty broad statement on the front page. Shouldn't you say for venue purposes?

CHAIRMAN SOULES: Okay. May be required for venue purposes. Sure. That's no problem to say that. That's what's intended anyway. The rule says anything about the plaintiff's pleadings that's specifically denied has to be supported by proof. And he read that to mean including that there is a cause of action or part thereof, not just where it occurred. So this just raises -- the only contest is where, not whether.

MR. MCMAINS: Are you talking about the Section 3 as well? I'm not sure I understand what -- you've got this section over here that says "and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence or absence of a" -- I mean, I'm not sure I understand how you have any statutory justification or otherwise that a pleading establishes a cause of action.

CHAIRMAN SOULES: Pleadings may not raise a cause of action.

MR. MCMAINS: But it says no party shall ever be required to support by prima facie proof the existence or absence of a cause of action.

CHAIRMAN SOULES: That's right. It's just

where.

MR. MCMAINS: Support the absence of? Why does anybody need to support the absence? I'm not sure that I understand what you're saying.

CHAIRMAN SOULES: Well, I'm getting back to the old venue practice where the defendant got to try that there isn't a cause of action. And you tried the absence of a cause of action at the venue hearing.

MR. MCMAINS: You didn't try the absence, you tried the presence. I mean, all I'm saying is there is no basis for a venue transfer on the basis that there is no cause of action.

CHAIRMAN SOULES: What's your recommendation, Rusty? Is it to take out the words "or absence"?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: All right. Say so. If that fixes it --

MR. MCMAINS: Because we're talking about the prima facie proof on the existence of a cause of action.

CHAIRMAN SOULES: So we should take out "or absence" in two places in the underscored portion on Page 653. And I don't know whether I've got it on 652 or not.

MR. FULLER: Yes, you've got it in two places. In the last line of the underlining, even

though it's misspelled.

CHAIRMAN SOULES: I've taken it out in two places on 653. I was just checking on 652 to see if I had the same thing.

MR. MCMAINS: It's not in that part.

MR. BECK: Do you need the phrase "or part thereof"?

PROFESSOR DORSANEO: I don't think so.

MR. FULLER: It could have occurred in two different counties.

CHAIRMAN SOULES: You don't have to show that a cause of action or part thereof arose. That's taken as established.

MR. BECK: No.

CHAIRMAN SOULES: That's not right, David?

MR. BECK: I don't think so.

PROFESSOR DORSANEO: See, part of the cause of action could be the thing that makes it accrue in the county of suit.

CHAIRMAN SOULES: That's right. See, that's in --

MR. FULLER: What if you shoot across the county line?

PROFESSOR DORSANEO: What if you hired somebody --

CHAIRMAN SOULES: That's what this is designed to eliminate.

PROFESSOR DORSANEO: How do they prove that it accrued there, then?

CHAIRMAN SOULES: You take the statement of what occurred. And it occurred. The only question is: Where?

MR. SPIVEY: Isn't the term that the Supreme Court uses "arose"?

CHAIRMAN SOULES: Yes.

MR. FULLER: So use "arose" instead of "accrued"?

CHAIRMAN SOULES: We use that in the rule now. 2 (b), nine lines -- I tried not to change anything except -- I used "accrued," used "part thereof," the same words that were here, except completely eliminating that anybody has to establish the facts of the occurrence. The place of the occurrence, yes, but not the facts.

PROFESSOR DORSANEO: See, I have difficulties in my own mind distinguishing between the facts and the element. We're saying the same thing, but in order to make prima facie proof, what am I making prima facie proof of? That there was an explosion in Williamson County. All right? Now, that's not part of the cause.

I'm not establishing part of the cause of action, I'm making prima facie proof of where the fact that gives rise, arguably, that a claim occurred.

CHAIRMAN SOULES: There was an explosion at the Exxon plant in Wharton County or Phillips plant in Wharton County. All right. All that is taken as proven except Wharton County. You say, "No, that plant is in Matagorda County." Then the only issue is just where. The explosion occurred, there was an injury, all of that is taken on the face of the pleadings. That's the way it's supposed to work. It's just: Where was it?

Now, the defendant gets that anyway, because the defendant gets to say, "If it occurred, if the explosion occurred at the Exxon plant, the Exxon plant is there."

This is giving the plaintiff the same. If it occurred at the Exxon plant, the Exxon plant is in Lake Jackson or wherever. It gives both sides exactly the same burden. It's just where. Because if the defendant says there wasn't an explosion, then the plaintiff has got to bring in prima facie and written proof that there was an explosion. And that's supposed to be taken on the face of the pleadings. But not all judges are ruling that way. Some do, some don't. This makes it plain that you do rule that way.

PROFESSOR DORSANEO: So if it was a case where you purchased a defective saw and you're the defendant and you say "I didn't purchase the saw in Williamson County, I purchased it in Travis County," if I purchased a saw, which I did, I purchased it in Travis County.

CHAIRMAN SOULES: The rule right now says -- read this. It's that way for the defendant now.

PROFESSOR DORSANEO: I understand.

CHAIRMAN SOULES: "It shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in a different county." That's the rule right now. So the plaintiff gets to say, "If a cause of action exists, it or a part thereof accrued in my county, not his county." And the only thing is which county. And both sides get the benefit of "if it exists, it accrued in whole or in part." That concept is taken from the pleadings.

JUDGE RIVERA: Luke, on Page 653, the last part of the sentence that's underlined, you know, it's conclusive on the pleadings, you've got that repeated twice on the page before. Under Subparagraph 2, "Burden, (b), Cause of Action," you've got it in there. "When pleaded properly, shall be taken as established." Then, if you go down a couple of lines on the underlined

portion, you follow that "taken as established by the pleadings." So that's three times. Do you need it that many times?

MR. BECK: I had a similar question. Why can't we stop in that Paragraph 3 after "cause of action"? Just put that for venue purposes no party shall ever be required, by prima facie proof, to prove the existence of cause of action, period?

JUSTICE HECHT: Doesn't it say that? Why doesn't the first sentence of 87 --

MR. BECK: And you could probably get away without the whole proviso, frankly.

JUSTICE HECHT: Why doesn't the first sentence of 87 (b) say that?

JUDGE RIVERA: It does.

CHAIRMAN SOULES: It does, but the judges are not reading it that way.

PROFESSOR DORSANEO: The cases before, from the before time, used exactly this same language that's in the rule and interpreted it as saying that in order to establish by whatever proof was required, not prima facie proof, where a cause of action accrued, you had to establish the existence of a cause of action.

In other words, when we did this drafting, we didn't go back and read all of the old cases and notice

the odd construction that was put on the language that we used. So it was possible for some judges to read those cases and come up with this odd construction. And this really is the way to solve it, this 2 (b) thing, if it does make it clear.

CHAIRMAN SOULES: The underscored portion of 3 is redundant. The question is: Does it clarify in redundancy? Does it make plainer what we're trying to get across?

MR. FULLER: You could put in parentheses: "We really mean it." If there is disagreement, looks to me like that would clarify it and certainly doesn't hurt it. May be a little wordy, but I think it says "We really do mean it."

CHAIRMAN SOULES: That's the purpose.

MR. BECK: It may not hurt to leave that in, because, if you look at the first sentence, it talks about how it's not necessary to prove the merits of a cause of action and that that shall be taken as true, but when that is specifically denied, then it kind of suggested it's back in issue again. So it may not be bad to leave that in 3, but I don't think you need that whole last section. I think you can stop after "cause of action."

CHAIRMAN SOULES: How about "a cause of

action or any part thereof"?

MR. BECK: Do you need "a part thereof"?

CHAIRMAN SOULES: That's a venue concept.

MR. BECK: But it says that no party shall ever be required to support the existence of a part of a cause of action.

MR. LOW: Cause of action includes damage as well. Something might occur here and I think that's the reason.

CHAIRMAN SOULES: All these words lend clarity, but they are redundant.

MR. BECK: I will defer.

MR. MCMAINS: Wait a minute, Luke. There is another alteration that has occurred by accident.

CHAIRMAN SOULES: Buddy Low has the floor.

MR. LOW: A cause of action includes not only the act but the consequences. And the consequences may be, in certain cases, someplace else, not right there. So that's the reason for the part of the cause of action, where the act occurred.

CHAIRMAN SOULES: Okay, Rusty.

MR. MCMAINS: This works all well and good in a situation where you're relying on a general venue rule, where the cause of action accrued in whole or in part. But as it reads as it's been amended by the

underlining, it says "when pleaded" -- that when the claimants -- this is the "but." "But when the claimant's venue allegations" -- that's general. Now, that may refer to other venue grounds than cause of action.

CHAIRMAN SOULES: Yes.

MR. MCMAINS: Okay. -- "are specifically denied, the pleader is required, by prima facie proof, to support his pleading that the cause of action as established by the pleadings, or a part, accrued in the county of suit." Now, that is not the only basis upon which you can maintain venue is a part of the action arising in whole or in part. You cannot impose that burden to superimpose Section 1 on every other venue concept.

CHAIRMAN SOULES: This only deals with cause of action or part thereof. That's the only part of the statute that it goes to or ever has, in its corrected state or this state. That's something that's there regardless of what we do. This only deals with the cause of action or part thereof accrued. That's all this section has ever dealt with.

PROFESSOR EDGAR: I thought about something else. I think you are right.

CHAIRMAN SOULES: Is there something else

about this you want to talk about?

PROFESSOR EDGAR: Yes. The second line, when you copy that, it should be "the merits of a cause of action" rather than "merit," if you are going to use that to send it to West. Page 652. It's just a typo.

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: Then I wonder if it would be helpful in the fifth line -- we talk here about the claimant and then you say "the pleader is required." You really mean to say "the claimant is required," don't you?

CHAIRMAN SOULES: That's the way it is in the rule now. I'll be happy to change it. I certainly accept that.

Any other suggestions? Any other debate?

MR. DAVIS: What Rusty was saying, let me see if I understand it, that it should be "but when the claimant's venue allegations that the cause of action or part thereof that accrued in the county of suit are specifically denied." If that's what it's referring to, then why not say so? It just says the allegations are specifically denied. That includes all of the allegations, even those that don't relate to a cause or part thereof occurring in the county of suit. I think that was the point he was making, if I understood it.

CHAIRMAN SOULES: What's the specific suggestion? What words go in and what come out?

MR. DAVIS: You start off "but when the claimant's venue allegations that the cause of action or a part thereof arose in the county of suit," then you pick up "are specifically denied, the pleader is required, by prima facie proof," and all you limit it is as to what allegations are being specifically denied.

MR. BECK: The problem with that is Subsection b only talks about cause of action. And the phrase, Tom, that you just quoted picks that language you just mentioned up in the next phrase. 2 (a) talks about all these other general provisions, and 2 (b) only deals with the concept "cause of action."

PROFESSOR DORSANEO: But the concept "cause of action" historically does fit into the other venue exceptions. Because on occasion, under prior precedent, a particular proof of a cause of action was required even though you weren't operating under any general principle. And that problem still lingers.

I think that Rusty's suggestion makes good sense because it does make it clear that this cause of action is talking about the general rule.

MR. MCMAINS: You could change the title to "Cause of action when venue is predicated under the

general rule" or something.

PROFESSOR DORSANEO: Then Luke's change in the proviso on the next page, if I'm thinking straight, is not really a redundancy, it is a more comprehensive statement of the principle that should be applied across the board. And it all does fit together very nicely, I think, with these little adjustments to it.

CHAIRMAN SOULES: "It shall not be necessary for claimant to prove the merits of cause of action, but the existence of the cause of action, when pleaded properly, shall be taken as established by the pleading; but when the claimant's venue allegations" -- What are the words? "That the cause of action" --

PROFESSOR DORSANEO: Or part thereof accrued in the county of suit.

CHAIRMAN SOULES: That is really an awkward sentence. Does that go before --

PROFESSOR DORSANEO: Tough sentence.

CHAIRMAN SOULES: It's a horrible sentence. Could we say "but when the claimant's venue allegations are specifically denied that the cause of action" --

MR. BECK: It's a question of where you are going to put it. You can move it up. But when the claimant's venue allegations are specifically denied. If we want to limit it to those venue allegations that

talk about cause of action or part thereof, you can move the phrase in the subsequent clause up and then you just have to change the language. Let me give you some specific language.

CHAIRMAN SOULES: All right. Good.

MR. BECK: Let me try to rough this out. But when the claimant's venue allegations that the cause of action or part thereof arose or accrued in the county of suit are specifically denied, the claimant is required by prima facie proof as provided in Paragraph 3 of this rule to support such pleading. Period. Or such allegations. Isn't that the intent?

CHAIRMAN SOULES: Well, yes. But you've got to keep hammering on this concept that it's taken as established by the pleadings. Can we just put that in?

MR. FULLER: But the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings, but when the claimant's venue allegations, based upon where the cause of action or a part thereof arose, are specifically denied. Then you've limited it to venue -- you've limited it to venue allegations based upon where the cause of action arose. Isn't that what you're struggling with, that you're trying to limit it to just venue allegations based upon where the cause of action

arose?

CHAIRMAN SOULES: I think maybe -- maybe the simplest is just to go with what they said, Kenneth. After "venue allegations" put "accrued in the county of suit" and not change it otherwise.

MR. FULLER: That would do it. That would do it.

MR. LOW: What would happen in a situation, and I don't have the rules before me, but say there's some question what county the land is. The suit involved land, it's really on the border between Shelby and Saint Augustine. They allege Saint Augustine. I say, "No, it's Shelby." Do they have to come in with affidavits, then?

CHAIRMAN SOULES: Yes.

MR. LOW: Is that taken care of?

MR. BECK: 2 (a).

CHAIRMAN SOULES: David, let me just insert that suggestion of yours after allegations and then suggest that the rest of it be, except for changing "pleader" to "claimant" --

MR. BECK: I was just trying to keep from repeating the same clause again and again.

MR. FULLER: Luke, can you read it to us the way you are suggesting?

CHAIRMAN SOULES: It would just be -- let me tell you where the changes are and then I'll read it. "Merits" in the second line. Add an "s."

Then go down to the fifth line. After the word "allegations," insert "that the cause of action or part thereof accrued in the county of suit"

I was having trouble lining it up. I gave you where the "s" goes.

Then, in the fourth line, after the semi-colon, "but when the," insert "defendant specifically denies the." And then go down --

MR. FULLER: "Defendant specifically denies these"?

CHAIRMAN SOULES: Article "the." Then, on the next line, insert that "the cause of action, or part thereof, accrued in the county of suit," and then in the place of the word "pleader," put "claimant."

Now I'll read it. "It shall not be necessary for a claimant to prove the merits of cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings; but when the defendant specifically denies the claimant's venue allegations, the claimant is required, by prima facie proof as provided in Paragraph 3 of this rule, to" -- so forth.

MR. BECK: Why don't you just put to support such allegations, period? Because you've specifically put what those allegations are. So you don't need to repeat them again.

CHAIRMAN SOULES: No. Because now you get into proffering that a cause of action or a part thereof accrued.

MR. MCMAINS: That's precisely the place where you need to tell them that doesn't mean --

CHAIRMAN SOULES: That's what the wording here does.

PROFESSOR DORSANEO: The old cases require more proof than what you are reading into what you are saying.

CHAIRMAN SOULES: He's got to support by prima facie proof that his pleading that the cause of action, which is taken as established by the pleading, or part of such action, accrued. We keep saying again and again.

I'll try to redo this overnight, I guess. I'll tell you, this rule was written in haste and it's hard to fix. And that's, of course, one of the problems. It's also hard to understand.

PROFESSOR DORSANEO: It's worth the time, because it has been a problem ever since its inception.

MR. BECK: Yes.

CHAIRMAN SOULES: Okay. What we've got to keep telling the trial judges, though, is that the existence of the cause of action is established by the pleadings. You've got to tell them again and again. And every time you omit that, then you get back to, "Well, are they telling me I've got to get prima facie proof that the cause of action occurred, or part of it?" Well, everybody knows the problem.

Next, David?

MR. BECK: The next one is Page 689, 690. This is going to provoke an awful lot of controversy, but we thought we needed to address it.

Professor Rossini at SMU pointed out in Rule 106b that the rule says "the defendant's usual place of business or usual place or abode." He said it should be "of abode." Our committee recommends this proposed change.

CHAIRMAN SOULES: Is there a redlined version of that someplace?

MS. HALFACRE: The redline is on Page 687.

CHAIRMAN SOULES: Change "or" to "of." Any comments?

That's done.

Next, David.

MR. BECK: Rule 107, which is at Page 366 or Page 691. There's another version on Page 366.

CHAIRMAN SOULES: Let's look at them both.

MR. BECK: The one on 366 came from the Committee on Administration of Justice. And the purpose of the suggested change is to allow for default judgments where the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108a. That's basically the reason for the change.

CHAIRMAN SOULES: Which version do you recommend, if any, David?

MR. BECK: I think we probably ought to work on the Subcommittee on Administration of Justice's rule. It refers to both Rule 108 and 108a.

Rule 108a deals with the foreign-country service problem.

Rule 108 deals with the defendant being outside the state.

I just personally had a question about whether or not the language is the proper language to use. I wonder whether we ought to use the phrase "proof of service" instead of "process" in the proposed change.

MR. FULLER: Would an easier way not be to just say "until citation as provided for by these rules,

where proof of such service shall have been on file with the clerk"?

PROFESSOR DORSANEO: The difficulty is that technically it's not citation under Rule 108 or 108a.

MR. FULLER: Could you say "until proof of service," then?

CHAIRMAN SOULES: No. We need Doak Bishop here, because he wrote these rules. But "process" is a word that means something internationally. That's why "process" is used here.

MR. FULLER: Well, could you say "citation, proof of process or proof of service as provided for by these rules shall have been on file"?

MR. BECK: What this says is that it doesn't require the citation in the Rule 108a and 108 instances, because you really don't have a citation coming back. What you have is a process. And then, in addition to that, you've got to have proof of service of that process before you can get a default judgment.

PROFESSOR DORSANEO: They do have returns of service on the back of them. And that is process.

JUDGE RIVERA: That's what they call it. The certificate has a little title that says "Return."

MR. FULLER: Return of service, yes.

PROFESSOR DORSANEO: Second the motion.

MR. BECK: Our committee recommends the change.

CHAIRMAN SOULES: The change on Page 366?

MR. BECK: Page 366.

CHAIRMAN SOULES: In favor?

Opposed?

Unanimously approved.

MR. BECK: The next one, Luke, really isn't a specific proposal. It was a page of a letter that our committee got. It can be found on Page 701. It's really a concept that I think we need to have the committee pass upon. That's the special appearance rule, Rule 120a. The concept is whether we consider an amendment to Rule 120a to allow the use of affidavits to resolve the jurisdiction issue.

Our committee really didn't pass on that because we didn't have a specific proposal. My personal view is that I don't know any reason why we wouldn't use affidavits to resolve the jurisdiction issue. We do it for the venue issue. That's the way you resolve the jurisdiction issue in federal court. That seems to work pretty well. I think we need some guidance from the committee as to whether or not the concept is acceptable. Then we can put it into words.

CHAIRMAN SOULES: Do you recommend that proof

by affidavits be permitted?

MR. BECK: Yes, I do. But I want to make clear that our committee did not pass on this.

PROFESSOR EDGAR: Just in thinking about that, did you consider whether or not the fact that the burden is different in the state and federal practice --

MR. BECK: We didn't get into burden at all.

PROFESSOR EDGAR: Would that make any difference? You're recommending it be considered. I'm just wondering if that would make any difference.

MR. BECK: In the state court practice, the defendants have got the burden. So they've got to prove it one way or the other. All we're really talking about, aren't we, is the form of that proof?

PROFESSOR EDGAR: I'm just asking.

MR. BECK: Doesn't matter to me.

MR. FULLER: I have a question. If you file affidavits by third-party witnesses, have you made an appearance? See, you've got a different problem under a 120a special appearance than you do venue. Venue, you're already in court. It's just a matter of which county we're gonna be in. But we're talking about jurisdiction here.

MR. BEARD: I don't think so. If it is, I really have blown a few. How else are you gonna prove

it?

MR. FULLER: "It fell out of the sky, Judge. I didn't really file it," I guess.

MR. BECK: But wouldn't you have the same problem, though, Ken, if a guy showed up in court and testified live?

MR. FULLER: No, you don't have the problem if he shows up live. He's definitely made an appearance.

MR. BEARD: No.

MS. DUNCAN: Not for 120a.

MR. BECK: That's the whole purpose --

MR. FULLER: No, if he loses it, he's made an appearance. It's an all-or-nothing shot. You can't go default until the expiration of 20 days from --

MR. BEARD: He's got his appeal if he has jurisdiction.

MR. FULLER: If you file a 120a and you sustain it, then you walk away free.

You file a 120a and you go into court and you say, "Judge, I never have been near this state. They just sued me here because they want to harass me," and the judge says, "I don't believe you, I think you really do have contacts or whatever, I don't believe you. Now, you can go default next Monday, 20 days after the

expiration of today, when I say that you really are before this court."

My question is: Instead of that process, if it's done in some form or fashion by affidavits and he doesn't physically make an appearance, is the effect the same? And if it is, we have no problem. But if it isn't, you do have a problem.

JUDGE RIVERA: There's a problem. We need to hear evidence and you need to have an examine, and if they cannot cross-examination whoever said whatever they said, we're putting the plaintiff at a disadvantage.

MR. LOW: They have discovery. That can be a whole ballgame. Just the fact you file an affidavit, the judge gives you chance to enter discovery, you're not waiving it.

MR. BEARD: We function in federal court very well on affidavits. So I really don't see why we shouldn't have them here to simplify.

MR. LOW: I think David hit the nail on the head. It's just a question of whether we'll accept this type of proof, no matter who has the burden.

CHAIRMAN SOULES: There's a push to have this adopted, that the federal system works. And internationally you've got people having to come from foreign countries, halfway around the world to appear

when the plaintiff really can't come up with anything to show contacts, can't really make an affidavit that's really credible. I guess if it's really a big storm -- I think the push is also that oral testimony not be precluding. It's precluding venue, but that it not be precluded. So, if you really have a major case and a major storm over jurisdiction, you're probably going to have an oral hearing, anyway. But the idea is that if it's a pretty clear-cut thing that somebody ought not to have to travel long distance to put on live testimony.

MR. FULLER: Is that really going to cure anything, though? If a guy files an affidavit, it's not set for two weeks, I notice him for deposition, he's still got to appear. If he doesn't, we'll move to strike his pleadings.

CHAIRMAN SOULES: You can get a protective order, too, for you to do the traveling.

MR. FULLER: I would. Because then I think you've waived your 120a. It's a gotcha.

CHAIRMAN SOULES: I don't think so.

Bill.

PROFESSOR DORSANEO: I think, David, in terms of one committees member's suggestion for your subcommittee, that the whole subject -- including

burdens, method of proof -- ought to be considered. Texas, for quite some time, was very proud of the fact that it didn't have a special-appearance procedure, and you can even read articles by old-timers now describing how people from other parts of the country, let alone other parts of the world, were tricked into making general appearances. That is a part of our history that is partially carried forward by 120a, which liberalizes the opportunity for a non-resident to make a jurisdictional challenge while retaining a lot of prior Texas xenophobia, or whatever you want to call it. It's not a part of Texas history that makes us look very good to the rest of the world or that we should be particularly proud to retain. The federal practice works well. We might consider going to it.

CHAIRMAN SOULES: The burden question is not here. And I think that may even get more debate than the affidavit aspect of it.

Elaine, do you want to speak?

PROFESSOR CARLSON: I wonder about what Hadley said. What is the defendant going to say in his affidavit, that they don't have sufficient contact or any contact with Texas? Then would the plaintiff say, "Yes, he does." If the defendant says that, can the court accept it? It seems to me that the opportunity

for cross-examination might be greater or might be needed more in the situation where the burden of proof is on the defendant than federal court.

MR. BEARD: The plaintiff is here. If he can't even make an affidavit that will get the local judge to support him, he's in a hell of a fix.

[Laughter]

CHAIRMAN SOULES: The Waco sage at it again.

MR. BEARD: But, you know, to have to bring somebody in here from Germany or something just to have a hearing when you could do something by affidavit, that doesn't make a lot of sense. It's not very equitable.

MR. DAVIS: I just want to add to what's been said. I'm not much for this proof by affidavit. If you are trying to prove something, I don't want to be met with an affidavit. You can't cross-examine it. As you pointed out, what's your option? When you know that they're going to use an affidavit instead of bringing a witness in in person, which you may not know until the day of the hearing, then, yes, you can try to take your deposition. But I don't think we ought to expand the acceptance of affidavits as proof.

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: Two quick observations:

Anytime you get to using affidavits, you do

run into these pesky cases that say if your affidavits are not contested, the trial court must accept them as true.

Secondly, there is provision in the Government Code -- we need to check and see if it applies to trial courts -- that any court may determine its jurisdiction. It may apply only to appellate courts, but you need to check that.

CHAIRMAN SOULES: Why don't we get a consensus on this, unless someone has additional observation. How many feel that affidavits should be permitted at 120a hearings?

Five.

How many feel they should not be permitted?

Eleven.

Eleven to five not to approve affidavits.

MR. BECK: Does that mean I don't have to do any more work?

CHAIRMAN SOULES: Do you want a proposal on that, Justice Hecht, for the Court's consideration, regardless of this?

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: David, the Court would like to have a proposal, nonetheless, that affidavits be used.

MR. BECK: All right.

The last item on our subcommittee's agenda is at Page 715. Frankly, we had difficulty in construing exactly what the proposal is. It deals with Rule 145 that pertains to affidavits of inability. It appears to be a request for a declaratory judgment by the committee as to Rule 145. But I'm really not quite sure what the question is. So we have no proposal, as I see it, that's pending before us, and our committee has no recommendation one way or the other.

CHAIRMAN SOULES: This is --

PROFESSOR EDGAR: Would it be proper, Luke, if you wrote the scrivener and suggested that he send you a proposal to be considered? I mean, I hate to just not respond to people, kind of fluff them off. He might have a good point. But if we don't know what it is, if he could put it in some kind of form we could consider it, it might be a good idea.

CHAIRMAN SOULES: We had this proposal from Judge Zardenetta's court reporter in a prior session. The complaint, as I understand it, is that in civil cases, on affidavits of inability, the court reporter has to prepare a transcript and nobody pays the court reporter. Mr. Kelley here is very interested in this, I'm sure, except he's not an ordinary court reporter.

In criminal cases, there are funds allocated for that, for court reporters to be paid when they do indigent appeals in criminal cases. What they really want is for us to provide money or a means for payment of a court reporter who does a transcript for an indigent client in a civil case. And we never could figure out how to do that and therefore have never --

MR. BEARD: If that's the point, we can't even get the money to fund our lunch here.

[Laughter]

JUDGE RIVERA: We need to refer him to Commissioners Court.

PROFESSOR EDGAR: Or the Legislature, one of the two.

CHAIRMAN SOULES: The rules require the court reporter to do the transcript, but they don't provide for any funding. And there's been all kinds of comments made. No. 1, well, the court reporter has got the privilege of having a job and maybe some burdens that go with it. That was once discussed here. But we never came up with a resolution. And I don't know if we can.

MR. FULLER: I don't see it as our job to answer money questions, funding questions. We've got big enough problems already.

CHAIRMAN SOULES: As best you can understand

this, David, does my understanding of it square with yours?

MR. BECK: Yes, I think that's probably right. But if you look at the last sentence of Rule 145, 1, it says: "If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action." So there is some discretion that the court has under the rule as it's presently worded. But I think Hadley's suggestion is a good one. So the judge doesn't think that we're ignoring his concern, you can write him, or I can, just to make sure we know what his concern is.

CHAIRMAN SOULES: This is a TRAP rule, actually, 53 (j): The judge shall order his court reporter to prepare the statement of facts and deliver it to the appellant, but the court reporter shall receive no pay. That's what the rule says.

MR. FULLER: The Court says.

PROFESSOR DORSANEO: Spread it around.

MR. BEARD: The court reporter does draw a salary.

CHAIRMAN SOULES: What do you suggest, David? Let me tell you what we do. When we get the transcript back, I have the transcript copied in pertinent part and send it back to the parties that write us requesting

changes so that they see our debate. In other words, we operate in the plain light of day and everybody gets a full transcript of the debate on their issues. And sometimes it agitates them, especially if they don't get their way, but -- I'm not saying that Judge Zardenetta would feel that way, because we gave it a shot and if we don't come up with a resolution, he would understand. Is there anyone who would want to make a comment that he would see in that connection?

Justice Hecht.

JUSTICE HECHT: What does the last sentence of Texas Rules of Civil Procedure 145, I mean, period, and also in this regard? "If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action."

CHAIRMAN SOULES: That's trial-court costs. And it does not go to the cost of an appellate transcript. It does go to deposition charges, those that are taxed as costs.

JUSTICE HECHT: First of all, why should another party be required to pay the costs they won just because the plaintiff is receiving in forma pauperis; and secondly, if he is going to be required to pay them, why shouldn't he be required to pay the cost of the

statement of facts?

MR. HUGHES: Pertinent question.

MR. BEARD: The prevailing party should not have to pay.

JUSTICE HECHT: That's not what this says.

MR. BEARD: I understand that.

CHAIRMAN SOULES: The reason that this was in there was that the committee, when it adopted this rule, felt that better the prevailing party pay than the county.

MR. BEARD: I'm against that.

CHAIRMAN SOULES: That's why it's in there this way.

MR. SPIVEY: You're getting into private enterprise. Because we're trying to get private enterprise to pay the cost of the trial.

CHAIRMAN SOULES: The defendant didn't bring the county to the court. Maybe the defendant didn't do something. That's why he won.

PROFESSOR DORSANEO: The thought was that he ought to be happy to get out and shouldn't mind paying.

CHAIRMAN SOULES: I guess so.

What are we recommending? There is a disparity, because the court reporters who are freelance, who do depositions that are taxable as court costs, get

paid by the losing party for discovery depositions. Of course, the court reporter that takes the testimony gets paid for taking the testimony in open court, a per diem, whatever that per diem is, but then when it goes to reducing that transcript to written form, there's no payment for that for appeal.

JUSTICE HECHT: Of course, as a practical matter, a pauper is going to have a hard time enlisting the aid of a court reporter to take a bunch of depositions on the hope that they're going to get paid under Rule 145. And the party who is not a pauper is going to have to make some independent arrangement with the court reporter. So it's a little different from the official court reporters.

MR. BEARD: The court reporter draws a salary. He doesn't just get paid per diem.

CHAIRMAN SOULES: I guess it depends on how busy the court reporter is with in-court activities. Because they do get paid for every day's work. Maybe that's the purpose. They have to somehow get that transcript done out of their salary.

MR. BEARD: I think court reporters get paid very well for the duties they perform in the smaller towns.

CHAIRMAN SOULES: We're fully hashing out the

same thing we talked about before and wound up deciding that what we had was about as good as we could get it. But what else should we --

MR. BECK: Frankly, I don't know what we can do.

CHAIRMAN SOULES: Okay. You recommend no change, then, as a result of this. And we should so advise Judge Zardenetta? Okay.

MR. BECK: That concludes our subcommittee's report.

CHAIRMAN SOULES: Okay. Good report. Thank you.

PROFESSOR DORSANEO: Let's keep going.

CHAIRMAN SOULES: Okay.

Bill Dorsaneo has a report on the discovery rules. Judge Keltner apparently wants to hear this. Is that right?

JUSTICE HECHT: Yes. And he's not here. I don't want to disrupt, but he did ask to hear it, I told him I didn't think we would get to it till tomorrow.

CHAIRMAN SOULES: Do you have any resistance to us going past you and taking your rules tomorrow, Bill?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Hadley, are you ready to do

your report now?

PROFESSOR EDGAR: I'm just trying to figure out where I start. Looks like Page 904 maybe. I'm trying to see what the backup material on this is.

If you'll look at Page 911, you will find that the Legislature, in enacting Section 51.604 of the Government Code, changed the rule of civil procedure. And without dealing with whether or not they had the constitutional power to do that, we took the coward's way out and suggested a change in Rule 216 (a), (b), which you find on Page 905.

CHAIRMAN SOULES: What does the Government Code provide, Hadley?

PROFESSOR EDGAR: It's on Page 911.

CHAIRMAN SOULES: Okay. Thank you.

PROFESSOR EDGAR: Basically, as we understood it, this was a request that came out of Ray Hardy's office in Harris County to some of the legislators.

Where's David?

MR. MCMAINS: He's gone.

PROFESSOR EDGAR: But it's my recollection that that's where that emanated. It applies to counties with populations of two million or more.

CHAIRMAN SOULES: Any opposition to this change to Rule 216? It stands approved.

MR. FULLER: Whoa, whoa, whoa. I need a clarification. I don't understand what you're doing.

CHAIRMAN SOULES: The Legislature has taken the position in the Government Code that in counties over two million it's $20, $17, so forth. That's going to 25 in Harris County.

MR. FULLER: It's also 10 days instead of 30 days as provided by rule. See, we've got a 30-day request. Now, I don't know if that request includes the payment of the fee or not. So I guess you've got to make your request within 30 days and pay your fee within 10. Is that where it's leading?

CHAIRMAN SOULES: Yes.

MR. FULLER: Okay. Just so I know. Like I say, I wasn't objecting, I just wanted a clarification.

MR. MCMAINS: Actually, this statute in its provision says this is in addition to the jury.

PROFESSOR EDGAR: Don't misunderstand me. We deliberated --

MR. MCMAINS: It doesn't change the jury fee, it adds to it.

PROFESSOR EDGAR: That's right. I think Tom Ragland raised this point in a letter to us, as well. What happened was, as I recall Tom's position, he filed a case in Harris County and then found that the fee was

inadequate and they just never did file it.

It just kind of sat there, I think, didn't it, Tom?

And he said it was very fortunate that the statute of limitations didn't run in the meantime. But we didn't really know how to correct the problem. So, as I say, this was our recommendation to solve a very minor problem, but it doesn't solve a much broader problem, and that is that the lawyers rely on the rules of procedure, and the Legislature comes along and makes a change, and Harris County doesn't even send the petition back advising them that it wasn't filed. But that's a much broader issue.

CHAIRMAN SOULES: Sarah has got a good idea here. Add a comment that this amendment conforms to Texas Government Code Section 51.604.

PROFESSOR EDGAR: That really still doesn't alert the practitioner to the fact that if a county has enacted or has incorporated this provision that they might get caught short somewhere. And that's a real concern. And that doesn't really have anything to do with the request for jury fee.

CHAIRMAN SOULES: How about this? This amendment was made necessary by Texas Government Code Section 51.604, which provides for additional jury

fees --

PROFESSOR EDGAR: In certain counties.

PROFESSOR DORSANEO: What counties?

PROFESSOR EDGAR: Counties of over two million or more.

PROFESSOR DORSANEO: That's one county. Right? Harris County.

PROFESSOR EDGAR: It may well apply in the future, though. It applies only to Harris County at this writing.

PROFESSOR DORSANEO: Hadley, how come you didn't change (a)? As Ken points out, without indicating what happens if you don't comply, this extra fee must be paid not later than the 10th day before the jury trial is scheduled. It doesn't provide a procedural penalty.

CHAIRMAN SOULES: I don't think we should do that. I don't think we should put in a rule that you can't get a jury trial if you don't pay this fee.

PROFESSOR DORSANEO: I agree. I'm saying we can interpret this as not -- this 10-day rule is meant to be abided by by statute, but it doesn't say you don't get a jury trial if you pay it a little later.

CHAIRMAN SOULES: That's right. Our law is: If you pay $10 and demand a jury 30 days ahead, you get

a jury trial. There may be something the statute does --

MR. MCMAINS: The statute means you don't get any jurors. You get a jury trial, but you get up there, there ain't no jurors there.

CHAIRMAN SOULES: It means that Justice Evans is getting $350,000 for his ADR in Harris County, but it really doesn't have a thing in the world to do with jurors. But why should we recognize that a failure to pay this has a sanction to deny a party a jury trial? Because we don't necessarily have to agree with that. The judge doesn't necessarily have to agree.

MR. FULLER: We don't know the effect.

CHAIRMAN SOULES: Let's don't make it. Or is the consensus that we should tell them that that could be a problem?

MR. FULLER: If you're from Harris County, be aware of red lights.

PROFESSOR CARLSON: I'm concerned, too, because under the decision of McCoy v. Hanlin the Texas Supreme Court said that if a fee is going to something other than support of the judiciary it violates the open courts provision. We don't know where this fee -- we can surmise where it's going, but we don't know that.

PROFESSOR DORSANEO: Where's Broadus?

MR. BEARD: They may have already passed another statute raising it again. You don't even know that. It may be on the Governor's desk.

PROFESSOR EDGAR: Subsection c of the Government Code provision requires that it be paid not later than 10 days before the jury trial is scheduled to begin. So there is a provision there that at least seemingly is a conflict at least in part with 216, 1.

MR. MCMAINS: Not necessarily in conflict. It says "not later."

PROFESSOR EDGAR: I know that. It's not in conflict, but it's different.

MR. MCMAINS: Doesn't say you can't do it earlier.

MR. FULLER: Evidently you pay your $10 within 30 days under the rule and then you've got another 20 days to pay your Harris County fee.

MR. MCMAINS: Mow a few yards.

CHAIRMAN SOULES: If we put this comment in, Elaine's point raises a question. If we put this comment in, does that mean the Court is saying McCoy doesn't count anymore, regardless of what the statutory jury fees are going to?

MR. BEARD: You put your comment in and it's wrong because they've already changed it again and

somebody relies on this comment and the fee is already higher. We're back in the same --

CHAIRMAN SOULES: It may be better to say "unless otherwise provided by the law." And the law is whatever it is. Not put a comment in there.

MR. MCMAINS: "See other law."

MR. LOW: The clerk is directed to collect ten dollars plus other statutory fees. So the clerk is required to collect ten dollars or five, plus whatever statutory fees may be established by the Legislature.

JUSTICE HECHT: I think I do need to add some comment on here, because lawyers are used to finding the jury fee in Rule 216. They don't find the other fees in the rules, but they're used to finding that fee there. They need to be aware. Not necessarily this statute, but some comment should be added that additional fee for a jury may be required by other statutes so that, you know, if they're looking, which they may not be doing, but at least they'll see in changes to Rule 216 that they better be aware that there are some other charges. Because it may be 20 bucks, as somebody has said, in Harris County this time, but it may be $15 in Dallas County next session or $18 in Tarrant County. Who knows? If courts and clerks are going to get involved in this, then your jury fee is going to vary

just like your filing fee does.

MR. FULLER: But if we know of an existing statute on the day of promulgation of this rule, that's as close to entrapment as anything I've ever seen if we don't refer them to that.

CHAIRMAN SOULES: But Elaine's suggestion is that the statutory history in the public hearings part is not going to be constitutional. So we can't say that is required by the Supreme Court, because --

PROFESSOR CARLSON: Maybe we should say this amendment is necessitated as of this date by virtue of --

CHAIRMAN SOULES: How about just saying additional fees for jury trials may be required by other laws?

JUSTICE HECHT: See Texas Government Code. For example.

CHAIRMAN SOULES: Additional fees may be required by other laws, e.g. --

MR. FULLER: There you go. If the Governor signs that new statute, will that be a repeal of McCoy in Harris County?

CHAIRMAN SOULES: Probably. Is that then approved, with the comment I just gave?

Okay. Unanimously approved.

Next item.

PROFESSOR EDGAR: The next one is on Page 924. That's what the index says.

MR. MCMAINS: That's the signature line.

PROFESSOR EDGAR: Let's see where the rule is, folks.

CHAIRMAN SOULES: What rule number?

PROFESSOR EDGAR: Rule 223.

MS. HALFACRE: Starts on 914.

PROFESSOR EDGAR: Let me kind of back up a minute. The problem arises with respect to Rule 223 concerning the situation where a panel goes into the courtroom out of an interchangeable system, central jury room, and one of the lawyers says "I don't like that panel; I want it reshuffled." Now, there are some cases, one of which one of our current members has more than an academic interest in, in which the Austin court, as I read the case, said that, as I read Rule 223, that means that that panel has to go back to the central jury room, then a new shuffle occurs and a new panel comes back.

Some other courts have said, "No, what the rule means is that this panel is reshuffled."

Now, a lot of interesting questions arose from that, because let's then assume that the other side

didn't like the way that the new panel looked. Could you go back and have the process repeated over again, whichever process it might be?

Well, our committee thought about this and we figured that you really, by golly, ought to be able to just be required to take the panel that's dealt to you to begin with. And that's exactly what we proposed. You want a random selection, anyhow, and you get that out of the central jury room to begin with. And so what we have done is just decided to eliminate the last couple of -- well, I guess it's the last real long clause in the first paragraph of Rule 223.

MR. MCMAINS: Eliminating shuffling altogether?

PROFESSOR EDGAR: The effect is --

MR. MCMAINS: You're eliminating the motion of shuffling?

PROFESSOR EDGAR: That's right. That's where they are shuffled. You get a random selection out of the central jury room, that's all you get.

MR. MCMAINS: I understand that.

CHAIRMAN SOULES: Okay. 223 on the next page does this, though: It says the panel doesn't go back for a new panel, you shuffle the panel that's in the courtroom. And it leaves the in-court shuffle, which is

what shuffle is supposed to be, anyway, on the books, but you don't get a new panel.

PROFESSOR EDGAR: That's an alternate suggestion. Our recommendation is the one that appears here on Page 914. That is our recommendation.

CHAIRMAN SOULES: Okay. The COAJ recommends the alternate. This comes from the COAJ.

PROFESSOR EDGAR: I think that's probably right. I think that's right. But we felt that you only ought to get one shake anyhow and that ought to be enough.

PROFESSOR DORSANEO: I understood from the COAJ committee meetings that some of the judges, a large number, who do both civil and criminal cases, prefer to have 223 drafted the alternate way because then their practice is the same in civil and criminal cases.

MR. MCMAINS: Is that what shuffling means, Judge, in the criminal?

JUDGE CLINTON: Yes, sir. It's a matter of right. You can't do it back there in the general room or out in the hall or anywhere else, it's got to be done in the courtroom.

MR. FULLER: In the presence of the lawyers?

JUDGE CLINTON: The lawyers are the ones that ask for it.

MR. FULLER: That's what I mean. They get to watch the shuffle, though?

JUDGE CLINTON: Well, they can watch the shuffle if they want to. But shuffle is demanded anytime after the panel is in the courtroom and they look at them and before any voir dire begins.

PROFESSOR EDGAR: But the reshuffle is done only from the members within that panel?

JUDGE CLINTON: You've got it. The ones that are in the courtroom. That's what I mean. The ones that have been assigned to that court.

PROFESSOR EDGAR: In order for the rules to be consistent, I think, between the criminal and civil rules, perhaps we should go to the alternate.

CHAIRMAN SOULES: This last sentence, I don't know whether this is consistent with the criminal practice, and we inquired about that and no one knew at the COAJ, really, whether -- we say one shuffle.

MR. FULLER: Is that all you get in the criminal court?

JUDGE CLINTON: Well, that's the way it was for years. Now some Court of Appeals has taken one of our earlier decisions to imply, at least, and based upon the implication have said that if the State gets it first, the Defendant gets it; if the Defendant gets it

first, the State can get it. Because we're now going to have to review it, I'm not going to say how it's going to come out, but I've already indicated more or less through implication that that was --

PROFESSOR DORSANEO: We don't want to know about that case, Judge.

MR. FULLER: Let's go with one shuffle. Shall we?

JUDGE CLINTON: That is the present state of the law on the Court of Criminal Appeals.

PROFESSOR EDGAR: I move we adopt the alternate appearing on Page 915 and 916.

CHAIRMAN SOULES: Any further discussion?

MR. FULLER: We need it. Most of the judges in Dallas County give it to you after you scream long enough, but I would sure like to see it written in.

CHAIRMAN SOULES: Any further discussion?

JUSTICE HECHT: Up in the body it says "selected by electronic or mechanical means." Some people use the ball, some people use the wheel. We used the computer in Dallas. Other people use different means.

CHAIRMAN SOULES: Randomly selected from the wheel? They still call everything a wheel, don't they?

MR. FULLER: No, just randomly selected.

JUSTICE HECHT: Randomly selected. They use all different manner, ways of doing it.

CHAIRMAN SOULES: Justice Hecht's suggestion is that we strike from the beginning of the underscore the following words: "either selected by electronic or mechanical means or drawn from the wheel," and insert for those words two words: "Randomly selected." Is that acceptable to you, Hadley?

PROFESSOR EDGAR: That's fine.

CHAIRMAN SOULES: Any further discussion?

All in favor say aye.

Opposed?

MR. FULLER: What all are you going to cut out, Luke? Not just the underline but all the way to "wheel"?

CHAIRMAN SOULES: All the way to "wheel."

That then will be the recommendation to the Supreme Court of Texas by unanimity.

PROFESSOR EDGAR: We're looking at Rule 224, which begins on Page 925.

CHAIRMAN SOULES: For the record, we approved the versions on 915 and 916.

Now what page, Hadley?

PROFESSOR EDGAR: 925 to 927, it says. But I don't see the rule there. Let me see what it is.

MR. MORRIS: What we just voted on was on 915 and 916. Isn't that correct?

CHAIRMAN SOULES: Yes, it is. I said that wrong. It's on pages -- what we just voted on was to approve the version of 223 that appears on Pages 915 and 916 of the materials. Thank you.

MR. FULLER: We also amended --

CHAIRMAN SOULES: With the words substituted that I said.

MR. FULLER: Right.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: I don't have in here a request on Rule 224. It's in your index, so that's what I was going by, but I don't see it.

CHAIRMAN SOULES: I don't think there is one.

PROFESSOR EDGAR: All right.

The next rule we have is Rule 239, which -- well, here's Rule 226a. All right. I know what that is. No, that's old. That's been taken care of. That was when West made the glitches. That's nothing there.

239 on Page 930. This was a matter which our committee considered. And we make no recommendation, as I stated in my letter to you, because we didn't know the source of the reason for the change. I just simply got a letter from you and we don't know what it was. In

fact, there was some comment from some of the practitioners that didn't agree with it. So I'll let them respond.

CHAIRMAN SOULES: Here's the source. Suit filed by the plaintiff, removal to federal court, defendant answers in federal court, suit remanded to state court, defendant does not answer again in state court. Trial court grants a default judgment for $8 million. Motion for new trial. And the whole controversy is over whether 239, where it says "not previously filed an answer," reaches the "answer filed in federal court," which was filed in this case or not.

MR. MCMAINS: It's got to be filed.

CHAIRMAN SOULES: What?

MR. MCMAINS: It's got to be. He can't render a default judgment.

CHAIRMAN SOULES: He did, though. This makes it clear if there's an answer on file in state or federal court it protects against default. That's the reason for it. And if you look at the file on this case, that result could happen. Because before this 15-day period was put in there to answer after remand, there wasn't any period. So the minute it got remanded, if there wasn't an answer on file, the plaintiff could go take a default judgment and there was no need to file

an answer. So John Pease wrote this committee years ago complaining about that. And the Supreme Court passed and gave 15 days to file an answer in state court. But it all talks about an answer filed in state court. And there's nothing in the history that recognizes that answer that got filed in federal court. And this rule says if there's an answer filed in federal court while it's up there on removal prior to remand, that covers -- that protects against default judgment.

MR. MCMAINS: If the current rule doesn't say either in state or federal court, I just don't see how under your scenario -- because it says if he has not previously filed an answer. Under your scenario he did file an answer.

PROFESSOR EDGAR: Well, did the trial judge in this case you are talking about accept the plaintiff's argument that an answer was not on file and thus entered a default judgment?

CHAIRMAN SOULES: The defendant, after a day of trial, on a motion for new trial, paid the plaintiff $45,000 to agree to grant motion for new trial because the defendant was afraid that there would be an adverse ruling in that connection. What does this hurt?

MR. FULLER: Where's the harm if we put it in there? It's clarifying.

MR. O'QUINN: Let's vote.

JUSTICE HECHT: Wait. Once again, just out of elegance, would you consider putting a provision in 237a, which talks about remands? The last sentence of it is "All such adverse parties shall have 15 days from the notice within which to file an answer." Maybe just add a sentence there that said, "An answer filed in the federal court during removal shall be deemed an answer on remand" or something? But the problem is, in 239 it kind of makes it look like maybe there's some separate action going on, two proceedings.

PROFESSOR EDGAR: That's right. It ought to be in 237a.

MR. FULLER: I think you ought to say it in both places. If you filed it in federal court, it will be deemed to be filed in state court. Then over in 239, to guard doubly against it, it doesn't hurt a thing to say "in state or federal court."

CHAIRMAN SOULES: Okay. Add into 237a a new sentence. Is that right, Judge?

JUSTICE HECHT: Well, that's what I suggested. Just a simple sentence at the end that says "An answer filed in federal court during removal shall be deemed an answer upon remand" or something.

PROFESSOR DORSANEO: I've got problems now

with this whole thing of worrying about due order pleas and every other thing.

PROFESSOR EDGAR: Shall be what, Justice Hecht? I'm trying to complete the sentence that you suggested.

JUSTICE HECHT: Well, I'm not enamored with the sentence, but I'm just suggesting that the idea be incorporated in 237a something to the effect that an answer filed during removal shall be deemed -- not deemed, it just is an answer.

MR. FULLER: Shall constitute an answer in the state court action regarding the same cause of action parties.

JUSTICE HECHT: On remand or something.

PROFESSOR EDGAR: That's a default.

CHAIRMAN SOULES: It prevents a default in 239.

MR. O'QUINN: Dorsaneo's suggestion is: What if you file an answer in federal court, then go back to state court and file your motion to transfer venue? Have you waived your motion?

CHAIRMAN SOULES: My inclination is to do it in 239 and not do it elsewhere.

MR. FULLER: You better just leave it in 239, then.

CHAIRMAN SOULES: There's still a hole in this. Because you file this petition for removal and while it's up there you may file Rule 12 motions. They're not answers. And that doesn't get the job done. When you come back to state court, you've got to file an answer if you haven't answered in federal court. But you've got 15 days to do it. But at least you're not relying on an answer that was up there. I mean, you know if you've answered, you've answered. If you've done a Rule 12, that doesn't count down in state court.

PROFESSOR DORSANEO: The answer includes everything, due order pleas and everything under our scheme. Maybe there shouldn't be a default judgment if you filed an answer, whatever it is, under --

CHAIRMAN SOULES: And that's all 239 says. If you've got an answer on file in federal court --

MR. FULLER: This just answers the default question. You can talk about the due order pleading later.

CHAIRMAN SOULES: Okay.

All in favor, aye.

Any opposition?

JUSTICE HECHT: So you leave 239 the way it is?

CHAIRMAN SOULES: Does the discussion here

convince you we should leave 237 alone?

JUSTICE HECHT: I don't much care about that. But when I read 239, I think what about the guy where there are maybe several suits filed, maybe one in state, one in federal, who knows where they're filing suits, somebody files an answer in federal court, that doesn't take care of his lawsuit in state court.

CHAIRMAN SOULES: In the case. How about filed an answer in the case in state or federal court?

JUSTICE HECHT: We're specifically talking about removal and remand.

PROFESSOR DORSANEO: That should be mentioned.

CHAIRMAN SOULES: Okay. Where do we put that language, Justice Hecht, that you are suggesting?

JUSTICE HECHT: I haven't suggested any language, but I just think a removal-remand situation needs to be made clear wherever you put it.

CHAIRMAN SOULES: Filed an answer in the case in state or federal court.

MR. O'QUINN: In the cause remanded.

CHAIRMAN SOULES: Filed an answer in the cause remanded.

JUSTICE HECHT: This is a broader provision than that. You may just want to add another sentence.

PROFESSOR DORSANEO: I think another sentence.

CHAIRMAN SOULES: What should that sentence say?

JUSTICE HECHT: An answer filed in federal court in a removed action precludes a default judgment from being rendered upon remand. Or no default judgment shall be rendered in the case on remand if an answer was filed in removed action, something like that.

CHAIRMAN SOULES: No default judgment --

JUSTICE HECHT: Shall be rendered.

CHAIRMAN SOULES: -- shall be rendered if an answer --

JUSTICE HECHT: In a case remanded from federal court --

MR. FULLER: Where an answer has been filed.

JUSTICE HECHT: If an answer was filed in federal court during removal.

CHAIRMAN SOULES: Okay. So we would take out the underscored language and then add a sentence to it. Is that your suggestion, Judge?

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: Okay. So we would delete the underscored language and we would add this sentence in the body or at the end of the current Rule 239: "No

default judgment shall be rendered in a case remanded from federal court if an answer was filed in federal court during removal."

MR. FULLER: You've got a problem with multiparty defendants.

CHAIRMAN SOULES: Shall be rendered against a party in a case remanded from federal court if that party filed an answer in federal court during the removal.

MR. FULLER: I hate to be this way, but don't we have to vacate these premises tomorrow? We can't be here tomorrow. Is that correct?

JUSTICE HECHT: Yes, that's correct.

CHAIRMAN SOULES: We're meeting at the Guest Quarters Hotel tomorrow.

MR. FULLER: It's going to take us that long to gather our stuff up and get out of the garage.

CHAIRMAN SOULES: Okay. We have a meeting room over there for tomorrow.

[Overnight adjournment]
