P R O C E E D I N G S

Friday, November 19, 1993

1:00 p.m.

(On November 19, 1993, previous discussions were had, and continued after lunch recess as follows:)

MR. SOULES: Okay. Orsinger, do you have a way to state the last proposition that you recommended to me? Let's let Richard so we can get -- so I get this thing on the record right, Richard is going to state a proposition that we are going to vote on up or down just to get things moving just to get an understanding of what, where the people stand on this question of some or no expenses and fees on sanctions motions.

MR. ORSINGER: Okay. I'm going to make a motion that I don't actually support, but I think it will clarify the debate. And the motion is that we should adopt a rule that prohibits the trial court from awarding fees or expenses on a motion to compel under any circumstances. No

discretion, complete prohibition, never recover fees or expenses on a motion to compel.

MR. SOULES: Those in favor?

PROFESSOR ALBRIGHT: Can I have some discussion, hear the reason why? Can you simultaneously file a motion for sanctions if you feel like that the motion to compel is required because of bath faith conduct?

MR. SOULES: No. I mean, not "no," but I don't want to put that appendage on. We just want to find out how many people here feel that a trial judge should never be able to impose sanctions.

MR. ORSINGER: Shouldn't be able to award attorney's fees and costs.

MR. SOULES: Award attorney's fees and costs in connection with the motion to compel.

MR. LOW: That is different than he stated. He said, "A rule stating that." Not what the rule claims.

PROFESSOR EDGAR: Could you speak up? I can't hear you.

MR. LOW: There is a difference in that, because there is a difference in having a rule stating you can't do it and just don't put it in the rule. The judge follow the rules. I mean, you know, there's a difference in that. I think the other --

HONORABLE DAVID PEEPLES: Is the motion to amend the rules and adopt a rule?

MR. ORSINGER: Well, no. My effort is for us to focus our debate. I think that there is a smaller nucleus that doesn't want fees under any circumstances than the 18 to 18 vote indicates, so I'm talking now about the policy. The policy is that we don't want district judges to have the power to award fees and costs on motion to compel. Do we believe that, or do we not believe that?

MR. GALLAGHER: On a discovery dispute?

MR. ORSINGER: On just a motion to compel. Not the sanctions, not the striking of pleadings.

MR. SOULES: State it one more

time so everybody has it.

MR. ORSINGER: That the policy is that district judges should not have the power under any circumstances to award fees or expenses in connection with a simple motion to compel.

MR. SOULES: Those in favor of that policy hold up your hand.

MR. SPARKS: Second.

CHIEF JUSTICE AUSTIN MCCLOUD: Does he mean district judges or county judges?

MR. SOULES: No. We're trying to focus the debate. This is not an up or down deal. Okay. How many feel that way? Fourteen.

And those opposed show your hands. Nineteen. Okay. Well, that's not a clear enough division to stop debate. I think let's go ahead and put the appendages with it that we were talking about. Sarah, you had some concerns. What were your concerns in connection with that vote or the policy?

MS. DUNCAN: Well, what concerns me, what several of us were talking about during the break is viewing this in a

piece-by-piece, isolated pieces fashion versus whole concepts that are different. And I feel fairly comfortable about what I think should be the whole concept, but I have trouble fitting things into it on a piece-by-piece basis, because they may not make much sense in my concept.

MR. SOULES: Okay. Alex Albright, you had a question then before we took the vote on does that mean that you could couple, or can you couple a motion to compel with a motion for sanctions all at the same hearing.

PROFESSOR ALBRIGHT: Well, I think my certain is like Sarah's is I have a hard time voting on these in individual parts. I like the idea that attorney's fees are thought of as some sort of sanction or sanctionable conduct in motions to compel. What I would like to see is Tommy Jacks and Scott McCown and David Perry going and drafting an alternative rule that they bring back to us and we can vote "Do I like this rule better than the task force rule," and then looking at them as a whole rather than

voting on them in individual increments. I have real trouble like Sarah in voting on each of these particular parts individually without knowing what the next step is.

MR. HERRING: Well, let me add to that. We found on the task force it real easy to agree on a lot of general concepts that we then tried to write down, and it was very, very difficult to put in a rule and have a procedure that would work. We have got 30 or 40 other drafts sitting in our files of things.

If we could get everybody who has a different approach or a different idea today, I don't know what you're going to do, Luke, but either before the next meeting or whatever to do that, give it all to Joe's committee and then lay out some different proposals and maybe different ways of going on this.

I think it's easier -- it's useful to have this kind of philosophical discussion --

PROFESSOR ALBRIGHT: Right. To a point.

MR. HERRING: -- to a point. It's a useful educational effort for us all, but ultimately the devils really are in the details.

PROFESSOR ALBRIGHT: Right. Because some of these things may be nice concepts, but they're virtually impossible to put into a rule. And so maybe the people that feel strongly about that there is something that I want to change about the task force rule, well, let's develop an alternative, and then we all have something to look at, and we can vote on it that way.

MR. SOULES: What are the concerns that you want addressed in order to make a decision as to whether or not a trial judge should be authorized to impose fees and expenses in connection with a motion to compel? Let's at least get them on the table so that if there is an interim committee, they're addressing those concerns. Steve Susman.

MR. SUSMAN: Well, one thing I want to know is how this rule will affect how expensive it is to get a motion to compel

resolved. Is it going to encourage lawyers to file 25-page briefs with 10 inches of appendices which include letters that they've written back and forth to each other; and I mean, or is is it going to -- I mean it seems to me the expense of getting a motion to compel ruled on is what we ought to really be addressing. Not who is going to pay it.

I mean, I'd like to see a system where you just have to call up a judge and say, "Judge, the guys won't answer the interrogatories" on the phone. The judge says, "Answer them." There it is. That's not expensive. Who cares.

So I mean I think you have to look at before you determine who bears the expense is how expensive is the process, how expensive should the process be, how quick is it; and then you could decide, well, who should bear the expense and should it be an expense which shifts from the winner to the loser and under what circumstances.

And I would just add one further thing. I mean, what's wrong with the way the Federal Rules operate on these

subjects? And shouldn't this group, I mean, before we impose yet another set of rules for lawyers of this state to learn which is different from the Federal Rules shouldn't we figure out what is wrong with the Federal Rules, why aren't they good. Are we curing anything? If not, why don't we go to be just like them so we only have to learn one set of rules.

MR. SOULES: Buddy Low.

MR. LOW: That's true. The most expensive thing in the lawsuit is the whole litigation. So then if we're going to do that, then why single out just discovery and say, "Okay. You filed this lawsuit, and you shouldn't have. You lost. You pay all my expenses and everything." No, I'm not for that. So why make such a privileged character out of the motion to compel when you wouldn't do it for the whole lawsuit? I mean, I don't see the reason.

MR. SOULES: Ken Fuller.

MR. FULLER: In the ideal world that I hear proposed where you would not have any sanctions for motions to produce and

also you can't have any attorney's fees, if I have a client and it's to his advantage to delay the litigation, do I have a duty, number one, particularly since there are no sanctions involved and no bad things can happen to me, why shouldn't I delay it by delaying it until the very last minute producing all my discovery. And I'm sorry, but that's the world I live in; and that doesn't make it right, but that's where I live.

I mean, we only get what we take away from them. I don't know what we'll do if we end up with a rule like that.

MR. BABCOCK: A concern I have about the no fees and expenses is that I agree with that on the first go-round. However, if you file a motion to compel and you get an order and then you have to go back with multiple motions, it seems to me that probably there ought to be a provision for awarding attorney's fees in that situation. Free first shot, but the second time around your client ought to be compensated for the expense.

MR. SOULES: Anyone else? Judge Guittard.

HONORABLE CLARENCE GUITTARD: I think there is a great deal of merit to what has been said here about how we ought to have some concrete alternative to consider. I think most of us can agree that the task force proposal would be a big improvement on the rules that we have if for no other reason as Rusty suggested it puts it down in the rule. You don't have to go through a lot of cases.

But there is also the problem that if we consider an alternative here, I think the main thing that the task force report doesn't completely deal with to the satisfaction of most members of the committee is those of us that are concerned about disincentives to such motions. I don't know whether we can provide any effective disincentives that would not also chill the discovery process to a reasonable degree. We have to strike a balance between the one and the other. And in order to do that it seems like to me that we ought to have some concrete proposal that would go further in the direction of disincentives that we could compare with what the task force has put

before us.

MR. JONES: I can cite you some disincentives, Mr. Chairman, and I remember.

MR. SOULES: Franklin Jones.

MR. JONES: I was a member of the committee that did those disincentives, so I guess I can talk about them. What they have done to the discovery process over there is Draconian; and you can disincentive the hell out of people and kill the baby with the bath, and think about that.

MR. SOULES: Can you give us an example, Franklin?

MR. JONES: Well, you can only take three depositions unless you have an extremely complicated case. You're limited on interrogatories, limited on requests for admissions. It's just like it was when I started practicing law. You'd look up and the witness would walk in and turn to one of these partners and say, "Are you going to examine this S.O.B. or me, and who is he?" It's back to the rudimentary Dark Ages. And that's not all bad, but this is what we're talking about

when we speak of disincentives being recovered, and I want you-all to think about that, because I'm a victim of it, and I don't see too many more around who have practiced in that district. Low does.

MR. LOW: I quit going there.

MR. SOULES: Why is that? No need to go?

MR. LOW: It got so complicated and so many rules that if it's not state court, I just get somebody else to take it.

MR. SOULES: Joe, the discussion seems to be focusing on giving it back to your committee to rewrite.

MR. LATTING: Yes, it does.

MR. SOULES: Now, do you feel like you have direction to --

MR. LATTING: Yes.

MR. SOULES: -- undertake the rule?

MR. LATTING: I'm going to have Scott and Tommy Jacks write the --

(Committee laughter.)

MR. LATTING: I am, seriously,

and David, and invite everybody to get in touch with us and help us come up with some modifications or alternative plans or --

HONORABLE CLARANCE GUITTARD: A minority report.

MR. LATTING: -- a minority report, whatever.

MR. SOULES: There is no need just going down a blind trail. And I think that we need to give Joe as much information as we can give him about in which direction we're inclined. What about the current proposal do we want to see different so that he can write it differently?

MR. ORSINGER: Didn't you announce a checklist earlier on?

MR. LATTING: I was thinking of getting Luke's checklist.

MR. ORSINGER: Maybe we ought to discuss the rest of the checklist.

MR. TINDALL: Are you asking about the entire proposal, or just this one issue of attorney's fees and expenses, Luke?

MR. SOULES: The entire proposal.

MR. TINDALL: I think we need to give some direction to Joe about when you can go directly to a sanctions motion and pass the motion to compel. The illustration of late discovered documents or the willful destruction of documents, fraud, delay, I mean there will be a number of ones where it seems like to me it is not just a routine quarrel that two good lawyers have about or inadvertence. You should be able to go straight to the hammer on something you view as serious; and I think the committee can give input on that.

MR. SOULES: All right. Then we had Judge Cockran's suggestion about the timing of the discovery award. I don't know whether that means the timing of ruling from the bench and the signing of an interlocutory order, and then when do you pay, or do you come in and argue for sanctions and the judge says "I'll let you know when you receive a final judgment." What will that accomplish? What about that?

MR. LATTING: I would like to speak in opposition to that, because I can see

situations in which a deep-pocketed client could make it very difficult for a litigant to get information and where he would need those sanctions; and in plain English I think there are situations where a trial court ought to be able to make them pay on the spot if the circumstance is merited, and I don't see a good reason for saying you could never do that in the statement.

MR. SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: It seems to me, and I may well be wrong, but I think we've reached the point of limiting diminished returns in talking about this particular rule, because I think we've covered this issue. And we certainly haven't resolved it, but I'm not hearing new things, and I'm wondering if it's not just best at this point becaue I know you have lots of other things you want us to look at in the, I guess, two half days we've got left as to whether or not we ought not move on and just have Joe's subcommittee come to us with the alternatives.

We all may have some thoughts

about minor details that we can share through correspondence with Joe separately; but I don't know if the majority of the group feels the same as I do or not, but I think we've chewed this one up pretty fine.

MR. LOW: If you want to get to the rule where you have the unusual situation, you need to go straight to the judge and file sanctions. Then lawyers might construe that as meaning "Well, this is unusual and I've got to do it." But if you have that, why not then you either have to file a motion to compel or a motion for leave to file sanctions and then you can attach your documents. I know it's more paper; and I'm not suggesting that's what I would even do, but that's a thought. You could do that so that the lawyers can't just automatically file a motion for sanctions saying "This is unusual," because every situation is going to be unusual. So that's just an alternative.

MR. PERRY: One of the things that I believe needs to be addressed in the rule and Transamerican deals with the concept that the punishment should fit the crime.

Now, there are various types of circumstances that occur with some degee of repetitiveness. It seems to me that it would be very beneficial if we spent a little bit of time talking about different kinds of circumstances that arise and seeing to what extent there is a consensus among the committee. Maybe not take a vote on it, but at least talk about it to give the committee some guidance, the subcommitte some guidance as to what ought to happen in various circumstances.

We've done a little bit of that. But for example, in the 10,000 documents situation where somebody finds a new warehouse 32 days before trial and they dump it on somebody, what ought to happen? Should they have to pay a million dollars in the expense of rediscovering the case? Should they get defaulted, or what else ought to happen? There are a number of cases like that that I think that if we were to discuss the nature of the situation, we might find a surprising amount of agreement as to what ought to happen, and that would be of guidance to the subcommitte in writing the rule.

The other issue that I would like to raise, and I think this is a very different issue but I think it ought to be discussed, Transamerican presently calls on the trial court to have a factual inquiry to determine as between the lawyer and the client who it was that did wrong. I have a grave question as to whether that is good policy with all respect to the Court; but the policy of the law has always been in the past that the lawyer is the agent of the client, and if the lawyer doesn't prosecute the case properly and it gets dismissed for want of prosecution, too bad. If the lawyer doesn't make -- if you have ineffective counsel in a civil case, your remedy is not a new trial. And if we're going to depart from that, I think we need to give some real serious thought procedurally how do we handle that, or do we really want to go down that trail?

JUSTICE NATHAN HECHT: Keep in mind though that that is one thing Judge Mauzy and I agreed about, so that may make it right or wrong. I'm not sure.

MR. PERRY: I started to tell

Tommy Jacks a minute ago that I wanted to go on the record as disagreeing with him; and I think if I could disagree with Tommy, you could agree with Oscar and maybe both of us are wrong.

MR. SOULES: Okay. Richard Orsinger.

MR. ORSINGER: I'm not comfortable closing debate at this point, although we will do whatever you decide; but I think this is one of the most contentious issues that trial lawyers deal with; and even if we spend the whole rest of the afternoon trying to formulate a consensus here, it will certainly save us time the next time a rule comes back because we'll have already, if you will, argued up some kind of consensus or maybe even taken a vote so that the rule that's drafted is closer to what me might ultimately adopt.

Secondly, there are some things that have never been talked about. Just for example Paragraph 5 of the proposed rule which has not be mentioned I think can be interpreted to eliminate mandamus review. It

says that "It shall be deemed to be part of the final judgment and subject to review on appeal." And I know that there is a dispute even as recently as just a couple of weeks ago as to whether appeal is an adequate remedy when the Court of Appeals won't let you file a statements of fact; and that's a very unclear area, but this suggests to me that even if you have a death penaly sanction that eliminates any semblance of a real fact finding at a trial, that you still have to go through that charade in order to raise your death penalty complaint on a direct appeal. And I don't know if the committee intended to do that with Paragraph 5 or whether it's just the words that were chosen, but if in fact that's what those words mean, I think we ought to discuss it real seriously before we just let it happen.

MR. HERRING: You have two questions on the floor. One is the culpability determination, and the other is the appeal point. The appeal point I'll let Rusty talk to us since he was the designated appeal expert. On the culpability

determination point here's the language that the Supreme Court had in Transamerican, and it's in the comment to the rule. It says, "The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both, and then the Court must punish the guilty party." You don't punish, the theory of that is, the client if it's the lawyer's fault.

We spent a lot of time talking about that, a lot of time talking about the conflict of interest issue. There is a long line of cases now in federal jurisprudence under Federal Rule 11 that says that there is a -- there well may be a conflict that's almost unsolvable in that situation; and they've reversed a number of sanctions awards where the same lawyer in a major sanctions situation represented himself or herself and the client.

How do you deal with that conflict, potential conflict situation? We now have the Beyers Product case which also addresses that and says in effect "Must judges

now give a Moranda warning to the client or the lawyer or advise the client that maybe another lawyer is necessary for the sanctions hearing?" So that's a problem. The comment goes on to say, "The court should exercise care in making the culpability determination required by Transamerican. The determination of relative culpability may be complex and fact specific, and a conflict of interest may arise between attorney and client who may have directly opposing financial and other interests depending upon the outcome of the culpability determination. The trial court should take appropriate steps to minimize as much as possibile any intrusion into the attorney/client relationship. In some cases postponing the decisions of a sanctions motion, or at least the culpability determination may be helpful. The Court also should control discovery and evidenciary inquiries concerning sanctions issues to insure that such inquiries do not unecessarily invade the attorney/client relationship or risk disclosure of privileged information. Protective orders and in camera inspection of

privileged information may be helpful to minimize such disruption."

That comment is pretty close to a statement that appears in the comment in Federal Rule 11, but we debated long and hard whether the trial judge should just be required to award monetary sanctions; and that's really what you're talking about is the monetary sanctions situation against the client. If it would be a severe sanction where there would be dismissal, that's going to affect the client anyway obviously. But whether there should be some procedure that you don't have to make that determination, because it can be very disruptive; and unfortunately right now it's kind of a cutting-edge, Rambo tactic that some people are using.

If you're trying to get sanctions against somebody, severe sanctions, and you know that that lawyer and the client are together and there is no separate counsel, are you going to be able to sustain that on appeal now?

It's a difficult issue. The

underlying theory behind that culpability determination is one of equity and fairness. If it's the lawyer's fault, you shouldn't punish the client.

We did not -- we were unable to come up with a creative, brilliant way to reconcile those two different sides of that, and it is as we talked about earlier further complicated by the exclusion in most legal malpractice insurance policies that says and in almost all of our policies that they do not cover monetary amounts awarded as sanctions. That's the issue and that's what we discussed.

MR. LATTING: What about the appeal question?

MR. SOULES: I'm curious as to how does a trial judge actually inquire into whether the discovery abuse is the fault of the client or the fault of the attorney.

Judge Brister.

HONORABLE SCOTT A. BRISTER: Usually it's not that hard. You know, I've seen it where somebody didn't show up for a deposition. We bring them in and say,

"All right. How come you-all didn't show up? Whose fault is it? Yours or the attorney's?" They both shake their head like this (indicating). In a lot of circumstances "How come did we not get the paper?" Usually you're not going to have to go into the evidenciary area. There is an explanation "How come we didn't get the document or didn't show up at the deposition." Here is what that explanation is," and it's not very -- it's not anything that they can do but place people under oath, but not to say you're not going to in some circumstances. Again, 90 percent of the time it's not something that causes any problem.

MR. BEARD: What do you do with the 10 percent where the lawyer says one thing and the client says the other?

HONORABLE SCOTT A. BRISTER: Well, I've never had it. You probably have to do what the comment says and maybe have to put it off until the end of trial, and then after the trial have some kind of hearing or something like that. I mean, it's similar to the question about whether you can look at an

insurance company's claims file. I think you have to have some kind of abatement of part of the deal.

MR. SOULES: Rusty McMain.

MR. MCMAIN: One of things that David has talked about was fairly contentious in the beginning on the committee, because Transamerican came out shortly after we started our work and the committee shifted in basically attempting to draft a rule that comported at least in part with Transamerica or deciding if that's what we were going to do. And I, and I don't even know if there were any other supporters on the committee, was on David's side in this in terms of thinking that it's an invasion and intrusion into the attorney/client process anyway to be making such inquiries; but more importantly it is almost always and certainly was under the case law as it existed prior to Transamerican in the attorney's interest to take the heat, because if the indications and readings of Transamerican and it's progeny are that you should not if the attorney is at fault default them, dismiss them, delare issues deemed,

those sorts of things on the merits of the lawsuit, and therefore even if the client did it, there is every motivation and incentive for the attorney to take the heat and basically then preclude the ability to apply sanctions directly against the client in terms of dismissal or default or issues deemed.

That to me creates an incredible amount of mischief as well as an intrinsic perversion of the truthful inquiries that ought to be going on anyway. If you are going to be having such inquiries, then you would have to have discovery on it. And there isn't anything worse than having a parallel discovery proceeding on a sanctions proceeding to see if they're lying about who did it, and especially if the issue that you're talking about what they did is something that was dishonest to begin with.

So the idea that somehow a client should be immunized from the effects of its agent seems to be so foreign to our law otherwise in which doctrines of respondeat superior and course and scope are fairly standard, they delegate -- if the client

delegates something performed in the court to the lawyer, the client needs to be the one that will bear the brunt of what will happen; and if there is a dispute arises, then the lawyer ought to pay back the client, ought to make good on the default, whatever, if that's what happened.

That was frankly my judgment, and I think Transamerican is dead wrong in going the other way, and I always did from the beginning. I think it's also contrary to the law of the restatement with regards to the responsbility of agents in the performance of their liability. In fact, a year before Transamerican I had a case that I took to the Supreme Court that they wouldn't take in which my client was basically infected with liability for the assult committed by an attorney on a peace officer during an execution, and it was imputed to the client; and that's just straight-up case law out of the restatement and didn't even make an exception on intentional torts.

Now, if they have tort liability, why don't they have liability

responsibility for conducting discovery which is what the lawyers ought to be able to do without intruding into this process? If you're going to have an administrative determination, it should be disciplinary and not otherwise.

That was my view from the beginning, but the problem is we either had to go one way or the other. This is not an issue in large measure upon which you can compromise. This is one of those things where you have to make a call are you going to -- do you buy the argument that the client should not suffer at the hands of the lawyer and thereby create potential for mischief as well, but also obviously due equity in those cases where it really is the lawyer and not the client. Or do you say, "That's not the issue. The issue is what is the essential impact of the particular abuse on the litigation, and if there is a relationship to it, to the litigation, then the litigant that caused it either himself or through his lawyers should be forced to bear that punishment.

And those are not things frankly in our discussions that seem to have any kind of middle ground. There isn't any place to go on that, because once you start making an exception for the attorneys, then you do exactly the vice -- as you open the door wide; and it's one of those things, it either stays shut or it stays closed.

MR. SUSMAN: You know, I mean, what three -- the one that allows you to impose a monetary award in addition to in lieu of actual expenses, that is punitive damages obviously. That is not compensatory. That is to punish. And even when you submit punitive charges in the case you have got to identify the person who is responsible for the malicious, the bad faith. I mean, as I recall the standard charge now if it's a corporation, you have got to identify an officer or some responsible person in that corporation.

Now, it seems to me you can't impose that kind of punitive -- I'm against judges having the ability to impose punitive damages on lawyers in the first place. I don't believe they ought to have the power

under any circumstances, because I mean a two million dollar punitive damage award against an attorney with no jury trial? Everyone else gets a jury trial. Why doesn't the attorney get a jury trial? Why doesn't he get due process before a judge can impose something that's obviously going to force him into bankruptcy. If he's not insured, he's history, I mean, plain and simple.

So, I mean, I'm not sure I'm in favor of it at all, but if you're going to do it, you have got to identify who is responsible, and then you get into this whole problem of creating another lawsuit between the lawyer. I mean Scott Brister is right. In the simple case you can tell who was responsible for the guy not showing up at the deposition, but we're talking about here now the 150,000 documents that show up before a trial. And I guarantee you in that case, because I've seen it happen before, there is going to be a huge dispute between the in-house counsel and the lawyer, counsel of record as to who gave appropriate instructions on where the documents should have been

produced, how they should have been looked for, "It was your fault you didn't tell me." "Oh, I told you. Look at my letter." "But it didn't say that."

It's a huge dispute in those cases where a lot is at stake. So, I mean, I'm in favor. I mean, basically my view is that you ought to eliminate the ability to impose punitive damages, and it all ought to go on the client. The client ought to be responsible, take that out of the system. The client is responsible for the lawyer's conduct.

MR. SOULES: No fines.

MR. SUSMAN: And no fines. No punitive. I mean, no fines.

MR. HERRING: How do you decide, though, if the imposed severe sanction is not monetary, you want to do something bad? We want to prevent you from putting on your witness, or we want to strike your pleadings, or we want to default. That's one that is definitely going to go against the client.

MR. SUSMAN: I think they all

ought to go against the client.

MR. HERRING: You want everything to go against the client?

MR. SUSMAN: Yeah. I don't want punitive damages mainly because you're going to have to figure out on that one whether it's the client or a lawyer who gets hit, because it's their state of mind that should be determinative. And I don't want a judge to have the power to assess punitive damages on a lawyer.

MR. LOW: In keeping with what Steve said, he's absolutely right, is that in punitive damages it has got to be a vice principal; and if a lawyer is not a vice principal in a lawsuit, then I don't know what he is. So that would be between the lawyer and the client. If a lawyer makes a client lose his case because of this, why make an exception? Why get into who did it or what? You know it came from that side. They're only one party. That party should suffer. And if he's not responsible, let him and his lawyer work that out, and just go from there.

MR. MCMAIN: Addressing Steve's point with regards to the reason that the damage number, that the number still exists basically our reading of Transamerican which relies on the U.S. Supreme Court cases that had discussed the issue is basically that we -- really and truly we thought that Transamerican as well as this rule is designed not to go to the merits of the lawsuit unless the abuse goes to the merits. The problem is that everyone that considered it has seen abuses that do not necessarily deprive you or maybe even per se adversely even affect the merits, but it's egregious conduct, and it may have cost a lot of money or expenses to have to get around it, but it may be absolutly immaterial like the 10,000 documents in the warehouse that you're talking about or that David is talking about. It may well be there is nothing there. But can you take that chance? You go do that. It doesn't affect the merits under the Supreme Court case basically and under Transamerican the way the committee read it. We couldn't go to the merits. We couldn't default. We couldn't

determine the issue. If it didn't have a bearing on the issue, we didn't have the ability to do that.

So the question is, should there be something else there? And that's kind of the only reason that there is a punitive part there at all. I don't disagree with the generic notion.

MR. SUSMAN: You cover that with expenses though.

MR. MCMAIN: Well, you can cover the 10,000 documents. The point is there are egregious things that can happen that you can never show would affect the merits; and that's the Catch 22 that you get into especially when you're talking about the nonproduction of things ever or the destruction of things in which the best you could do is to get into some kind of a presumption argument there which the cases might let you do, but and then we get back to the question of do you do it against the lawyer or the client.

HONORABLE F. SCOTT MCCOWN: I agree with Rusty on this, and would like to

just point out a small technical related issue. In Subdivision 1(c) is uses the term "law firm or other person or entity whose actions necessitated the motion"; and that suggests to me vicarious liability of the firm for the actions of a single lawyer, because it says "attorney"; and to then say "law firm" would be redundant unless it was trying to capture some notion of vicarious liability which seems to me to go against the Limited Liability Partnership Act and the Corporations Act if they are in fact constituted that way and would be a change of substantive law. And I certainly think that there ought not be vicarious liability, though I would agree with the larger point that it ought to be visited on the client anyway. But those are two separate issues; and the rule seems to suggest vicarious liability.

MR. SOULES: Isn't it true that the firm has vicarious liability for the attorney's errors? It's just the other lawyers don't.

MR. MCCOWN: Well, it wouldn't if it was a limited liability partnership or

if it was a corporation.

MR. HERRING: And the contemplation of the rule is still, the sense of it is, you're going to punish the guilty party. If a law firm has done something either by nonsupervision of a lawyer or affirming what the lawyer did, I think the intent of that is, or I know that's what we were talking about, is that you're not going to deal with the law firm just as a matter of course.

Now, the reasons it has changed is because the same change just came up in Federal Court where the issue arose and the Supreme Court said under the existing Rule 11 you can't sanction the law firm. It's not contemplated, and the rule has been to have been proposed to change that. We thought we would be consistent with that. But there might be some circumstances where the law firm indeed did have not pure vicarious culpability, but actually was not doing what it should have done which led to the bad conduct.

HONORABLE F. SCOTT MCCOWN:

Well, but then it would be an attorney. There is going to be some individual. When you say "law firm" that suggests some kind of entity liability as opposed to liability of a specific individual.

MR. BECK: Scott, there are some law firms, and actually there are bar associations outside the State of Texas that are making conscious policy choices in their rules to make law firms liable for sanctions imposed upon their lawyers. The theory is that it will require those firms to police the lawyers and to supervise the lawyers as opposed to having the courts do it.

HONORABLE F. SCOTT MCCOWN: Well, if you want to go that way, I suppose you can. But I think that that policy decision is one that is not -- I'm just trying to point it out, that those words give a policy decision to do what David just suggested or not.

MR. BECK: I'm not suggesting you do that. I'm just simply saying that there is at lesat one policy argument in favor of making the law that way.

HONORABLE F. SCOTT MCCOWN: Right.

MR. JACKS: I have a question of Chuck Herring regarding the intent of the task force in this regard: The phrase that follows "law firm or other person or entity" is "whose actions necessitated the motion." In order to hold the firm responsible for the sanctions would it be necessary that there be a finding that it was the firm qua firm whose actions necessitated the motion as opposed to a lawyer in the firm?

MR. HERRING: Well, I'm not sure my firm even has a qua firm in it, but I think the answer is "Yes." I mean, if the firm -- and I think it's David Beck's point. The idea there is that the firm as firm did something. Or suppose the firm had a policy: You know, "We will file," as someone has said, "a sanctions motion in every case just for the heck of it because we like them, and we are that kind of image out there." A judge could be offended by that.

We didn't talk about that example, but that comes to mind. I think

that's the intent.

MR. MCMAIN: Tommy, the other thing frankly that we did talk about was if you don't talk about it as a collective entity, if you were to try and read too literally as the Feds have actually their Rule 11 and you get two lawyers from the same firm maybe one of which is no longer there saying "He did it," then basically one of the purposes of this was that the judge doesn't have to figure out who did it --

MR. JACKS: Right.

MR. MCMAIN: -- from that standpoint. And again that is to me one of the vices of Transamerican. You not only -- of the Transamerican notions anyway, because you not only go into the attorney/client relationship, you go into the internal core relationship.

MR. PERRY: Then it's a responsibility issue.

MR. HERRING: Going back to the point on do you allow a Court to do something against the lawyer, or do you try to say, "No. Let's do it all against the

client," the three arguments, and I guess we've already covered them really, but there was concern that if a lawyer engages in misconduct, the judge ought to have more ability to do something than simply contempt which is very limited and wouldn't reach a lot of discovery abuse kinds of situations, that judges don't like to and as a practical matter often don't refer to grievance committees, and we shouldn't make that the first step, and the problem of financial penalties. If it's a sanction and it's excluded from legal malpractice insurance policy, the client sues the lawyer and can't get it back from a lot of lawyers. I don't say those are carried today. Those are simply some of the considerations that we discussed.

Really the reason it's in there is because again this was an effort to incorporate and make sure people were aware of existing law under Transamerican, and that is Transamerican. It's just how you deal with it. In most cases it doesn't come up. In many cases the lawyer and client have worked it out before the hearing, but there are some

cases where it will come up and can be very painful; and we -- I just want everybody to be aware of that, and we didn't solve it. It's just these are procedures that we mentioned and people should be aware of it.

MR. SOULES: Do we want to give direction to Joe's committee as to how we think that should be resolved? Lawyers only; client only; lawyers and clients; lawyers and clients and law firms and other people who may be responsible? We've got I think about every category that you can think of in the rule right now. Should any of them be deleted in the work Joe is going to be doing in the interim?

MR. BEARD: Should we -- I'll ask Justice Hecht this. Should we be trying to overrule the Transamerican case?

JUSTICE NATHAN HECHT: You can't, of course; and a record is being kept.

MR. SPARKS: Oral motion to reconsider.

JUSTICE NATHAN HECHT: But the Court can, and rules are treated at the same level of a statute or a Supreme Court

opinion. So if there is significant feeling that this rule should be different, I think the Court wants to hear it.

MR. SOULES: I've never sensed any restraint on this committee, Pat. If the committee felt procedurally there was a case out there that needed to be addressed and some recommendation made to the Supreme Court that the rule ought to be changed so that the procedure were different, I've never sensed any restraint at all in this committee for making those kinds of recommendations.

JUSTICE NATHAN HECHT: No. I think that's true.

MR. SOULES: Whether they take them or not, again, the Court takes the action.

MR. BABCOCK: In line with what Rusty said, which I fully agree with I make a motion that we limit it to clients only.

MR. SUSMAN: Seconded.

MR. SOULES: The motion is made and seconded that the sanctions be visited only upon the clients. Then I guess

they sort it out later with the lawyer.

MR. BABCOCK: Right.

MR. SOULES: Does anyone have any further discussion?

PROFESSOR EDGAR: What are you going to do where you have professional misconduct by the lawyer, subordination of perjury, for example? Now, are you going to penalize the client for that which was a conscious decision made by the lawyer of which the client was completely unaware? I mean, is that what you're saying?

MR. SOULES: Who wants to respond?

MR. SUSMAN: No. I mean, I think that penalties that can be visited on the client should be. Like monetary penalties should be visited on a client. There are other things that obviously could only be visited on the lawyer. In my view it would be okay to send a lawyer and make him take CLE every Saturday which would be a terrible punishment, maybe worse than money, or at least something else. Like, I mean, I think you could make, report them to a grievance

committee. There are things that could I think be done to a lawyer for misbehaving, but I would not -- money would not be one of them. A reprimand.

PROFESSOR EDGAR: Well, but this is cast in visiting the sanction on the client and never on the lawyer. That's the way I understood you.

MR. SUSMAN: That's what I wanted.

MR. SOULES: Did you have something to add?

MR. SUSMAN: Or maybe we could clarify the motion.

MR. BABCOCK: Yeah. I mean there are statutes that prohibit anyone including an attorney from supporting a perjury. And what we are dealing with is discovery abuses. This is what this rule deals with; and I think along with what Rusty said I mean I couldn't say it better. You create a terrible conflict and terrible problems that are totally unnecessary when you try to sort it out at that level as between the client and the attorney.

MR. PERRY: I agree entirely. And the thing we have to remember it has always been the policy of the law in every area relating to the trial of a case that the party is bound by the conduct of their attorney. If the lawyer does not file a lawsuit on time and the statute of limitations has run, it doesn't make any difference whether that was negligent, whether it was intentional, what the problem was. It's the client that is out of court. If the lawyer fails to make an objection to the charge that he ought to make, it doesn't make any difference why he didn't make that objection to the charge. It wasn't made. It can't be raised on appeal, and the client is bound by that. And all this motion does is continue the same policy in this area of the trial of the lawsuit as in every other area that the client is bound by the conduct of their lawyer.

The only exception to that that is generally recognized that I'm aware of is in criminal cases with respect to criminal Defendants who have appointed counsel. That

is a tremendous can of worms in that situation, and we don't and should not be in that opening that can of worms. In civil cases when we're dealing with lawyers that have been retained by their clients if there is a problem, it's between the two of them. That should be resolved later between themselves.

HONORABLE SCOTT A. BRISTER: I want to just raise two concerns to think about on the motion. Number one, if the sanctions can only be assessed against a client, some of these sanctions which have been recognized under existing law will be removed. Attending CLE, that obviously only applies to the lawyer. Reprimand or a warm discussion as discussed in the Federal cases, that only applies to the lawyer. Several of these -- you will remove several tools as possible punishment, possible sactions to use.

Second of all, I think we should think real hard about changing the law if the group of attorneys passes a rule that attorneys can not be punished, we're going to

stick it all on the client. As someone who has to stand for election I want to distance myself from saying I'm going to be the one that wants to put it all on the clients. Attorneys once again are a group who are immune to any punishment for things which admittedly many times they themselves did. I would think very carefully about the political correctness of that kind of rule.

HONORABLE F. SCOT MCCOWN: I don't know what the answer to this is either. But following up on what Judge Brister said and thinking about what David said it's not true in the law that the sins of the lawyer are always held against the client. For example, deemed admissions are undeemed quicker if it was the lawyer's negligence than if it was the client. Default judgment is going to be undone quicker if it was the lawyer's negligence than if it was the client. And there are many, many times when a trial court is going to rescue the client from the lawyer.

The other problem it seems to me to follow up with what Judge Brister just

said, if you say that only the client can be sanctioned, you still don't solve the problem that Rusty identified, because what is the client going to do. The client is going to come in and say, "I'm the only person that can be sanctioned, and you should not strike my pleadings because it was all my lawyer's fault." It doesn't moot or make irrelevant the inquiry of whose fault it was. The client will still plead that as a factual circumstance for why the sanction should be something other than striking pleadings or excluding evidence or something that would affect the merits of the case, and the judge is going to want to hear that.

MR. MCMAIN: Understand this, Scott. Frankly, it's much preferable to me if in fact that dispute deserves to be there, you probably are going to make further progress in the case in my judgment if you get the recalcitrant lawyer out of the picture. And one way to do that is if the client understands that he's going to be held responsible for the conduct of his lawyer and if he goes and gets him a good lawyer that

will follow the rules and work with the Court, so much the better, and let the bad lawyers go without business.

I don't have any problem at all with that. We're not talking about trying to solve legal problems. We're talking about trying to close inquiries by Courts and adversaries into the attorney/client relationship or allow them to drive a truck through the bond that should be there between the attorney and the client with regards to performance in the course of litigation, and that's what Transamerican does.

MR. LOW: There are other procedures that accomplish what Rusty wants; and when they say, "Well, we're coming out saying lawyers are immune," we are not. If a lawyer doesn't do something on time, you go to grievance committee. There is a procedure for that. The judge doesn't have to get involved in that. If a lawyer is negligent, there is a procedure for that. He can be sued. So this is in no means saying a lawyer is immune. There is nobody here feels immune from anything, and I think we all get the sense of

that. So they are not immune, and there are other procedures where you can best resolve a conflict between the lawyer and the client better than trying to solve it in the very lawsuit where the lawyer is representing the client; and I would second Steve's motion.

MR. ORSINGER: I have a problem with the sense of fairness with the client who typically at least, not the commercial clients, typically don't really understand the litigation process in good faith taking the advice of their lawyer who is giving them bad advice. Then they suffer from that, and it doesn't look fair. When I read Transamerican I thought for example of the lawyers who constantly interrupt in a deposition, making objections to tip the witness off, constantly asking for conferences with the witness telling them how to answer questions and things like that; and they do that from case to case to case, client to client.

You can directly stop that by the same district judges that have seen this lawyer do it in five different cases, start

fining him $1,000 and then $3,000 and then $5,000 and then $10,000. But if the only way to punish the lawyer is to punish the clients so that the word gets out among lay people "Don't hire this lawyer or you may get fined for his misbehavior," we can't focus the punishment on the person whose behavior we're trying to correct. If you can only punish the client when really what we ought to be doing is giving the lawyer an incentive to act right, then we are dealing indirectly through harming the people who really aren't responsible in order to get at what we really want which is to change the behavior of the lawyer, and that doesn't seem fair to me.

MR. YELENOSKY: Yeah. I think on a theoretical level the arguments that this is an agency principal matter and it ought to be treated just like every other agency principal matter are compelling. My concerns were Judge Brister's concerns and with something added, and that is sure, you can say that the lawyer is still accountable because the client can turn around and sue them for negligence. Right. Go get another lawyer.

Or they can go file a grievance. Right. File it with the State Bar, more lawyers.

I don't think there is going to be much perception and probably much reality that those things make it all the way back around again. So I don't know if -- I tend to think that maybe the reality of the situation is such that it prevails over the compelling logical argument about agency and principal.

MR. HATCHELL: I think Scott's discussion highlights for me what is ambiguous to me in the motion, and that is whether or not we are doing away with the trial court's ability to properly inquire into the place of the fault to determine the severity of the sanction, not who bears it. I would be very much against that, because I thought that's what the purpose of Transamerican was. I know everybody is very influenced by the latest case they have. But let me tell you about my latest default sanction.

A lawyer misses three discovery hearings in a row probably because he has a substance abuse problem. The client

is in jail. He knows nothing about any of these discovery -- even discovery even being served, any hearings being held. Rusty's answer is, "Well, sue the lawyer."

The lawyer is disbarred because of his substance abuse problem and doesn't have malpractice insurance. I don't understand why the client bears a default judgment sanction as a result of that conduct when the purpose of the sanction is to secure compliance with discovery, not to fix liability.

PROFESSOR CARLSON: As I read Transamerican the Court was suggesting some due process implications when disposing a case based on serious sanctions that necessitated the inquiry into the wrong doer before those serious sanctions would be imposed. I'm not sure that is something you can undo by a rule change.

MR. PERRY: There are certain obligations that are obviously the obligation of the attorney as opposed to the client. Richard talked about the conduct of an attorney in a deposition or the appearance or

nonappearance at a hearing. Judge McCown talked about failing to timely deny something on the request for admissions. The practical approach that judges almost always have is that if something is obviously the lawyer's fault in an area that is obviously the lawyer's responsibility, judges do not generally visit that, visit the harm on the client; and I think we all recognize that that is fair.

The problem is that there are a lot of areas such as locating and producing documents and answering discovery in which the obligation is one that is a mutual obligation that the attorney and the client have to work together in order to accomplish, and Transamerican appears to require that there has to be an inquiry as to which of those two it was that made whatever mistake was made. Now, I don't understand it to be the sense of the motion on the floor that the rules would prohibit a party from coming in and letting the lawyer throw himself on his sword and take the wrap, which is very common, if that's what the party and the lawyer decide they want to

do and try to avoid the sanction; but it's one thing to say we are going to require an inquiry as between those two, and it's another thing as to say we're going to let the lawyer throw himself on the sword if he wants to.

Before Transamerican it was common for the lawyer to come in and try to take the wrap, but there was no mandated inquiry into the attorney/client responsibility. It seems to me the sense of the motion is that we should not mandate that type of an inquiry, but if in defense of the sanctions motion they want to come in and say, "Well, hell, it's really all the lawyer's fault," well you know, the Court is going to listen to them, and maybe he'll believe them and maybe he won't.

MR. BABCOCK: That is correct. That is the sense of the motion, because it is the client's privilege.

MR. SOULES: I thought the motion was that the sanctions could be imposed only upon the client and not the lawyer.

MR. BABCOCK: That's correct.

MR. SOULES: Even then I guess

if the lawyer says, "It's all my fault" and falls on the sword and the judge believes him, then no sanctions can be imposed on anybody.

MR. BABCOCK: Or he may impose it on the client anyway.

MR. SOULES: Okay.

MR. SUSMAN: How would we reword the motion? "Sanctions can be imposed only on the client unless the lawyer -- unless it's clear the lawyer is solely responsible" or something like that.

MR. HERRING: That's the rule now. That's the same thing.

HONORABLE ANN TYRELL COCKRAN: It's not a rewording of the motion.

MR. BABCOCK: It's not a matter of rewording the motion at all. It's just a matter --

MR. HERRING: You just don't want sanctions against the lawyers.

MR. BABCOCK: Right. And because the way it is now this is a tactic that opponents are using to try to get between the lawyer and the client. And if the client is properly advised just as you say, that it

may well be that the defense to the motion will be it was the lawyer's fault. And if the client gets sanctioned, he may be irritated at the lawyer and he may get himself a new lawyer, or he may wait and file a subsequent lawsuit to get back the money he's been sanctioned.

MR. HERRING: He can't do that under the malpractice insurance policies.

MR. BABCOCK: It depends on how much he's been sanctioned. I mean, some of us have got some assets.

MR. HERRING: Speak for yourself.

MR. MCMAIN: You don't work for Jones, Day.

MR. BEARD: The motion for sanctions is going to have to be personally served on the client now or just one of the lawyers? He may never know about it.

MR. HERRING: We actually talked about that where there ought to be a notice in a severe sanction situation, and if the client is on the hook potentially for a severe sanction, you're committing malpractice

and violating the disciplinary rules if you don't inform the client of that fact. So we figured that you really don't need to put that in here because that's --

MR. BEARD: What if the lawyer doesn't tell him?

MR. HERRING: Then the lawyer is going to have real problems after that when it comes out. The client is going to be --

MR. SOULES: The lawyer is the agent for service, but not the agent for sanctions.

HONORABLE F. SCOTT MCCOWN: This illustrates the wisdom of getting rid of sanctions almost all together.

MR. SOULES: Anything else on this? Harry Tindall.

MR. TINDALL: Isn't there a middle ground where we don't sanction if it's going to be intrusive of a privilege, but if at the hearing the lawyer throws himself on the sword and it's apparent at the sanctions hearing that it's the lawyer's fault, that the Court can then impose sanctions?

MR. HERRING: That's how it is

in the rule now. Unless the lawyer is at fault, you can't sanction the lawyer the way it is in this proposal.

MR. TINDALL: Well, the concern is that the way it's written I think, Chuck, is that if the Court has to make an inquiry; and I think there is concern that that's intrusive of privilege and agency and things like that. But if the lawyer goes down there and is about to have his client sanctioned and says, "Judge, hold up. I went on a vacation. I didn't have my file supervised. It's my fault." Why couldn't in that situation where there's been a disclosure of a problem voluntarily at the hearing, that the lawyer should be sanctioned?

HONORABLE SCOTT A. BRISTER: It doesn't require an inquiry. It says "On the party whose act necessitated the motion." As indicated many situations that will be clear what the violation is. Maybe it will show up in the discovery.

MR. BEARD: What if the other side says, "I don't believe that lawyer. Bring that client in, and let's prove he did

it."

MR. TINDALL: Well, you have a privilege unless it's voluntarily disclosed is what I'm trying to get at. It seems to me it sort of solves 95 percent of these problems.

MR. BEARD: I thought we were knocking out the privilege when we got into these issues.

MR. TINDALL: Well, I'm trying to see if there's not a middle ground here.

HONORABLE F. SCOTT MCCOWN: What Mr. Beard is saying is that what is voluntarily disclosed may not be true, and the other side might insist upon the right to discovery.

MR. LATTING: Well, if they do that, they rely on privilege and put the evidence on.

MR. MCCOWN: Well, but you're right back where you started.

MR. SOULES: Let's see where we are, at least just get a consensus, unless somebody else has got something they think will influence the votes. David Perry.

MR. PERRY: If the inquiry is

not mandated but in effect is optional on the part of the party that is being, potentially going to be sactioned, if that party wants to come in and say, "I blame it on my lawyer," they have the right to do that. They might waive some attorney/client privileges and so forth, but if they choose to do that, then that's up to them, but it seems to me that I think there is a consensus that the rules should not mandate that there be an inquiry as between the attorney and the client as to who was responsible, and that as a general rule the rule should not abrogate the general rule that the party is bound by the actions of the attorney.

MR. SOULES: Okay. Chip, this is your motion, isn't it?

MR. BABCOCK: Yes, sir.

MR. SOULES: Why don't you restate the motion, and we'll take a show of hands.

MR. BABCOCK: Can the court reporter read it back, please? No. I'm just kidding. I think the motion is that the discovery sanctions that we have been

discussing would only be visited upon the client and not the attorney or law firm.

MR. SOULES: Is that the motion you seconded, Steve?

MR. SUSMAN: It is the one I seconded.

MR. SOULES: All in favor of the motiong show by holding up your hands.

PROFESSOR EDGAR: We can't hear. We can't hear down here.

MR. MCMAIN: Are you talking about modifying it?

MR. SOULES: You couldn't hear?

MR. SUSMAN: I'll take amendments.

MR. SOULES: State it again.

MR. BABCOCK: Sorry. The motion as made was that the discovery sanctions would only be visited upon the client and not the attorney or law firm. That was the motion that I made.

MR. SOULES: Okay. All in favor of the motion show by hands.

MR. HERRING: Just a

clarification here. Any sanction? That is couldn't do CLE, couldn't do money, couldn't do anything?

MR. BABCOCK: That's correct.

MR. SOULES: All in favor show by hands. Eight. Opposed? Okay. The house is very definitely against the motion. So that will give you some guidance on that, Joe. Judge Cockran, I had --

MR. PERRY: Wait a minute. Does that leave us back with the -- I don't think people intended to vote that they were in favor of mandating an inquiry between the two.

MR. LATTING: Could we get a show of hands on that, because we didn't vote on that.

MR. SOULES: Well, one of the things you're going to have to look at Elaine has raised a serious issue here, and it's not just in Transamerican. It's in the Supreme Court of United States cases and federal cases. If the sanction is going to go against the client, default judgment, striking pleadings and that sort of thing, it may be

essential that the Court first determine whether the lawyer or the client did it.

MR. PERRY: Well, not really. It would always be up to the client to decide whether they want to raise as a defense "We did not do it. Our lawyer did it."

MR. SOULES: You can waive your Constitutional rights.

MR. PERRY: You see, there's no reason that the initial burden of making that inquiry should be on the Court or on the Movant. The initial burden of raising that as a defense should be on the client, on the party defending the motion.

MR. FULLER: You don't have to say that though, do you? You don't have to say that, move for sanctions weighed against. You don't have to say that. And if they want to raise the privilege or waive privilege, fine.

MR. SOULES: Judge Cockran, I had a question. You were indicating that you thought maybe the order on a motion for sanctions may be delayed until the time of judgment or after verdict or at some point

later in the trial. Did I understand that correctly?

HONORABLE ANN TYRELL COCKRAN: I wasn't -- just to clarify, I wasn't suggesting that that be mandatory, but that if you could, to take care of those times somebody over there brought up before lunch when the sanctions hearings are not really over the sanctions conduct as much as they are trying to paint the picture of who is the good guy and who is the bad guy for the judge, sort of setting the stage where the judge is going to make a real decision in the case, and you know, when it becomes this one-upsmanship and, you know, who can deliver the more devastating blow during discovery; and I have found that it's like a lot of things. If you don't get caught violating the rule, it doesn't matter, you know, that sometimes just saying, you know, "Let's work on the problems; let's work on getting the discovery done and getting the case prepared," so I will make those orders now about, you know, who is going to do what in discovery; but as far as arguing about who should be slapped with what monetary

sanctions for being a bad guy, "Let's not worry about that until we get the case itself ready. And then if you-all still want to argue that, we'll hear the motion. We'll hear the evidence on that and hear the argument on that while we're waiting on the jury verdict" just to diffuse this situation of litigants trying to use it as a way to resolve the case on something other than the merits which is becoming a real problem, but at least having the option there in the rule that awarding of these monetary sanctions doesn't have to take place at the same time that you actually rule on getting the discovery or not having to produce the discovery.

MR. SOULES: The reason I was curious there is if the purpose of sanctions is to deter further abusive conduct, one of the things you're doing even by delaying the decision is the threat at least of sanctions later is I guess a deterrent without actually --

HONORABLE ANN TYRELL COCKRAN: And a lot of times if you say, you know, "Instead of deciding the question of

attorney's fees now, let's wait and see how everybody behaves for the rest of the depositions." You know, it's amazing how it cleans up people's acts.

MR. SOULES: You don't feel that you have to come down right now in a hearing in order to get the deterrent effect of possible later sanctions.

HONORABLE ANN TYRELL COCKRAN: I would I least like that flexibility.

MR. SOULES: Doke Bishop.

MR. BISHOP: Luke, I think that David had a good point a minute ago, and perhaps the rule ought to be stated in terms of being a rebuttable presumption that it's the client who is responsible for the sanctions, and that way it makes it clear that it's a defense that the client can bring up and then waive the privilege if they want to, but the moving party doesn't have to. The judge doesn't have to require that. It's strictly a defense.

MR. SOULES: Can that issue be raised after the sanction has been visited? That's the problem we pose to you. Somebody

is threatening you with death penalty sanctions; and if they come down, the client is out of court. And is it too late then for the client to say, "Wait a minute; I didn't do that; my lawyer did," or whether they have to fight prior to really knowing whether there is going to be a serious sanction. Do they have to get into a quarrel between themselves for fear that there may be a death penalty sanction and it would be too late to raise the question after the sanction has already come down.

MR. BISHOP: I would think that you would want to make them fight that upfront. I mean, it's a good point. Otherwise you're going to wind up with two different hearings, and this could go on for a long time. I don't know that that is a practical approach.

MR. SOULES: I don't know either, but it does put the issue prior to trial, some of the things that Rusty was talking about was if there is going to be a sanctions visit in one place or another and it's a serious hearing, then you almost have

to broach that issue or the client bites the bullet as somebody said they might do. David I think. Mike Hatchell.

MR. HATCHELL: One other point about Doke's and David's comments which I take seriously it sounds as if there is always a deliberative process between the client and the lawyer to lead the lawyer to the sword.

It can work the other way. The other death penalty sanction, a case I'm working on the week, the sanctions hearing is held without any notice whatsoever to the client in the judge's chambers, and the lawyer who is responsible for getting the situation where it is to begin with puts on evidence at that hearing exonerating himself and secures an order from the judge that it isn't his fault.

And the only point I'm trying to make is that in the mandated inquiry in Transamerican the Court looked into this consciously. It may be the only time that the client has to determine that its his lawyer that is at fault. He can then take

corrections to secure compliance with discovery by getting rid of his lawyer.

MR. LATTING: It says in a comment, by the way, that's after the rule, it says that "The trial court should take appropriate steps to minimize as much as possible any intrusion into the attorney/client relationship," for whatever that is worth. It does say that.

MR. SOULES: As far as these comments are concerned if you look at your rule book and see the length and the subject matter of the comments that get published when the rules get published, it's not this kind of comment that comes out. And what we are trying to communicate, if that's what we're trying to do, if we are attempting to communicate through comment how the rule is supposed to be interpreted, that may never get published in the rule book. The comments may or may not get adopted by the Supreme Court of Texas. What the rules mean needs to be stated as much as possible in the rule and not in the comment.

MR. LATTING: Maybe we need

to -- I was just pointing out that it is in the task force report, that it's been addressed; and maybe it's a good idea. I don't know if it does any good, Rusty, or what you think about whether that helps to put that in the rule after you've mandated an intrusion into the attorney/client relationship and say "Do it as unobtrusively as possible." I don't know if that helps, but it might make him feel a little better.

HONORABLE F. SCOTT MCCOWN: One of the problems is that these motions for sanctions that plead pretty severe sanctions against the client such as striking the pleadings or excluding evidence are common. Now, the fact that that is the way it comes packaged when it's filed doesn't mean that that is the way it's going to look at the hearing. But what you've got is a very common motion; and on motions to withdraw now you are required to serve that. If you file a motion to withdraw, you have got to serve it on your own client and advise them of their right to come to the hearing and protest. So if you get one of these motions for sanctions, what

are you supposed to do?

As pled it's a serious problem. Nine times out of ten in reality it's not, but you have to bring your client in who has no way to assess whether you're telling him the truth or it's serious or not and say, "This has been served. You need to now retain another lawyer to look over my shoulder and make sure that I'm handling it appropriately. And we've got to come to a strategy about this."

That's pretty unrealistic; and if it's what you did, it would really drive up the cost of litigation. Yet at the same time if it's not what you do and you fail to assess, you fail to guess how it's going to be handled, and the client actually does get a sanction visited against him, then you're in serious problems both from malpractice and grievance for not providing your client appropriate notice. And so it seems to me to be a terrible can of worms. I don't know what you do about it, but...

HONORABLE SCOTT A. BRISTER: And I think that Judge McCown directly points

out the difference between a rule and a comment. To try to put all those circumstances in a rule you end up with something more specific, and a rule says something more specific than "Sometimes you want to notify the client. Of course sometimes you don't." That's not a rule. Sometimes, you know, you don't want to go into this until the end of the trial, and then have the hearing, because sometimes you can't even announce that. That is appropriate for a comment to give. The rule would be, as I think it does, give discretion, say "The Court should do this, may do that, and assess it on the party appropriate," and point out in the comment, "Think about this" and "Think about that," but it's hard to write the rule that covers all of those circumstances to say when specifically you need to do it, when not and when if it's just looking at the face of the motion. "That's right, but that's again usually not the deal." At some point you have to leave some discretion to us judges.

MR. SOULES: Are we ready to go to Paragraph 5 now?

MR. HERRING: Let me just comment.

MR. SOULES: Okay.

MR. HERRING: A comment on comments because you raised it. It was the overwhelming sentiment of the lawyers and the judges who responded to the questionnaire, 250, that we ought to have comments to the rules. The reason is there are a lot of things to say like that. Federal Rules have lengthy comments; and we do have comments in some of our rules, the Rules of Civil Evidence. Rule 801 has lengthy comments. We do have some of that, but we're building up so much of this decisional gloss that you really can't simply put in the rules and shouldn't be in the rules, but it would be nice for people to have access to it. And we've had 3,000 reported Federal decisions on Rule 11, over 3,000 now since 1983. We'd like to have that information that the lawyers and judges want, some of it at least available.

MR. SOULES: Okay. Are we ready to go to the question of mandamus review, whether or not to leave 5 as it is,

what is the meaning of it? Rusty, what is your input on that?

MR. MCMAIN: Well, the reason for the wording of the rule, it was not intended to detract from mandamus. Nobody intended to overrule Transamerican. It simply provides that, and it was primarily designed to deal with the greater sanctions saying if you are going to go to severe monetary sanctions, they're going to be in the final judgment. You're never going to put them anywhere else, and I mean basically to follow some case law that had followed the Transamerica case with regards to monetary sanctions, Downey and the other cases.

We weren't really saying that you couldn't go to a mandamus, but by and large if you follow the procedure the way the rule is designed, it doesn't get done until the end, because that's what essentially the law had developed by the time we wrote the rule.

The question we had was whether or not to have an interlocutory appeal procodure was the real issue that we tried to

focus on as opposed to whether you resort to mandamus; and kind of everybody said, "No." Nobody likes -- well, I shouldn't say "nobody." Justice Scoggin probably likes the ceiling rule provision with regards to immediate appeal, but those were the extremes. You can provide an appellate remedy whenever there's a decision on sanctions which will not only clog up the trial courts but the appellate courts, or you basically not provide any appellate remedy except in the context of the appellate final judgment; and if there is something else that happens, you're left with the principles theoretically of Transamerican as to whether or not mandamus review is applicable. And nothing we did was intended to do away with it if the sanctions went that heavy.

MR. HERRING: You might even want to add a statement, Richard, in a comment to clarify that --

MR. MCMAIN: Right.

MR. HERRING: -- it wasn't any attempt to abolish or to change the applicable principles of mandamus law.

MR. MCMAIN: We weren't trying to change Transamerican. What we were trying to say is -- the problem is once again because we could not develop or nobody could develop a consensus bright line between what is a substantial. In other words, when you're using Procedure 3 versus Procedure 5 or Procedure 4 almost everybody agrees that if you're -- if the sanction is not overwhelmingly significant, and in most contexts you can say $1,000 or less, that it was going to be a non-issue.

When you're using the other sanctions it's really each case has got to be decided on its own. We did not want to provide any separate procedure even though virtually all the mandamus cases are going to be in the second procedure. $1,000 might be fatal to an indigent Defendant if he's got to pay it right now. So it may be that his position is one of mandamus because under his circumstances wrong procedure was followed. It should have been under 4, didn't have an evidenciary hearing, whatever. Even if it cost $1,000 to defend, even if that is a

reasonable number, basically it's going to wipe out the lawsuit and you can't afford to do that.

But we didn't have -- there is no bright line way that we could arrive at that; and that's kind of our consensus, and that's kind of where we came out was just kind of keep the law the way it is and mold it into a rule. But I agree with what the comment basically says. We're not changing the availability of mandamus relief where you essentially are killing the lawsuit.

JUSTICE NATHAN HECHT: But I do think it sounds like you are. I agree with you as a strict matter of logic and English it doesn't do it, but it kind of suggests that if they are deemed to be part of the final judgment and subject to appeal, then that remedy is adequate and ought not to be made. I agree with you it doesn't have to be that way, but it sort of sounds like that.

MR. SOULES: Let me ask you this: If we just took out -- if we stopped the first sentence after "part of the final judgment," period, "An order under this rule

shall be deemd to be part of the final judgment," and don't say "and shall be subject to review on appeal therefrom."

MR. ORSINGER: That doesn't help you. I think it's risky.

MR. SOULES: Why? I mean if it's part of the final judgment.

MR. ORSINGER: I think if you want to fix this, fix it by saying, "Nothing herein shall be construed to deny the remedy of mandamus when appropriate." Hang that on the end.

MR. LATTING: That is what I would strongly favor.

MR. ORSINGER: And let the Supreme Court tell us --

MR. SOULES: Okay. Whatever the draft, whatever else.

MR. MCMAIN: I might point out, Luke, that Bill has raised a point. We actually have this language or something very close to it in Rule 215 now, and it didn't preclude the Court from going to mandamus.

PROFESSOR DORSANEO: I think it was put in in 1988.

MR. MCMAIN: In 1988 it was put in "Such an order shall be subject to review on appeal and final judgment." We put that in several different places.

PROFESSOR DORSANEO: Awards of expenses.

MR. MCMAIN: Awards of expenses.

JUSTICE HECHT: This is for everything?

PROFESSOR DORSANEO: Yes. This goes beyond that.

MR. ORSINGER: And as the new rule, then it might be interpreted as being something different.

MR. MCMAIN: I understand. I just want you to understand that nobody thought that was a limitation on mandamus, because the Court didn't.

MR. SOULES: The last big issue that I heard was Steve Susman's suggestion that we not have a Texas Rule or that we think about not having a Texas Rule and we just adopt the Federal Rules. And, Steve, why don't you explain that?

(At this time there was a discussion off the record, after which time the deposition continued as follows:)

MR. SOULES: Again the last big issue that I had down here, and I man not not have written them all down as they came up, was the question of considering utilizing the Federal Rule in our State Rule and not have variations from that to others. And, Steve, your thought?

MR. SUSMAN: I just heard there are 3,000 decisions interpreting Rule 11. I withdraw my suggestion.

MR. HERRING: That was one of the points against it.

MR. SOULES: Okay. That fixed that one. Does anyone have any other thoughts that you want to express to give guidance to Joe as they, he and his subcommittee go forward? Joe, do you have a question?

MR. LATTING: I have a question about Section 3(h) on sanctions, and I'd like to know what the committee thinks about giving trial courts the ability to require community service or pro bono legal

services from lawyers for violating discovery orders or for failure to make discovery.

MR. HERRING: Well, the discussion was that, number one, judges are doing it. If you look at Braden v. Downey, that was a specific award that the Supreme Court commented on at least in terms of discussing the creativity. Since that time Braden has gone back down and been appealed, and that's been affirmed, the community service award.

Federal courts have done pro bono service. The idea -- and Justice Gonzales in his concurring opinion mentioned the community service. The idea is to lay the full panoply of possible things that a judge might want to do. In some cases if you go back and look at the Federal discussions of Rule 11 like Judge Johnson's article, he says that too often judges immediately go to monetary awards of attorney's fees, and that doesn't solve the problem. You have lawyers who don't know how to behave, or lawyers who maybe we bring them up in a bad culture. In any event, you think you ought to do some

things that you shouldn't do; and hence if you tell them that they've got to go watch the videotape put out by the Center On Legal Professionalism or if you tell them to go listen to David Beck lecture on ethics, or if you come up with some creative solutions, you may be able to deal with them individually; and that's the reason it's in there. Of course, they're doing it State and Federal, and maybe it shouldn't often be done, but there are some times when it might make some sense. That's why it's in there.

Some people object to that obviously for the same reason some people object to any kind of pro bono or any kind of personal service. No. We got those objections, but it's being done in State and Federal Court, and it's a judicial option, and our judges need more options instead of less options in terms of trying to get lawyers to behave reasonably.

MR. SUSMAN: I mean where is the empirical evidence that judges need more power? I mean where is this? First punitive damages, now slavery. I mean you are

converting civil judges to criminal judges in allowing them to sentence lawyers.

HONORABLE F. SCOTT MCCOWN: It's even worse than that, because in criminal court conditions of probation are optional. You could always go incarceration. I mean seriously. You don't even give the lawyer the chance to just pay the monetary fine. You force him to go do something demeaning. I think it's demeaning.

MR. SUSMAN: To me it's so Micky Mouse. I think it is so Micky Mouse. It demeans our profession. It is just the product of some judge who wants to be able to do something bizarre to some lawyer and then write about it in Texas Lawyer, and I think we should not allow them to do it, period.

MR. HERRING: A lot of judges are doing it. I don't necessarily agree they need more power encouragement. The question is whether they should ever have that option; and maybe you could if you think they sometimes perhaps should, you add a comment to say that should be used only in rare instances.

A separate issue from the personal service is the CLE, and you can distinguish those at least logically and say maybe they should have that option and maybe not the other option, or you could say they shouldn't have any of those options.

MR. LATTING: I have a motion. I move that we -- as you can tell by my comments, I'm for broad powers for trial judges, but this is too far in my judgment. I move we take away all ability of trial judges to require community service, pro bono legal services. I move we strike that from the draft.

MR. SUSMAN: Second.

HONORABLE SCOTT A. BRISTER: Can I make a suggestion? We're probably going to have to bar it, because the rule says "including the following." So if you want to bar it, you're probably going to have to add a provision specifically barring it.

MR. HERRING: What you need to do is delete it and add a comment that says judges shall not do it.

HONORABLE SCOTT A. BRISTER:

"May not do it."

MR. HERRING: Because (i), the last provision, is a catch-all that says "other orders as are just." And that's the provision in the current rule that judges are using and have used to order CLE and other kinds of things.

MR. LATTING: Well, whatever it takes is the spirit of my motion, because I don't think it's appropriate for judges. It seems to me that in terms of conduct that is this egregious, then it's a matter for contempt or for a grievance procedure. It doesn't seem to me to be connected with not producing documents, "Well, you have got to go to CLE," or "You've got to work for the Travis County Republicans."

MR. TINDALL: We have a district judge in Houston who banned a lawyer from practicing in his court. Do you envision that?

MR. GALLAGHER: Can we select which judge?

MR. PERRY: Can I take my case with me?

(Discussions simultaneously among committee members.)

MR. SOULES: Who wants the floor? Hold up your hand, and I'll recognize you. Does anyone want to speak in favor of judges having the right to give community service, pro bono legal services? Richard Orsinger. And Steve, I'll get to you next.

MR. ORSINGER: I don't have any problem at all with community service, but I do have a problem with pro bono legal services. And I don't have a problem with CLE because they're definable and they'll probably teach humility and knowledge in a few things; but the problem that I have with pro bono legal services is if you have to do 25 hours of pro bono work and you take a case, you don't know for sure that at the end of 25 hours you can walk away from it.

If you're foolish enough to take a divorce case, you may find out that there is a sexual abuse allegation that surfaces, and you may be involved in a termination case, and you may be involved with the Department of Human Resources, blah, blah,

blah, blah; and you can't sentence somebody to X number of hours of pro bono, because once they take a client I think the duty to the client is until the end of case.

But on community service you can go work with a charity or work with a church for 200 hours and then leave. And so to me I don't have a problem with service, but I do have a problem with the indeterminate nature of pro bono services.

MR. YELENOSKY: I don't know how common this is, but I know Judge McCown has compared it to some penal penalties where you have the option of doing something other than the service, but I don't think it should be compared to that. This is a profession, and we have made a choice to join the profession, and that carries some responsibilities; and sometimes it requires policing, and sometimes I think a judge may be required to police a particular member of the profession by requiring something of them in kind, and that we should not proscribe that. And I think it's going to look awfully funny if we are going to specifically proscribe that

in this rule.

MR. SOULES: We're certainly going to be running counter to the State Bar's pushing to get pro bono services.

MS. SWEENEY: That's totally different.

MR. SOULES: Anyone else? I think the motion was to delete both community service and pro bono legal services. Is this against the motion?

HONORABLE F. SCOTT MCCOWN: I'd just like to amend the motion slightly just to suggest that what we ought to do is just delete (h). I mean I don't think you have to go so far as prohibiting judges from doing that or, you know. It just seems to me that (h) encourages it and legitimizes it and will foster it, and we ought to just delete (h), and then, you know, leave it up to community pressure to produce the appropriate amount of it.

MS. MIERS: Well, I just wanted to comment that I know a lot of lawyers that would like judges to rather than a monetary dismissal or some other sanction

enter some sort of less destructive form of sanction, so I just point out to you that maybe it is this room's consensus that they'd rather pay a fine or have a case dismissed, but I know a lot of them that would like to be able to do community service or pro bono work instead of be sanctioned, some other way.

MR. SOULES: Anyone else?

MR. LATTING: The idea of sanctions is something they don't like, so I'm not -- it just seems to me -- well, I've said what I have to say. And if taking it out will do it, then I'm agreeable to that amendment, but I would prefer to have it deleted.

MR. SOULES: That is what I was going to ask you. Do you agree to the amendment so that the motion would be to delete (h)?

MR. LATTING: No, I don't, because I want to see if the committee feels -- I feel that we should, that judges should not be allowed to do this, and I don't think just taking this out gets me there.

MR. SOULES: Okay. So the motion is that we should have a rule or a

comment that prohibits it.

MR. LATTING: I don't care whether it's a comment or a flat prohibition. I just don't think that this has anything to do with failure to make discovery.

MR. GALLAGHER: Can I ask a question? How do you distinguish between from the standpoint of the merit of the sanction, community service on the one hand or incarceration or whatever it may be, striking the pleadings versus the monetary sanctions? I'm in agreement with the motion. I'd like to see it go forward. What's the distinction between the two?

MR. LATTING: Maybe I suppose one distinction is that this is just farther removed from the discovery process. That is, doing community service, as we'll all agree I guess, is a good thing to do, but it has nothing to do with what is going on in the lawsuit. Whereas the lawsuit is literally I guess about money or about something identifiable, and the sanctions have historically been applied to those things that are within the controversy.

Say we just don't like the way you've been behaving, so we're going to make you go do something else outside the courtroom or sweep up the park or something. It just seems demeaning to me; and I guess it's an emotional response as much as anything.

MR. GALLAGHER: But a million dollar sanction versus community service, Chapter 11 is demeaning also.

MR. LATTING: I'd rather sweep up the park. I agree.

MR. LOW: I was just thinking I would hate to be the client. "How come you're representing me?" "Well, I messed up, and they gave you to me." I don't know that pro bono would be too good, a good springboard for pro bono work.

MR. SUSMAN: Yes. I think one way, Mike Gallagher, one way that could be distinguished, they talked about on the monetary, the fines, the punitive damages instead of going under the court system, go to the injured party, the other side, because the rule is we want to avoid the impression that

judges are imposing these sanctions, punitive damages to finance the judicial system. It looks a little fishy.

I think you have the same fishiness when a judge orders a lawyer to go work on some community project that is their favorite project or favorite charity. I mean, how the hell do you select the charity? I mean, we will get in all kinds of scandals by this. I just don't think it's necessary. I mean, you've got the same bad-looking appearance. That is my thought.

MR. GALLAGHER: Hence Judge McCown's suggestion, elimination of sanctions all together.

MR. YELENOSKY: Sorry to speak again, but I know I'm one of the few taking this position. But as I understand it these are the possible sanctions for the whole range of conduct, and that may include destruction of evidence. Destroying evidence isn't part of the lawsuit either. It's an offense against not just other lawyers. It's an offense against the judge. It's and offense against the community, and it's an offense

against the profession. And to order somebody to do community service for destroying evidence is probably a punishment that very well fits the crime. So I'm not saying that this is appropriate for every violation, but there are some things for which it is appropriate, and it isn't a defense to say "Well, it's not part of the lawsuit."

HONORABLE F. SCOTT MCCOWN: Could I suggest a compromise? I think, and I don't want to speak for him, but I think what troubles Steve Susman and what troubles myself is that this allows a trial judge to put a lawyer into a very demeaning situation that he can't control, and I just see it's potentially ripe for abuse.

On the other hand, I understand Ms. Miers' point that sometimes requiring a lawyer to attend reasonably related CLE might well be an appropriate and tailored sanction. What about making it exactly like probation and writing the rule to say "A judge may suspend a monetary award against an attorney conditioned upon performance of reasonable community service or

completion of reasonably related continuing legal education." And that way the judge can set an appropriate monetary award against sanctioned behavior and say "I'll suspend it if you go to this CLE program and send me the certificate of completion," or "I'll suspend it if you'll do this community service."

MR. SOULES: Do you want that as an amendment?

HONORABLE F. SCOTT MCCOWN: Yes.

MR. LATTING: I don't want them to be able to do that. I'll take it better than the next.

MR. PERRY: I think part of the problem also is that these particular items do not seem to me to be reasonably related in severity to the type of conduct for which sanctions ought to be imposed. I thought there was a consensus among the committee earlier today that sanctions would be reserved for very severe and egregious conduct, destruction of evidence, violations of court orders, flagrant bad faith, things of that nature.

Now, I think the rules need to make a relationship between the badness of the conduct and the nature of the punishment. If the sanctions rules in fact are going to be predicated on flagrant and/or intentional misconduct, which I believe they should be, a slap on the wrist like sending somebody to 10 hours of CLE is not appropriate.

MR. LATTING: I agree.

MR. PRICE: I was going to just simply echo Harriett's comments. And I don't know. This has its own problems. But isn't there a way somewhat similar to what Judge McCown was suggesting that lawyers be able to opt for community service in lieu of monetary fines. I think there is a -- you know, I'm shocked every time you read the average salary of practicing lawyers. It's incredibly low, and there are a lot of lawyers that can't afford a $500 sanctions order. So if you can somehow allow the lawyers to agree somehow, I know that has it's own problems, but I think we need to be sensitive to what Harriett has brought up.

MR. YELENOSKY: That is

sensitive to the problem that Ms. Miers has brought up which is sensitivity to lawyers who would rather do the community service than pay the fine. It is not sensitive to the situations where you may want to require a lawyer to do something that he could very well afford to buy his way out of, and that it isn't appropriate that attorneys who can afford to buy their way out of things essentially would be able to do that.

I think the question is whether this is an appropriate sanction to impose in some circumstances, or whether you're going to proscribe it entirely. When it is appropriate it shouldn't be one that you can buy your way out of.

MR. SOULES: Does anybody have anything new on this, because I'd like to get to the charge part today.

HONORABLE SCOTT A. BRISTER: Very briefly, I would like to point out that under Paragraph 4 community service is specifically an area that cannot be imposed until after the appeals are all final. I think it does make sense, as Judge McCown

points out, to make it some kind of reasonably related matter.

It is demeaning. I've never applied it, but as I understand it the judges that have ordered it done in Harris County was because the attorneys did something demeaning. They got in a fist fight at a deposition. They did something childish, and they got a childish punishment.

So I think that that is the concept of it. I think it does make sense to put some reasonable relationship. It does offend me that because I did something wrong in discovery I could be ordered to go do community service at something that was, for instance, politically related, or was something that I'm absolutely opposed to. I think we get into serious kinds of personal privacy, et cetera concerns if it is unrelated to the specific conduct involved.

MR. SOULES: Okay. Those in favor of the motion? That may be pretty lopsided. It may be right down the middle. I have no idea. Those in favor of the motion?

MR. LOW: What's the motion?

MR. LATTING: The motion is that we prohibit trial courts from requiring community -- that we prohibit the conduct that is set forth in 3(h) requiring community service, pro bono legal services, continuing legal education or other services.

MR. SUSMAN: Seconded.

MR. LATTING: That it be prohibited.

MR. ORSINGER: That's against lawyers. You're not prohibiting it against clients. Just against lawyers?

MR. LATTING: Everybody.

MR. HERRING: Take it out.

MS. ALBRIGHT: So you're saying take it out and put someplace else in there that says you can't do it?

MR. LATTING: Yes. That's the motion.

MR. SOULES: Cast a vote. Everybody got the motion in mind? Those in favor show by hands. Okay. Those opposed? Okay. 22 against. 10 for.

MR. ORSINGER: What about proposing a deletion without prohibition?

MR. SOULES: Okay. This vote is to delete (h) and not say anything about the prohibition. Those in favor show by hands. Delete (h). Those opposed? Okay. We delete (h). The house is against it.

MR. TINDALL: I move that we delete (i). I think (i) is a freight train exception, that we don't cure the problem that Joe brought up if we leave (i).

MR. SUSMAN: Seconded.

MR. SOULES: Harry, I think there is going to be some discussion about that. I'd like to get to the charge. This is going to come back in another draft.

MR. TINDALL: Can we vote on it real quickly --

MR. SOULES: No.

MR. TINDALL: -- while we're on the subject?

MR. SOULES: I don't think we can vote on that without discussion. We can't vote on that without discussion.

MR. TINDALL: I thought I --

MR. SOULES: I'd like to get

to the charge some day, if possible. Obviously we're not precluded from looking at this when it comes back again.

MR. SPARKS: Luke, to keep (h) just from falling under I'd like to suggest that the comment say that a person sanctioned could elect in lieu of to accept community service. I think that satisfies Steve's comments; but it's under the comments and not under the rules, because as I understand what we're saying now you can do (h) under (i). You are not prohibited (h).

MR. LATTING: I hate to give them the idea though.

MR. SPARKS: I said "at the election of the person being punished." If the person being punished would rather do community service rather than Chapter 11, I mean, that's a lot of community service.

MR. SOULES: Okay. Paula --

MS. SWEENEY: Yes.

MR. SOULES: -- would you and Judge Cockran give us a report on the charge rules and the task force report?

MS. SWEENEY: I will.

As the sanctions task force, we have not yet met having been appointed in the past 10 days or whatever. Judge Cockran chaired the task force, and I'll ask her to report to us on those rule changes.

HONORABLE ANN TYRELL COCKRAN: I'm a little nervous about doing this today after coming after the last six hours or so worth of discussion. Particularly I mean I feel like we all need to cross our fingers and do something superstitious, because so far the work and product of this task force have been free from any known controversy, but I don't know if it's possible to sustain that momentum in this group.

You will also note that our report is much, much shorter. I mean it's as big as it is only because it's done twice in the attachments, and that's with changes shown and once with a clean copy. This task force, and since many of you have been on this committee before are well aware, has a history to it in that there were some attempts earlier in the '90s to look at the question particularly the rules relating to the jury

charge as they relate to the preservation of appellate complaint about the charge itself.

There were a couple of years worth of work in this committee and a couple of others, I believe. Luke when I first got started on this sent me the transcripts from a lot of those hearings, so I sort of knew from reading those exactly where the debate had centered; and I think because this, the disputes in this area are not traditional ones in that they are not one segment of the Bar against another segment of the Bar, but turned out to be lawyers and appellate judges versus trial judges in that it was lawyers and appellate judges who worked on the earlier work product found a lot of agreement among themselves, but then when it was published in the Bar Journal there were a certain number of trial judges who became very vocal in their opposition to it, and many others of us who although not vocal did see a lot of problems coming in trying cases if the proposed rules were to go into effect.

So the Supreme Court decided to revisit this issue by appointing this task

force along with the others that were parrallel to it, and once we met, and I guess once I read all of the history that went into it I realized that we were at a disadvantage because I was the only trial judge who had been appointed to be on the task force, so at our first meeting the task force authorized me to ask Justice Linda Thomas who was then the Chair of the Judicial Section of the State Bar to give us sort of an informal working advisory group of good trial judges from across the state, urban as well as rural judges and really representative geographically to meet with us so that I was not the sole representative of the viewpoints of the trial bench of the State of Texas.

We had I guess about a total of three meetings with those judges. The first meeting was here in Austin. It was really a help to everybody who was there. I see several of the task force members here today, really a remarkable, intense day spent. It was a wonderful -- both the judges that Justice Thomas suggested we contact and the task force members were all wonderful

listeners. We all really became educated at the concerns and problems that our colleagues on the other side of the bench were having in this area, and after we really understood each other's problems it became a fairly easy task.

I think we were all surprised once we had really listened and absorbed each other's points of view that it was relatively simple to come to what we believe is a very workable proposal on the question of how to preserve appellate complaint in the court's charge that addresses responsibly the primary concerns of those involved, and each side gave up a few of its concerns in accommodation of the other.

Essentially what we found was that first of all everybody agreed the system was broken as is, that it is now impossible to preserve complaints about errors in the court's charge under the current system, and everybody agreed that it needed to be fixed. Trial judges were very vocal in trying to get the lawyers and appellate judges involved to realize that although lawyers and appellate

judges too often look at this purely as an appellate question, that for the trial judges and the lawyers and the litigants actually at the trial court level it is a question of how much help to give the trial court to get it done right the first time.

Very few people get to the point of asking an appellate court to address errors in the trial, and it is very important that as much be done as possible to get it done correctly the first time and to get all of us away from focusing on this question just as one of appellate review and instead look at it dually, both how it should work at the trial court level and how it should work on appeal.

The trial judges involved in this process became very sensitive to the concerns of the Bar both in the impossible standards of perfection now required by the appellate review process and for the serious threats to the advocacy system that lawyers see the requirement that they now completely write the other side's charge for them in order to be able to complain about it on

appeal.

The trial judges -- the lawyers were very good at listening to the trial judge's concerns about not being given anything in writing particularly realizing that, you know, trial judges often leap from, you know, it might be a second degree murder case one day, and three days later a domestic case, and the next Monday a very complex commercial litigaion trial with very few resources, oftentimes not even a typewriter and someone who knows how to type around, much less any briefing attorneys.

A lot of the trial judges have very inadequate law libraries, and the pressures on the judge that come from the jury sitting out in the hall, a lot of lawyers and it gets back to what we were talking about earlier on the sanctions practice and in some ways the handicap of the caliber of lawyers who are appointed to serve on the task forces and on this committee in that you don't see a lot of the problems that the trial judges see.

A lot of trial judges, and I

count myself firmly among them, are convinced that without some sort of consequence to, you know, failing to at least give some bare bones of the charge, that there are an awful lot of lawyers who would try cases without even thinking about what should be in the charge until after they got the verdict and that the judges needed some help.

So essentially what we did was say first of all that tender is only going to be required in limited circumstances, and that is if the question, instruction or definition is omitted entirely from the court's charge and it's on something that is raised by your pleadings. In other words, so it's going to get away from one side having to tender something that is really the other side's case. That will give the trial judges just the bare bones of the charge.

Everything else is an object-only system. So that the, you know, if you know, the compliant is, you know, the definition of conspiracy and there is an attempt to define conspiracy in the charge, then everybody can object, even the person who

is alleging in their pleading that conspiracy is part of the cause of action.

The most important thing I think we did was to totally delete the reference to tenders having to be substantially correct because of all of the appellate baggage that that phrase carries with it now, and instead go to, and this is on page two of the report, language that says "Defects in a requested question, definition or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition or instruction" to get away from the problem of appellate courts finding waiver of a complaint because of a semicolon instead of a comma and things like that.

PROFESSOR DORSANEO: Is that meant to adopt the Federal Fifth Circuit requirement that the trial judge is a person having responsibility to have the charge correct even if the request is affirmatively incorrect? In other words, if somebody requests an instruction or a definition that

is just affirmatively wrong, that the judge could look at it and say "That is a term that should be defined."

HONORABLE ANN TYRELL COCKRAN: Yes.

PROFESSOR DORSANEO: Is that the judge's job then rather than nobody's job?

HONORABLE ANN TYRELL COCKRAN: Well, it's still going to be the lawyer's job. Essentially what the judge could do then would be to put that in the charge even if it was affirmatively wrong, and then it's the burden of the lawyers to make specific objections that point out what is wrong with it, but they would not have to tender it perfectly.

PROFESSOR DORSANEO: Get there eventually.

MR. ORSINGER: If the tender is incorrect, the burden falls on the other side to object, or no error is preserved.

HONORABLE ANN TYRELL COCKRAN: Yes.

MR. ORSINGER: If you make a

faulty tender and the other side doesn't --

PROFESSOR DORSANEO: Federal practice.

HONORABLE ANN TYRELL COCKRAN: In other words, if the instruction, if the definition of the term is dead wrong, but it is clear from that being tendered that the judge will, anybody should realize that that term needs to be defined in the charge, then yes, it is then the judge's burden; and if the judge doesn't get it right, then in objecting to the charges the lawyer has preserved complaint.

That's the main. The rest of it really is we finally rewrote all the instructions to the juries that are required under 226a to be given. They're rewritten hopefully in plain, clear English. We moved a lot of instructions around, because if you look at them which most lawyers don't, because you're busy getting ready for either voir dire or your first witness when the judge is reading these instructions to the jury, but a lot of the instructions are in the wrong place. We tell them what they can't do during

deliberations when they first get sworn in instead of right before they go to deliberate. A lot of them were just moved around.

We tried to do the same things with the two or three oaths that are scattered through the rules about where to go. The rest of it is pretty much cleanup, consolidation. The last portion of the report that you have got has the strike-through and underline, but also has annotations on the right that shows where it's been moved from or to try to just consolidate, simplify a lot of the work that I know that Dorsaneo's committee is going to go, you know, back behind us.

I have already sent a copy of this to Judge Lynn Hughes who is on that task force who is trying to make our plain English even plainer, and you know, making sure that we are very consistent with word usage and things like that, but that's essentially it.

MR. SOULE: Okay. Doris Lange.

MS. LANGE: I'd like to compliment you on all of this since I'm the

one giving the oaths and everything in our court. The next to the last page, 22, I would suggest adding in "in writing, to inform the bailiff in writing," because they invariably come to the door and say, "We're finished" or whatever, and our judge wants that in writing all the time; and so --

HONORABLE ANN TYRELL COCKRAN: Some of us don't require it in writing. They just tell the bailiff that they have a verdict.

MS. LANGE: Oh, then I stand corrected. All the courts I work with did.

MR. SOULES: Let's see. What draft should we -- where should we be looking?

HONORABLE ANN TYRELL COCKRAN: Well, really it just depends upon if you want to look to see what we did. The clean copy is the first one, you know, just the clean copy if this were to be adopted and printed, how it would look. And then about six pages or so behind that it's the one with the columns with the strike-through showing which rules have been repealed, which have been moved where.

That's harder to read, but it is a lot more informative about what we did.

MR. SOULES: And we're going to start now looking at the rule commencing with 271.

HONORABLE ANN TYRELL COCKRAN: Yes. If you want to skip over 226 and the stuff about the oath and the reliefs and all of that stuff.

MR. ORSINGER: Let me just comment before you skip it.

HONORABLE ANN TYRELL COCKRAN: Stuff that just the judges do.

MR. SOULES: I wanted to kind of get a consensus of the committee where do we want to start?

HONORALBE F. SCOTT MCCOWN: 274.

MR. SOULES: 274.

PROFESSOR ALBRIGHT: I have 272.

MR. BABCOCK: I've got 272.

MR. SOULES: What do we want to do with Ms. Lange's suggestion that the requirement to summon the bailiff after the

verdict be in writing? Do we want to leave that up to the individual judges?

HONORABLE C. A. GUITTARD: Why?

MR. SOULES: Will that work?

HONORABLE ANN TYRELL COCKRAN She just said that some judges were requiring it to be in writing when they had reached the verdict.

HONORABLE C. A. GUITTARD: Well, why shouldn't that be in the judge's discretion?

MR. SOULES: Well, that's what we just said. Just should we leave it up to the individual judge?

MS. LANGE: That's fine. Yes.

MR. SOULES: I believe Ms. Lange has indicated that that would work.

MR. ORSINGER: On 226?

MR. SOULES: Okay. 226, do you want to turn through the earlier rules and see if there is anything there? Go for it. What about 226, Richard?

MR. ORSINGER: I don't remember that we made a conscious decision to do this, but Rule 226 as it's presently

written says that the court will give appropriate instructions, and then the Supreme Court by --

HONORABLE ANN TYRELL COCKRAN: You're talking about 226a?

MR. ORSINGER: 226a. The Supreme Court by order on its miscellaneous docket has provided what the instructions are which gives them more flexibilty to adjust them. What used to be a three and a half line rule has now turned into a multipage rule, and so the instructions to the jury will probably be fixed in concrete more than they are today, and I think we should be aware of the fact that we are promoting what used to be a freely substitutable miscellaneous order or miscellaneous docket order from the Supreme Court.

HONORABLE ANN TYRELL COCKRAN: Though in practice that was not what occurred. It has not been amended I think since --

MR. ORSINGER: Thirty years or something like that?

HONORABLE ANN TYRELL COCKRAN:

Yes.

MR. ORSINGER: But, you know, all the stuff that is going on about jurors asking question and I don't know what all, but let's just be aware. I think it's important that we be aware that this proposal elevates what used to be an order that could be changed just by the Supreme Court issuing a new miscellaneous order is now part of our rules of procedure and will be much more difficult to modify. Be aware of that in case you don't want to give up that flexibilty.

MR. SOULES: Okay. Any comment on 271?

PROFESSOR EDGAR: What about 226a?

MR. SOULES: 226a, okay.

PROFESSOR EDGAR: I thought that is what Richard was talkings about.

MR. SOULE: Yes. And I think since we don't have a member of the court here that I see, I think they've got to really decide whether they want to put this in a rule or whether they want to put it in a miscellaneous docket, and we need to just

submit that to them for their decision.

HONORABLE ANN TYRELL COCKRAN: And I think you asked if it was, and my recollection on the task force is that very few of us realized it until we really started scrutinizing. Everybody assumed that 226a instructions are in the rule because they are printed in all of the rule books as if they were, and because it had been 30 years or so since anybody had changed them, but it is certainly not one that the task force had any strong feelings on.

You know, if the Supreme Court feels that, you know, more flexibility is appropriate, we wouldn't have any problem with making it a miscellanous order as well.

MR. SOULES: Hadley Edgar.

MR. EDGARD: Whether it's been on the miscellaneous docket or whether it's a Rule of Civil Procedure, I would suggest that the court note Paragraph 16 and 18, because our county courts and county courts at law require only five of six people to reach a verdict.

HONORABLE ANN TYRELL COCKRAN:

There is a note at the beginning. In fact it's the first paragraph of Rule 226a. It says if the case is tried to a six-person jury, the references to 10 or 11 should be changed to 5.

PROFESSOR EDGAR: I stand corrected. I was looking at the wrong portion.

MR. TINDALL: Luke, are we on Rule 271?

MR. SOULES: Well, right now we're on 226a, but I think we're getting past that. Is there anything else on 226a? Okay. Richard.

MR. ORSINGER: There was also some discussion on our task force about the practice in some courts of allowing jurors to take notes, and there were some judges that have actually drafted instructions on controlling juror note-taking. There are other judges that don't think juror note-taking is good. I think we finally elected not to do any proposed instructions on juror note-taking.

HONORABLE ANN TYRELL COCKRAN:

And I will say parallel to that that there is a State Bar Committee that's working on a juror's handbook and that met Wednesday of this week, and they were looking at the same thing and did some pretty exhaustive research that I think I did when we were -- you know, when I first started letting jurors take notes. The case law is almost entirely in criminal cases and almost entirely when just one juror was taking notes, and that there was just so little guidance, that they weren't going to put anything in the handbook.

And we certainly decided that we didn't want to actually put it in the instructions, that right now it is in one of those experimental phases that Alex was talking about. And I think everybody felt a lot more comfortable just letting it bubble to see if it was going to be a practice that everybody accepted and worked well before we started writing a rule about it.

MR. SOULES: 271, this doesn't say when the trial court is to provide counsel. Getting back to 271 does anyone have any comments about proposed 271?

MR. SUSMAN: I don't know if there is anything in here, but it seems to me that there should be some provision in these rules to allow trial courts to experiment with giving preliminary jury instructions, instructions that they give at the beginning of the case rather than at the end of the case. I know it's done and has been done for some time, can be done in Federal courts giving instructions, not final instructions, but some instructions at the beginning of the case on what the issues are and what the law is. And I'd just like to see the rules have enough flexibility so that judges can do that, because I know a lot of judges are thinking about shortening the length of trials, making them go quicker, which I personally think is a great solution to our problems; but I think if they're going to do that, the judges are going to have to have the discipline to figure out what the law is a little earlier in the case and to tell the jury what to look out for.

HONORABLE ANN TYRELL COCKRAN: Even if the lawyers don't know?

MR. SUSMAN: Well I think the

lawyer is going to have to get disciplined. I mean, that's one of the problems. You're going to have to discipline yourself to figure out what the charge is before you go over to the courthouse; and so that because, you know, you call these jurors together and you ask them to listen to evidence with no indication to them as to what is important, what they're going to be asked to spot.

I think lawyers and judges don't do it now because they're lazy on both sides, and that we ought to at least have that possibility, should not be required, but the rules should make that possible at least.

HONORABLE ANN TYRELL COCKRAN: Do you think that the rules prohibit it now?

MR. SUSMAN: I'm not sure whether they do now. I have not read these that carefully, but this is just where you're talking about when the charge is read. I just want to make sure that that is possible in these rules.

PROFESSOR CARLSON: Was there any committee discussion on whether the provisions of Rule 166k which gives the trial

judge as a pretrial matter the ability to require either side or all parties to submit the proposed charge? Would that practice continue or that authority continue for the trial court under your proposed amended rules?

HONORABLE ANN TYRELL COCKRAN: I don't see any conflict with it just as I -- we certainly we talked about it. We really talked about it in terms of the proposal from the last time around that the judges could order lawyers to give them proposed questions and instructions to go in the charge, but that there would be no appellate consequences to it. And going back to what Judge Brister said earlier, be it on another topic, if there are not any consequences, it's not a rule and it's not an order.

And there was a lot of discussion about what the effect particularly in a lot of the language here about not requiring the lawyers to make even that limited tender that we're proposing until after the conclusion of the evidence, but the tension between that and the pretrial order

rule exists now, because now it says that it's not until, you know, that your total tender doesn't have to be done until the completion of the evidence. And as far as we know there are no recorded cases about what the effect of a 166 pretrial order would be requiring an earlier tender would be. The question of preserving appellate complaint, there is just no answer there.

The tension is still there. I don't think our rule has really changed what the answer to that unanswered question right now will be.

MR. BEARD: I would oppose what Steve is saying. The Federal Court has got the power to comment on the weight of the evidence. I think the state district courts ought to be confined to granting, overruling, sustaining and not comment on the weight of the evidence. To attempt to make statements I think we just have a lot of questions raised in the process.

MR. SPARKS: Are you going to help do the voir dire, Steve?

MR. SUSMAN: I don't really

understand. I don't understand about your comment. It is the same charge made at the end of the case being given at the beginning of the case. It just requires that you understand what the law is, what the issues in your case are early on.

HONORABLE ANN TYRELL COCKRAN: It also depends in large part -- a lot of times I could see problems where it would not be possible to make an accurate forecast of what you are going to end up putting in the charge because of evidenciary disputes and whether or not there be any evidence raised by the particular point.

I will say that there are an awful lot of instructions other than the 226a instruction that have been given traditionally and that are being given now. Even things about, you know, the great role in the American system of government of juries and things that are not in here, but that are rather common additional instructions about the trial itself.

Some judges tell them about what the stages of the trial will be, and I

don't think that there has ever -- I don't know of any hints that if it's not 226a, it is prohibited. I think maybe that what you are talking about unless some question does arise about these being, you know, the only instructions that can ever be given jurors, I don't think has ever been suggested before, that you know, I would at least propose that what you're talking about probably falls into the same category as juror note-taking where it's probably better to let it bubble up a little bit since, as I said, I don't know of any hint that this is an exclusive outline of what can be included in instructions to jurors.

MR. SOULES: Anything about 271?

MR. TINDALL: Would you consider a provision allowing the parties to waive the reading of the jury charge? I hear of these three-hour charges being read to the jury which are mind numbing.

HONORABLE ANN TYRELL COCKRAN: I don't think it came up.

MR. TINDALL: And then the

lawyers arguing for --

MR. HATCHELL: I think we considered that that is optional by agreement.

HONORABLE ANN TYRELL COCKRAN: I think we considered that just about anything is waivable, you know, by agreement.

MR. TINDALL: I don't see any rules written that says that, you know, the parties shall agree on reading to the jury but whether or not lawyers argue, so --

HONORABLE ANN TYRELL COCKRAN: I don't remember this exact point, but I do know there were several things about it that we kept saying should we put in "unless waived," and we realized that you'd have to put "unless waived" in almost every rule in the book.

MR. TINDALL: Yes.

HONORABLE ANN TYRELL COCKRAN: You know, that once you started this, "unless waived" is missing from one of them that you can't waive that, and we just didn't want to. We felt that was too dangerous a project to embark on.

MR. SOULE: Anything else on

271?

HONORABLE PAUL HEATH TIL: At the present time in the Justice Court it is forbidden for the judge to give a charge to the jury; and this produces a lot of not of confusion, but a great deal of open animosity among the jurors and the Court, because they want, they expect it. Was there any thought given on perhaps preparing a written charge that would be appropriate to be given at the justice court level?

HONORABLE ANN TYRELL COCKRAN: The subject did not come up.

HONORABLE PAUL HEATH TIL: It would appear to me that it would be important. My court alone does about 1,000 civil trials a year. I deal with a lot of people that get a lot of impressions as to what the court system is in justice court. And it doesn't have to be nearly as precise as you might suggest, but primarily follow what you have laid out here, but the present rule forbids it. It doesn't say it's permissive. It says "you shall not."

MR. SOULES: Judge, then we

need a submission from you. If you will give me a letter with whatever recommendation you think that should be under what rule, I'll put it in the agenda and we'll bring it up.

HONORABLE PAUL HEATH TIL: All right.

MR. YELENOSKY: I just have a question about that. How many of those jury trials are pro se litigants?

HONORABLE PAUL HEATH TIL: Say again?

MR. YELENOSKY: Are you having pro se litigants with jury trials?

HONORABLE PAUL HEATH TIL: Yes.

MR. YELENOSKY: And would you be asking them to tender a written charge?

HONORABLE PAUL HEATH TIL: Since about 85 to 90 percent of the court trials are pro se litigants on either one side or both, yes, that that would be the case. But as you said, they can always waive it if they wish. You would not command them or demand that they do it. But if they want to do it, they ought to be given the

opportunity.

But in any event, I'll get you your letter right away.

MR. SOULES: Okay. Thank you.

MS. SWEENEY: Can I clarify something here?

MR. SOULES: Yes. Paula Sweeney.

MS. SWEENEY: Judge, are you asking for the court in the Justice Court to be able to submit one perhaps sua sponte or for the Court in that circumstance to have leave to ask the parties to create one, or both?

HONORABLE PAUL HEATH TIL: Primarily it would be the first, for the Court to just do it on its own.

MS. SWEENEY: Okay.

HONORABLE PAUL HEATH TIL: And again, it would just be nothing more, and which most of us would like to be able to do, of a general statement of what you have here of "You will follow the law. You will follow the instructions." It's given twice. We had

to take the instructions to the jury, and we presently have to delete them and modify them so we can use them because they're inappropriate in several areas of our court; but we still want to give instructions to the jury as to what their conduct is and who can talk up and whatnot. We've made it up, but we've done it on our own. We've taken the rules and put it to them now and tried to make them fit, because they're clearly not drafted with our court in mind.

MR. SOULES: If you could help us by giving us the modified versions that you've used and your colleagues have used Judge, we'll certainly give that attention.

HONORABLE PAUL HEATH TIL: You'll have it in your office Tuesday.

MR. SOULES: Thank you. Anything on 272?

PROFESSOR DORSANEO: I have something.

MR. SOULES: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: I'm all the way down to the Paragraph (2)(d) in 272.

If somebody has something before that, I'm certainly willing to defer.

PROFESSOR EDGAR: I'm on (2)(e), so you go ahead.

MR. BABCOCK: I'm on (1)(a). I assume this is not meant to affect trial by consent. I think you're just going to have to tie it into Rule 67. Or was it meant to affect when you try the issue by consent?

HONORABLE ANN TYRELL COCKRAN: This is not a change. This part is essentially just a rewording of what is now currently in 270a, so this is not a change in substance at all.

MR. ORSINGER: In (1)(a) we've assigned the responsibility to the party that has the burden to plead though rather than the party that has the burden of persuasion at the end of the jury trial, because the burden of persuasion shifts sometimes depending on whether a fiduciary relationship was found and whether or not it's a --

HONORABLE ANN TYRELL COCKRAN: But what we were talking about, this is just that you're not entitled to a submission of

it. This is the current law. Then we tie it into that since that's already part of the rule and say that in, what is it, 274, that yes, in 274 that to preserve appellate error if you have this burden to plead that is already in the rules and it's omitted, then you have to.

And then Richard is right. We stayed with the burden to plead rather than the burden of persuasion, because that does tend to shift in a good number of situations.

MR. ORSINGER: But if you try it by consent, it may still be your burden to plead.

MR. BABCOCK: Right. Rule 67 ties into 277 and 279 which has now been deleted as I understand.

HONORABLE ANN TYRELL COCKRAN: Yes.

MR. BABCOCK: You're just going to have to amend 67 to tie into 272.

HONORABLE ANN TYRELL COCKRAN: To get the right rule.

PROFESSOR DORSANEO: And that raises the question as to whether you want to

retain the proviso in Rule 67 which does require --

MR. BABCOCK: A pleading --

PROFESSOR DORSANEO: -- a pleading.

MR. BABCOCK: -- before submission, right?

CHIEF JUSTICE AUSTIN MCCLOUD: You'd still have to get an amended pleading under 67.

MR. BABCOCK: Right. You have to get a trial; and then the --

CHIEF JUSTICE AUSTIN MCCLOUD: You still have to make the objection and then do what you needed to do depending what the court did on the objection.

MR. BABCOCK: Right.

CHIEF JUSTICE AUSTIN MCCLOUD: I don't see that it would affect it.

MR. BABCOCK: No. It doesn't look to me like it would other than having to change 67 just to tie it into 272 now. Ready for (b)?

MR. SOULES: Okay. 272(1)(a) and (b). Anything else under (1)? (2)(a) and

(b)?

MR. ORSINGER: Nobody is objecting to broad form submissions?

MR. TINDALL: I do on (a).

MR. SOULES: Harry Tindall on (2)(a).

MR. TINDALL: It seems to me that (2)(a) the phrase "factual" could be deleted. I think in broad form submissions we are not really asking keep, break, lookout type questions anymore. We are asking really disputed material issues, and we need to where we can delete references like "factual."

MR. SUSMAN: I agree.

MR. SOULE: We're going to find out, aren't we?

MR. HATCHELL: I'm not sure I agree with that.

HONORABLE F. SCOTT MCCOWN: I had a question on (b). I don't know if there was still something on (a). But the term "whenever feasible" it seems to me either ought to be deleted to simply say "The court shall submit the case," or "feasible" ought to be changed to what we really mean if we mean

if there is any discretion, if we're talking about desirable or practical, because it's always feasible.

There is not any case in the world that can't be submitted on broad form. So we either ought to say it's always going to be broad form and take "whenever feasible" out, or we ought to say what we really mean about when there is some discretion not to be broad form.

PROFESSOR EDGAR: May I respond?

MR. SOULES: Before we go to that, let's address Harry's whether or not we should delete "factual." Any discussion about that?

MR. TINDALL: I so move that we delete "factual."

MR. SUSMAN: Seconded.

HONORABLE C. A. GUITTARD: If it's not factual, why submit it to a jury?

MR. TINDALL: Your question is what?

MR. FULLER: If it's not factual, it won't go to the jury.

MR. TINDALL: Well, because the issues typically submitted to the jury are conclusory issues that really don't get into specific fact issues any longer; and so I think that we need as a matter of writing these rules to get away from these fact specific type rules.

PROFESSOR DORSANEO: It doesn't say "specific factual." It says "factual."

MR. TINDALL: I know. But really it's issues like "Did the Defendant breach the contract? Who should get custody of the children? What are the reasonable" -- I guess reasonable attorney's fees could be a fact issue, but there are really...

HONORABLE ANN TYRELL COCKRAN: I think it's important too. I mean, it doesn't say that "The court shall submit issues." It says "The court shall submit questions on the disputed material factual issues." I mean, the juries -- you have to have a factual dispute before there is any point in submitting it to the jury anyway; and I think that that was sort of the --

MR. FULLER: What do you do

about the mixed questions of law and fact?

HONORABLE ANN TYRELL COCKRAN: It's okay for that to be in the question, but we're just saying that I guess the reason for the language is because you submit questions on disputed fact issues, and sometimes they do involve mixed questions --

MR. FULLER: And that really gets --

MR. SOULES: The court reporter is not getting either you, Ken, or Judge Cockran. Ken Fuller, ask your question or make your comment and then let the judge respond.

MR. FULLER: My reply to that is there are mixed questions of law and fact, many of them that go to the jury, and therefore I don't think that you're being precise when you say "factual issues." Issues are what are submitted to the jury, not just factual issues.

MR. TINDALL: Questions are submitted to the jury, but they're not factual questions.

HONORABLE C. A. GUITTARD: I

would suggest to you that there must be a factual element in anything submitted to the jury, and that just because that it's a mixed question of law and fact as in the inquiry concerning negligence under proper instructions, that doesn't keep it from being a factual issue. And if we take out "factual," that would imply that you can submit pure questions of law to the jury, and I don't think any of us want to do that.

MR. SOULES: That seems to be the purpose of it, Ken, as distinquished from questions of law or issues of law.

MR. FULLER: Okay. I don't think either way does violence to it. I think we've wasted enough time on it. We could probably take some words out and it would be a bit more descriptive without it, but I have no problem.

MR. SOULES: Does anyone else have any comment on that? Judge Brister.

HONORABLE SCOTT A. BRISTER: Judge Cockran is the expert in Harris County on "that" and "which," and it seems to me that one time in her career she has erred here,

because it should be "that" and not "which." Am I correct?

HONORABLE ANN TYRELL COCKRAN: You're correct.

HONORABLE SCOTT A. BRISTER: You're right. Let the record reflect that.

HONORABLE ANN TYRELL COCKRAN: But I knew he and Lynn Hughes were coming behind me and cleaning up after us.

MR. SOULES: Okay. Anything else on (2)(a)? Okay. Now (2)(b)?

PROFESSOR EDGAR: I'd like to respond to question or the comment that Judge McCown has raised. We deliberated this for probably as long as we deliberated the sanctions this morning when we inserted the term "whenever feasible" several years ago. And you will recall that the reason we did that is because there really are some things that cannot be submitted broad form, Judge McCown.

For example, workers compensation cases.

MR. SPARKS: There aren't any more.

PROFESSOR EDGAR: Whenever feasible to submit a workers compensation case you can't submit it in broad form. And then also under recent case law, for example, we have some owner/occupier cases that cannot be submitted in the traditional broad form "Did the negligence of the parties proximately cause so and so." So we had to leave a loophole there, because it may not be feasible in some kinds of cases to submit in the broad form that we envisioned broad form to be, and that's why we left it there. That's why we inserted it.

MS. DUNCAN: Bill and I have been arguing about this. I don't like these words. I haven't liked them since I first read them. I have read every word of your deliberations that came up with this formulation more than one time because I keep seeming to get involved in cases where it is feasible, it is clearly feasible to submit it broadly. Now, whether that means one question or lots of questions nobody knows. And it's real hard to tell from reading the deliberatons of the committee.

Additionally, even if it's feasible, it doesn't mean it's fair, and it doesn't mean that you're not denying somebody their right to appellate review; and I think the formulation means different things to different lawyers and different judges in every different cause, and to me that is not a rule that works. A rule ought to convey pretty much the same thing to most people who read it.

HONORABLE ANN TYRELL COCKRAN: I would like to say that we spent a couple of hours at one of our early sessions with some preliminary sort of warm-up talks about complaints about broad form submissions. We decided that it was not in our, within the scope of our employment to even, you know, that we even those who were complaining about it be decided, that you know, enough energy and time and you know had been spent, and that we really for purposes of this task force I'm not saying that it's not the job of this advisory committee to revisit it if they so choose, but that we assumed that the battle had been fought. The bodies had been buried.

You know, the dead had been mourned, and that we were going to assume that it was a given and move on.

MS. DUNCAN: And I don't mean to criticize either the task force or the concept of broad form submissions. All I'm saying is that I think whatever our rule it needs to say what broad form submission is, because I don't think either the rule says it, and I know the committee's deliberations don't say it.

MR. SOULE: Let's see if we can get this done. Not rush through it because it's very important.

MR. PERRY: Luke, could I ask a question?

MR. SOULES: Yes, sir.

MR. PERRY: I wonder if the judge -- I read most of this as being a nonsubstantive revision of the rules. And I wonder if I could maybe cut through this a little bit by asking the judge to point out to us the specific places where the committee intends to make a substantive change and tell us what the substantive change is that they

intend to make.

HONORABLE ANN TYRELL COCKRAN: In 50 words or less. Most of that really can be found from the great draft that Mike Young did that shows the sources and dispositions, that shows what we -- you know, I mean it really is about as good an effort at describing, you know, what we've done, you know, and with this unecessary, you know, moved around. And you know, where it says "Source: New" is where we really -- and some of it we tried to like the "omitted as unnecessary" we are not thinking that we are making any substantive change, you know. It's the last part of the packet here (indicating).

MR. SOULES: It starts with it looks like this on the first page about halfway through the materials.

HONORABLE ANN TYRELL COCKRAN: Two columns.

MR. PERRY: I'm looking at this.

HONORABLE ANN TYRELL COCKRAN: There are some things. Most things except for

the preservation of error and some things in the 226a a lot of which have been instructions that trial judges have added over the years and have gained enough popularity and are used often enough that we decided to go ahead and include them now. Except for the preservation of error system there are very few substantive changes, at least that we thought we were making.

For example, you know, the deemed findings portion in here we tossed around a bit some of the problems, but I think finally concluded we would probably make it worse if we changed it. So there are some rewrites of it, but really no dramatic substantive changes, but I really think everything is fairly outlined here.

MR. HATCHELL: David, I can give you two places to look. The two things that stand out in my mind are the burden of pleading duty to tender, otherwise to object is a major change which we think hopefully fixes the rules. And second, the reasonable guidance concept in terms of the duty of the trial court.

MR. PERRY: By the reasonable guidance concept you're talking about the provision that instead of saying that if you make a request, you have to tender it in the substantially correct form --

MR. HATCHELL: Right.

MR. PERRY: -- it is now saying that it's okay for it to be wrong if it provides reasonable guidance?

HONORABLE ANN TYRELL COCKRAN: That is correct.

MR. PERRY: Could I inquire why that change is being recommended?

HONORABLE ANN TYRELL COCKRAN: Primarily because it was the conclusion of almost I think everybody involved directly and most people that we talked with outside the task force that the "substantially correct" language was really at the heart of most of the problems now, that it was the appellate court's interpretation of "substantially correct" to essentially mean "perfect" that was the basis of so many repeated findings of waiver of appellate complaint, and that we made a conscious decision to try to get away

from that.

MR. PERRY: What is the thought process as to why if somebody tenders a request to the court and it's wrong, why should they get a reversal based on that?

HONORABLE DAVID PEEPLES: Good question.

MR. SUSMAN: Good question.

HONORABLE ANN TYRELL COCKRAN: They can't.

MR. PERRY: Under the rule as proposed they could.

HONORABLE ANN TYRELL COCKRAN: No. If they tender something that is wrong in substance but that clearly is on a topic that needs to be included in the charge, and the trial judge says, "It was not perfect enough. I will not include it," then yes, he can complain about the total omission of that from the charge.

If it is submitted in that wrong form, then unless that party specifically objects to its own tender, which I can't figure that out, and that objection is then overruled, it's not going to be the basis

of appellate complaint.

MR. SUSMAN: Well, since David has jumped ahead to 273 or 274, I did think I do have these two questions. It seems to me there are two premises underlying the changes. First is that it should be easier to reverse a judgment on the basis of an incorrect charge, that is premise one. Okay?

HONORABLE ANNY TYREEL COCKRAN: No. The premise is that it should be easier to get appellate review of complaints about the charge on the merits. Not that it should be easier to reverse, but that you should at least have a review of it.

MR. SUSMAN: Well, isn't that about the same?

HONORABLE ANN TYRELL COCKRAN: No. I think it's very different.

MR. SUSMAN: I mean, the second thing it seems to me that may be an underlying premise there is that the charge makes a damn bit of difference on whether justice is -- on the result or the outcome of the case, which I don't think it ever does. I think there is plenty of empirical proof. I

think you can prove that it doesn't make much difference. So I question, well, why should at a time when we ought to be concerned about the loss to society and judicial resources in terms of retrying cases, about appellate time spent reviewing the charges, about bills being generated to clients for writing appellate briefs and hiring people like Rusty to go argue the improper nature of the charge when it doesn't make a God damn bit of difference anyway? I just question whether that is what this committee ought to be up to.

The second premise that underlies these changes as I read it is that trial courts are smart enough to write a proper and correct charge without all the help that they can get from the lawyer. I think that's an incorrect premise too. So I think that both of the premises which I see in this are bad; and I think it's going -- I don't think the charges make that much of a difference, and all we're going to do here is encourage more appellate work, more appeals.

Obviously if the courts can look at them, they're going to reverse them

periodically, and I just don't think that -- I don't think anyone can persuade, make any kind of persuasive case that the charge, mistakes in the charge are producing an unjust result.

There are people that have experimented with all of these jury simulations, and you can mock try the same case 10 times and get 25 different charges and it doesn't affect the result, because the jurors who are deliberating ain't reading them, period. Why are we spending so much resources worrying about charges? Why don't we get down to deciding cases?

HONORABLE F. SCOTT MCCOWN: If I could kind of respond to that and make a couple of different points. The problem that comes up here is that in a charge you're trying to capture and resolve tension in the law. A good example is the agent principle discussion we had earlier and the notion of when do you visit the sins of the lawyer on the client.

There are tensions in the law where the law when applied to these facts has an ambiguity or has a tension that you're

trying to capture in the charge. It is very easy to talk about it in abstract and very difficult to write it in English, and that's the problem we're having today when we talk about principles we agree on, but we can't put it in words that capture the concept.

And so when you go to the charge stage I think it's unfair to say that trial judges aren't smart enough. The problem is it's extremely difficult to do. The lawyers have a disagreement about it; and if all they have to do to preserve error is articulate into the record eloquently what their disagreement is and the appellate court then reviews that on the merits and picks between those eloquent disagreements and reverses for a new trial, you still have to stop and say "What did the trial judge do wrong."

And to illustrate how difficult this is, appellate opinions that reverse for errors in the charge almost never say how to do it correctly. They will pick abstract concepts, but they will not say how to do it correctly, because they don't know

because it's too hard.

And so to reverse for a new trial because the trial judge didn't get it right merely because the parties were able to articulate their disagreements and provide reasonable guidance by an incorrect tender seems to me to be a mistake.

And I don't think it's correct to say that the charge doesn't make any difference. That's the same as saying the trial doesn't make any difference because after voir dire everybody has made up their minds and that's what studies show. Well, that's true only if the trial actively unfolds what happened in the voir dire.

A charge that captures properly the law in the hands of a skillful advocate is going to make a lot of difference, and the question is how to get that charge and at the same time not be reversing trials because the trial judge couldn't do something that the appellate court can't do, which is capture that tension correctly.

That's why I prefer like most trial judges the present rule of substantially

correct.

MR. LOW: One item we delt with way back over the years and Hadley worked on this, the trial judges came to us and they said, you know, we have -- "I'll be trying a different case today, something else tomorrow and something else. I can't research the law and prepare a charge for all of these lawyers. I cannot do it. I physically can't. I'm ruling on their sanctions motions." And so therefore they said, you know, "We don't care how you do it, but we do have a body of law how where the jurors go astray or not. We lawyers shouldn't -- we should have the law because the legislature passes it. The Supreme Court writes it. And therefore how do we get the charge?"

So the idea was that we would get something up so that the judge wouldn't have to prepare the charge. Now, how are we going to do it? There wasn't only just that. There were questions when was something omitted and when was it defective? If you omit one word, is that defective or is it omitting? So we needed to kind of put these

together to put them in focus so that the rules would be clear. Whatever the rules were, it would be clear. There would be a charge prepared by the lawyers that would substantially state what the law is.

Now, that's why we did it that way. I question changing the language now, because if you don't submit it in substantially correct form, then they've given the judge something he can't submit. He really shouldn't submit it if it's not in substantially correct form. So therefore who is going to submit it? The other side? Not them. They are not going to put it in.

So it should be on the person who has the burden on that issue to submit it in substantially correct form, not just so he knows what to do, but so the judge can turn around and give it without the judge having to revise it and spend time. And that was why we did it that way.

So I question the change of the word.

MR. GALLAGHER: If judicial economy is our objective, I tend to concur

with David's suggestion that anything that makes the trial less meaningful and reversal a greater probability is probably not serving that goal. And I'm sure that this committee thought about those kinds of things, but I have yet to hear enunciated a satisfactory response to David's question with regard to why this was deemed advisable.

HONORABLE ANN TYRELL COCKRAN: Well, I would like to say that first of all I don't think that anybody wanted more reversals because of the change of the rule. I think that a lot of us thought that it was probably going to be either a bit too presumptuous of us to write a rule that said that the problem was that appellate courts were reversing too many cases and to say "You need to take a more relaxed review standard," you know, "that the charge was also substantially correct or gave reasonable guidance to the jury," you know, and use that standard for your review purposes. But again, I mean it really was, we didn't really see that the Rules of Civil Procedure could be used as a vehicle to tell the Appellate Courts what their review

standards were.

MR. BEARD: It appears to me that you submit a charge that may not be substantially correct, but if the court submits it without objection from the other side, then who can complain? It's when he doesn't submit anything at all and you get upstairs and they say, "You left out two words or something, so it's not substantially correct." It looks to me like the adversary system takes care of the problem.

MR. MCMAINS: Well, one of the things I appear to be hearing is this revisiting of why are we revisiting the charges. But everybody so far is ignoring the fact that one of the problems that is addressed in this rule is it reduces your burden or the burden of a party to submit. The current rule requires a submission as to a question, definition or instruction that ain't there, whoever's burden it is to plead or prove. Even the other side's lawsuit you have got to submit their definitions, instructions and questions, or not questions, but instructions, definitions, anything other than

a question. If it's missing, you have got to do it in substantially correct form, or you're not entitled to it. And so that in the classic example --

MR. PERRY: What is wrong with that?

MR. MCMAINS: Well, because I was just getting ready to talk about it. Thus far the consensus of the committee and in the past has been that is not fair that I have to do something for the other side and take the position as to the proving up a cause of action, for instance, that I don't think exists.

And the classic example of that is a good faith and fair dealing claim in which you are at an advantage right now under our current rules if you submit good faith and fair dealing as a question. This of course assumes the judge will do it, but some judges will, with no definitions or instructions. You as a Defendant take the position there is no such cause of action, but you are then forced if you wish to confine in any way whatsoever the jury's explanation of what good

faith and fair dealing means, a definition for it. Otherwise you cannot complain about it. An instruction for it, you cannot complain about it if you don't. If it's totally missing, your burden. And you not only have to do it, but you have to do it right. And if what you do doesn't happen to be right, then it's not error not having defined it at all.

MR. SUSMAN: In that example that you just gave where you don't think I have a cause of action with good faith and fair dealing I say yes, you should be able to say there is no cause of action. That's point one.

But then you should -- if you have ever complained about my failure to give an instruction, you should give that instruction as an alternative, because I might say, "Rusty, I like your charge. Put it in." And now we have got if the court finds there is a cause of action, if the appellate court does, we have a bullet proof instruction becuase it has come from you. What's wrong with that?

MR. MCMAINS: The way it is

and what the courts have held otherwise in reality is that because you put the instruction in and the other side took it, that you're stuck with what the elements of it are. That is you have invited errors, so you can't complain now about how good faith and fair dealing is defined because you put it in even though your position is it doesn't even exist.

CHIEF JUSTICE AUSTIN MCCLOUD: Why should that be a problem? You wanted it. That's the reason you put it in.

MS. MCMAINS: No. But you didn't want it. You don't want it at all. Why do I have to do anybody else's work?

MR. SUSMAN: You don't. But then you take the change, okay, that -- I mean you can say "I'm smart enough that I believe that there's no such" --

MR. MCMAINS: But --

MR. SOULES: Don't talk at the same time now. Judge McCloud wants to say a few words and hadn't had the floor today, so Judge McCloud.

CHIEF JUSTICE AUSTIN MCCLOUD:

Well, I was just questioning Rusty there about being concerned about the fact that he is going to tender a definition which he otherwise would not tender because it was not his burden, but if he does tender that definition, then he's stuck with it. Well, it looks to me like if you want the definition, if you feel like it's going to help your case, you would tender it. If you don't want it, well, don't tender it.

MR. MCMAINS: That's not the point as to whether or not you want it. The point is your position is that you don't want the defense or the question asked at all, be it a defense or whatever. But you are now left in the rules when there is an omission with no option in order to complain about what the jury can consider in answering that question. You cannot limit their constraint without attempting to do the other side's work. And you can argue whether that's a good thing or a bad thing. I'm just telling you the committee in the past has voted overwhelmingly. Most in fact people didn't even know that was their obligation.

agreed what the charge rules even in existence were at the time. But one thing we did get from the trial judges was the trial judges said, "Wait a minute. We didn't want to go to a straight objection practice, because I need to be able to have something in any hands and be able to tell them to give to me. It doesn't matter whether it's perfect. I just need to have something that I can work with," which is I think what the reasonable guidance principle is. They've got something to work with.

Now, that's step one. It actually does nothing to preserve error. Even if it's perfect, it does nothing to preserve error in the context of these rules. The objection still is what preserves error. Your objection is the only thing reviewed by the appellate court, but you never get to the review of the objections unless you have given them something if you have the burden of pleading it. That's the way the rule is designed.

The law now is just the opposite. It doesn't matter who has the

burden of pleading, and it doesn't even matter who has the burden of proving it. It may all be on the other side if it isn't a question and if it's omitted, which is one of the places we get into a lot of trouble, because whether or not something is defective or omitted. And the question frequently is, "Well, if you add a few words, does that mean therefore it's omitted?" "Well, if it's omitted, it's your burden to submit it."

So like, for instance, in a fraud case, if you you leave out reliance in your definition of fraud, if the Plaintiff does, then is it defective? Can you object to the omission of reliance, or is it omitted so that you have the burden to submit a reliance issue? Not very clear as to which that is.

So what is happening is people are trying to do both and frequently are leaving out a word, not doing it right, or not realizing that they need to define reliance, and the courts are saying, "Uh, reliance omitted. No tender. Don't have to deal with the weight." And the question is, will therefore the jury answer the fraud issue

without regard to reliance?

Now, maybe you think that that doesn't have any impact on the jury, that they don't have to find reliance. And maybe you're right. Maybe they don't pay attention to the charge, but most lawyers who look at the question and see that there isn't a requirement that they even find reliance, that that makes a difference to them.

MR. LATTING: I have a question, Luke.

MR. SOULES: Okay. Joe Latting.

MR. LATTING: Rusty, or to anyone, Ms. Cockran. What is the idea of making the reference to the burden of pleading as opposed to the burden of proof?

MR. MCMAINS: The reason for that is because there is a shifting burden of proof in a lot of areas, some areas, and particularly in the domestic relations area.

MR. ORSINGER: Also in fiduciary litigation.

MR. MCMAINS: Fiduciary litigation.

CHIEF JUSTICE AUSTIN MCCLOUD: Fiduciary relations is the big one.

MR. MCMAINS: Is the big one. Some of it grows out of it.

MR. SOULES: Let Judge Cockran answer your question.

HONORABLE ANN TYRELL COCKRAN: And I think another reason too, I mean, that is, you know, the big problem with doing it by the burden of persuasion. But we already had, if you'll look at 271(1)(a) which is now the second sentence of Rule 278, we already had in place a rule that says that you are not entitled to submit something if you have the burden of pleading it unless it's in your pleadings. So we already have some rules about submission that are triggered by the burden to plead, so this was like this.

MR. LATTING: That's what caused my question. I didn't understand. I know that that's when you want it submitted, but as I understand now you can't even complain about it unless you have submitted it in what is your language?

HONORABLE ANN TYRELL COCKRAN:

No. Now who can't complain about it? You can complain about anything in the charge no matter who you are, what side you're on, whether it's in your pleadings or not by objection.

MR. LATTING: But you can't preveil via an objection unless you've submitted --

HONORABLE ANN TYRELL COCKRAN: That's not true. The only time you have to submit it is if your objection is "Judge, you totally left this out of the charge."

MR. LATTING: Okay. All right.

HONORABLE ANN TYRELL COCKRAN: That's the only time you have to tender.

MR. HATCHELL: Joe, the problem that we have is when, and I'm sure you're familiar with Payne, the rules are broken. We used to have this old your-issue theory rule, but with the advent of broad form submission when you have a question that says "Was Plaintiff, Defendant or some third party negligent? Whose issue is that," we don't know. So in addition to that, so that

standard is gone, but so there has to be a new standard for tender.

The trial judges prevailed upon the committee and I think very eloquently and convinced us that an object-only world doesn't work for us. There are some of us who don't, as they told us, have secretaries. We need some help. So the subcommittee and the task force was faced with the proposition of finding a new analog for the duty to tender; and that's the one we used, and that is as I told David is the big change, and you're right to focus on it. But that's the reason why we are where we are.

HONORABLE F. SCOTT MCCOWN: But this analog is completely a matter of fortuity. In other words, the trial judge's big problem is not whether he or she has or doesn't have a secretary. The trial judge's big problem is correctly capturing a complex area of law when he's got a jury waiting, and he's got to move this trial on. And if he addresses it in the charge at all with a single word, now you have relieved the parties of the responsibility when they object of

providing a written tender of how to do it.

It's only if he leaves it out that he gets any help under the reasonable guidance tender.

MR. MCMAINS: That is current law.

HONORABLE ANN TYRELL COCKRAN: Scott, I want to say that I wholeheartedly agree with all of the concerns that you and lots of other trial judges have expressed. It is the hardest part of the case. It is the part that we need the most help on that our inadequate resources hurts the most, but I am also thoroughly convinced that this situation is one of those tensions that either the lawyers or the judge are going to have terrible problems if you go to a system that addresses all of the problems of one side. Then it's going to leave the other side in a terrible situation; and this is not the best system for trial judges. It's not the best system for people who focus only on, you know, preserving appellate complaint, but I think you've got to take both those positions into consideration; and each side has had to give,

and I have agree with you. My life would be a lot easier if perfect tender were the rule.

HONORABLE F. SCOTT MCCOWN: It only works if appellate courts relax their scrutiny of the trial court's charge and say that if it reasonably captured the law and provided reasonable guidance to the jury, it's affirmed. In other words, that's the -- if we adopt the Federal Rule on one half, we have to adopt the Federal attitudes on the other half. And if we adopt the Federal Rule only on preserving without adopting the Federal attitudes about the charge, then we've just flipped the world. It's still a terrible world, but now it's terrible for me.

HONORABLE ANN TYRELL COCKRAN: I agree with you. And maybe we need to talk to Justice Hecht about how if the Supreme Court would look terribly askance at our trying to dictate to them what appellate review standards are, at least say "Don't adopt this unless you also make this change.

MR. GALLAGHER: I have a question. The objection, Rusty, the point you're making in the objection process even

where it's a matter that has not be submitted on which you have the burden of pleading, the failure to get, the objection you have to state distinctly the error of the court in failing to give that instruction, which seems to me to go a little bit farther down the road to trying to give the court guidance, and then in your written request you have to give reasonable guidance, but in the oral objection you have to state distincly the grounds of the objection so that you bring it to the court's attention.

MR. MCMAINS: And how to fix it.

MR. HATCHELL: And how to fix it.

MR. GALLAGHER: And how to fix it.

MR. SOULES: Where does it say "and how to fix it"?

MR. GALLAGHER: If you have to state distinctly the grounds of your objection in the failure to submit, then you're having to point out specifically the nature of the omission. I mean, am I incorrect in my

understanding?

MR. SUSMAN: And Rusty, I take it that I could say "I object because reliance is an element of common law fraud and there is no definition here of reliance."

MR. MCMAINS: Correct.

MR. SUSMAN: I say no more. I have preserved error, okay, and I have allowed the Court of Appeals to look at that even though I have got in my form book the perfect pattern reliance charge. I could have handed that to the judge, but I didn't, but I have preserved it, done all I need to do by just -- I haven't showed the judge how to fix it.

MR. MCMAINS: Yes. If that's not your burden.

MR. SUSMAN: It's his burden.

MR. MCMAINS: I understand. If it's not your burden to plea, yes.

HONORABLE ANN TYRELL COCKRAN: But, see, what is going to happen though is that then the trial judge says, "Yes, you're right. I'm going to put reliance in here. Do you want to volunteer how I should define it?

No, judge, I don't have to do that." So I say, "Fine. Reliance means, you know, the price of eggs at the grocery store" and put that in the charge, and then it's your burden to point distinctly what is wrong with that definition which is going to give me the information I need.

MR. SUSMAN: So the judge has got to go get the definition in the first instance.

HONORABLE ANN TYRELL COCKRAN: Or make one up.

PROFESSOR DORSANEO: Or ask the other lawyer if he wants to define it.

HONORABLE ANN TYRELL COCKRAN: Yes.

PROFESSOR DORSANEO: I have one technical question. There is a sentence that means various things in various places. At the end of current Rule 273, "a request by either party for any questions, definitions, or instruction shall be made separate and apart from such party's objections," is that -- I didn't see that in there anywhere, and it made perfect sense to me the way you

described it. You could say your objection and make your written request simultaneously.

HONORABLE ANN TYRELL COCKRAN: I guess the reason that we found that you didn't have to, because you do as Rusty pointed out, you have to object to the omission and then, you know, as well as tender; and there have been some problems with some appellate courts saying that you did not do it separately enough.

PROFESSOR DORSANEO: Do that separately. Yes. I hate those opinions. I hope they're gone.

HONORABLE ANN TYRELL COCKRAN: And so since you're going to have to object, even if you're going to say, "I object because you are not including this in the charge," then there is no point in having them separate. So we did and we have tried.

PROFESSOR DORSANEO: Let the record reflect it was omitted on purpose.

HONORABLE ANN TYRELL COCKRAN: Right.

MR. ORSINGER: I wanted to repeat for Justice Hecht's benefit, because

I'm not sure he was in the room when this happened, but the reason at least my conception of why the task force threw out or dropped "substantially correct" was not because the words are poorly chosen. They are good words, but they've developed a meaning in the courts of appeals that is hypertechnical and result in too much waiver on the merits.

It was our desire to find other words that could serve the same vehicle that didn't carry that old baggage. If these new words are adopted and the courts of appeals carry over their very restrictive interpretation to these new words, then these new words have accomplished no amelioration of the condition, and we really need for the Supreme Court to tell us that these new words don't carry the same baggage that "substantially correct" carries, and that "reasonable guidance" is going to permit the courts of appeals to look at the merits more often than they have been in the past.

If that doesn't happen and the courts of appeals do the same thing over again, we haven't improved anything.

MR. LOW: It takes me a while to understand what you've done. I think you've done a great job, because even under our old system just tendering issues it might state the law so incorrectly, the other side still has to object. So you have got to point them out, so every error is there to be corrected, and I agree that "reasonable guidance" should be, because there's no need in doing it twice. It has to be perfect here, and the other lawyer has to point it out, so it shouldn't be done but once; and this committee is just smarter than I am. They saw through. I commend them for what they did.

PROFESSOR EDGAR: Buddy pointed out too a minute ago during the break that the requirement under Rule -- let's see where it is. The pleading requirement under 272(1) there is a recent Supreme Court case that says mitigation --

MR. LOW: It was before Tort Reform. Rusty tells me Tort Reform changed that. I don't know. Mitigation. You know, the Supreme Court case was before Tort Reform. It was an older. I'm sorry if I

misstated it. And Rusty tells me the law has changed on that where like mitigation was not -- you didn't have to plead it in order to get mitigation.

PROFESSOR EDGAR: Okay.

MR. MCMAINS: Isn't mitigation now -- I mean, mitigation at least in the classic, in the personal injury mitigation area are things controlled by Tort Reform. Clearly that is now a part of the affirmative defense of what in essense is comparative negligence.

PROFESSOR DORSANEO: Contributory negligence.

MR. MCMAINS: Contributory negligence, contributory responsbility, or whatever you want to call it.

MR. PERRY: Comparative responsibility.

PROFESSOR DORSANEO: It's contributory negligence.

MR. MCMAINS: So I think you have the burden of pleading it there. Now, the question is in general lit cases as to whether or not the doctrine of mitigation or

avoidable consequences or whatever may be something that has to be pleaded, I haven't frankly researched that; but if it's not controlled by Tort Reform, I don't know that it has changed.

CHIEF JUSTICE AUSTIN MCCLOUD: I don't know of any way that you can correct this, but it is something that's always bothered me, and there was some discussion about it a moment ago when you're talking about simultaneously objecting and handing the trial judge the tendered instruction. The last sentence, which is believe me I prefer this rule much more than what we've had. I commend this group for doing this. But the last sentence this is still better, but it says, "If a request has been filed and bears the judge's signature, it shall be presumed unless otherwise noted in the record that the request was tendered at the proper time."

And up there in the first part of that you talk about the proper time for tendering being after the evidence and before the objections are starting. And that's just a little bit of a time problem there. I've

always taken the position that this business of the judge signing it some sort of presumption. It doesn't mean it couldn't be shown by other ways such as now they talk about a Bill of Exception in the rule. No formal bill. Maybe have an informal bill, and maybe you have the court reporter showing what is taking place.

But do you see what I'm saying? In other words, it says that it shall be presumed unless otherwise noted in the record that the request was tendered at the proper time, which would indicate your tender had to take place before your objections. I wish we could correct that.

MR. SOULES: "Before or at."

HONORABLE ANN TYRELL COCKRAN: "Before or at."

CHIEF JUSTICE AUSTIN MCCLOUD: Does it say?

HONORABLE ANN TYRELL COCKRAN: "Before or at the time of objection."

CHIEF JUSTICE AUSTIN MCCLOUD: That's great. That's wonderful.

MR. SOULES: Does that fix

it?

CHIEF JUSTICE AUSTIN MCCLOUD: You bet. That's wonderful. I'm sorry I missed that, because that is a good thing, "before or at time of objection."

MR. ORSINGER: One of our concerns was that some people either because of a pretrial order or trial strategy will submit their charge before they even impanel the jury, and we didn't want to get into an argument because actually you're required to tender after the close of the evidence, and people are looking around in files and everything; and we just said if the judge had it in his hands during the charge conference and signed it, let's not worry about whether it was submitted before the jury was impaneled or after the evidence was closed.

HONORABLE ANN TYRELL COCKRAN: The main thing was the problem that trial judges often have of not knowing what the district clerk has file marked in that file and making sure that not just the clerk had it to avoid sandbagging to the extent possible.

CHIEF JUSTICE AUSTIN MCCLOUD:

That's great.

HONORABLE DAVID PEEPLES: Can one of you-all walk me through a common situation? Several theories have been pleaded. I decide to submit three, but the fourth one, and let's say it's fraud, I decide is not raised by the evidence. Now, if the party who wants it submitted tenders an issue with an instruction that has four of the six elements, can I safely refuse that and is it over?

HONORABLE ANN TYRELL COCKRAN: Sure, if you're right that there wasn't any evidence to support.

HONORABLE DAVID PEEPLES: Yes. It bothers me. What else does the tendering person have to do in order to preserve it for appeal?

MR. MCMAINS: They must object to the omission.

PROFESSOR ALBRIGHT: But they don't have to have submitted it correctly to preserve the error that they're entitled to a fraud claim.

HONORABLE DAVID PEEPLES: Okay.

HONORABLE ANN TYRELL COCKRAN: The theory is that it is not a game of got you, and that the trial judge just like the other side should not be able to say, "Well, I thought that no evidence thing was a close point, but boy, this makes it easy, I don't even have -- because he left out an element." You know, if it's enough to tell you that fraud should be in there, because the two omitted elements are ones that you could cure by putting it in the charge and then hearing objections.

HONORABLE DAVID PEEPLES: When do they have to tell me there are six elements and you need to submit all six? Fraud is easy because we can all look that one up. There are a lot of theories that are not that easy. I choose fraud because I know there are six elements. But at what point do they have to tell the trial court, "Look, it ought to be submitted this way," which really gives me some guidance?

HONORABLE ANN TYRELL COCKRAN: At the point that you decide to include it in the charge.

HONORABLE DAVID PEEPLES: No. I'm deciding not to include it. And they've submitted it in what would right now be substantially incorrect.

MR. MCMAINS: Again the point, and I think what we are trying to do here is, then all they have to do is object to the failure to submit our cause of action for fraud.

MR. SOULES: As I understand they have given you pursuant to number one up here, the first sentence, they have given you a defective question, instruction or definition, however it's tailormade by them. And you've refused it. Or have you refused it or included it?

HONORABLE DAVID PEEPLES: Refused it.

MR. SOULES: You refused it. At that point unless that gave you reasonable guidance in fashioning a correct question or definition or instruction, well, really nothing has happened probably either way. Then they have to object to your failure to give a fraud question, instruction, definition

cluster and tell you expressly what should be in it as I understand it.

HONORABLE DAVID PEEPLES: Okay. Is that right? Do they ever have to tell me --

MR. LATTING: No.

HONORABLE DAVID PEEPLES: -- it ought to include elements one through six?

HONORABLE ANN TYRELL COCKRAN: Not if they're not going to submit it.

MR. SOULES: I don't think that's right.

MR. MCMAINS: But the point is that if you say at that point, "Okay. I have this one here; it looks to me like that there is another half a dozen of them also," and you make an extra half a dozen of them also that you want to make them overcome, and you write that in, or you give the one that they've got, if sombody wants to complain about that, then they complain about the omission of the other two elements or object to them.

MR. SOULES: It says, "No party may assign as error" and so forth "unless the party objects thereto before the

charge is read to the jury stating distinctly the matter objected to and the grounds of the objection."

PROFESSOR ALBRIGHT: Well, then the objection is you failed to submit the issue. The objection is not there is something wrong with this issue, because there is nothing in the charge.

HONORABLE ANN TYRELL COCKRAN: The objection is you failed to submit this issue. Then you go to number one; and before you are legally permitted to make that complaint, to make that objection, if it's something you needed to plead, you had to have tendered it before you can legally make that objection about omitting.

PROFESSOR ALBRIGHT: Right. And you have to tender it in a form that gives reasonable guidance. I guess we could get into a big brouhaha about if reasonable guidance --

MR. YELENOSKY: If four of six elements.

PROFESSOR ALBRIGHT: -- if a four element gives reasonable guidance than

six, but we're hoping not to.

HONORABLE ANN TYRELL COCKRAN: Well, but you also have to realize the lawyer doing, you know, it's not -- that is not the standard for grading what was in the charge.

PROFESSOR ALBRIGHT: Exactly.

HONORABLE ANN TYRELL COCKRAN: It is only, you know, "I have fraud pled. I have evidence of fraud. You refused to give me any submission of fraud, and I gave you know, a fraud. It wasn't perfect. I left out a couple of elements. Maybe those are the two elements I didn't have any evidence on." But it's a wholly different problem than if you're complaining about what the judge did put in the charge where having all six elements really becomes important.

MR. SOULES: See if this works. Just like Judge Peeples said, I had the burden to plead fraud, and I gave them a defective question, instruction, definition cluster and omitted two elements. Later I say "You erred in failing to submit fraud and you should submit fraud." Okay. I've got maybe a valid objection, but that doesn't preserve the

error, because I have to both object and request if it's my burden to plead. I have to do both, and my request has to give reasonable guidance in fashioning the correct cluster that you did not submit. So if my request gave reasonable guidance in fashioning this correct charge even though it omitted two elements, and that's what the appellate courts hold, then I have preserved error. Otherwise not.

HONORABLE DAVID PEEPLES: Let me ask it this way: Suppose it's a cause of action that's on the cutting edge of the law and we just can't go look it up in a dozen Supreme Court cases and nobody knows what the elements ought to be. Can I get reversed for saying, "I'm sorry. The jury is out there. You want this to go to the jury. You should have had me some help. Tender something to me." Well, I can't do it, Judge." "Then I'm not going to submit it." How do they reverse me on that? It sounds like you just make an -- you tender something that is not even close, make an objection --

MR. LATTING: That doesn't

give you reasonable guidance if it's not even close.

MR. SOULES: You have to do two things to preserve error if it's your burden to plea. You have to object, and you have to tender something that gives reasonable guidance in fashioning a correct cluster.

HONORABLE DAVID PEEPLES: Okay. There will be litigation over what reasonable guidance means.

MR. MCMAINS: There is no question about it.

MS. DUNCAN: And it will become "substantially correct." We will just change the words.

MR. ORSINGER: Judge Peeples, that was the point of my earlier comment. We're trying to find words that mean something different from substantially correct as interpreted, and it may require litigation or maybe we ought to put a comment in there warning all the Justices on the Courts of Appeals "We changed these words because we didn't like your interpretation of substantially correct, and we would like a

little bit loser and yet well defined idea of reasonable guidance."

MR. SPARKS: I thought you said a while ago Judge Hecht has already written about it. "Reasonable guidance" is substantially correct.

MR. SOULES: Reasonable guidance in fashioning a correct question, definition or instruction will be litigated if we change to that. Are we going to change to that and litigate, or are we going to stay with substantially correct and live with the very technical way that that has been interpreted? That's really the policy question that's before the committee; and there are I guess reasons for doing both. Do we want to litigate a new term, or do we want to stay with one that is very technical, very strictly construed and is causing the appellate lawyers difficulty?

MR. BEARD: I move we adopt the reasonable guidance standard.

MR. SUSMAN: Seconded.

MR. SPARKS: I believe we already have. Judge Hecht, he defined

"substantially correct" as "reasonable guidance." He's already done it.

MR. SOULES: That does move us along. Any discussion about going to this new standard now?

MR. BECK: Can I just say one thing about this new standard? You know, under the substantially correct form standard the appellate court looks at the tendered definition or the tendered instruction and then looks at the law and determines whether or not that is substantially correct. As I interpret what has been said with respect to the reasonable guidance standard there may well be a factual dispute involved, and I'm talking about a complex piece of business litigation where you have multiple parties where you don't just have one document and the appellate court then has to apply the law to that. You've got lawyers arguing about whether or not this language ought to be in the instruction or definition, whether some other language ought to be, and the debate can go on for hours.

Now, how is the appellate

court going to sift through all that and make a determination of what is reasonable and what is not when there may well be a factual dispute?

HONORABLE ANN TYRELL COCKRAN: It sounds to me like what you were talking about is a situation where the lawyers are arguing about the language of something that they both know is going to be in the charge. The reasonable guidance standard doesn't come into play where that is the situation. It's only when something is totally omitted from the charge that you even look to this reasonable guidance language.

MR. BECK: Yes. But there is a debate though, judge, about whether something ought to be included or excluded from the charge.

HONORABLE ANN TYRELL COCKRAN: Okay.

MR. BECK: And I guess what I'm concerned about is I don't want to get into a situation where the appellate court is somehow deciding facts that were before the trial judge with respect to what is and what is not

reasonable guidance. That's what bothers me.

HONORABLE ANN TYRELL COCKRAN: Well, we don't have any discretion. Everything is mandamusable anyway. It's unrealistic to think trial judges are to be given any new discretion.

MR. SOULES: David, I'm sorry. I don't really understand the problem. Could you run it by me again? I'd like to try to understand it, if I can.

MR. BECK: Well, I guess what I'm concerned about is in a complex case where you've got multiple parties and there is a debate about whether or not to include a particular instruction in the charge or not, okay, under this proposal when does the reasonable guidance standard come into play?

MR. MCMAINS: When there is no instruction given.

MR. BECK: All right.

MR. MCMAINS: And you have the burden to plead.

MR. BECK: All right. Now, when the appellate court is trying to determine whether the trial court has been

provided with reasonable guidance or not, what is the appellate court going to look at?

HONORABLE F. SCOTT MCCOWN: The tendered reasonable guidance.

MR. BECK: The tendered written reasonable guidance.

HONORABLE F. SCOTT MCCOWN: Yes. That is the reasonable guidance is the written request.

MR. SOULES: Written request.

MR. MCMAINS: They'll look at the request.

MR. YELENOSKY: Is that what the language says?

MR. SOULES: Yes. That's it the way this rule is structured right now.

MR. SOULES: My question is, am I reading it right?

MR HATCHELL: Yes.

MR. MCMAINS: Yes.

MR. SOULES: Okay. Hatchell and Rusty say, "yes."

MR. MCMAINS: You need to understand that's just a threshhold. I mean, like for instance, and we do have a dispute

I think between what David's interpretation of reasonable guidance in light of Luke's comments versus mine. And that is if there is a fraud cause of action pled and the judge has determined he's not going to give fraud and you've submitted fraud as a pleading, all you have to do in my judgment is object to the omission of your fraud claim. Now you're obviously confined to the pleaded claims and what's in the evidence in order to make that, but your position is you had evidence raising it and so on.

What David would like to do and what the other side would like to do is to be able to sandbag me because my submitted instruction wasn't 100 percent correct, even though he knows full well what all six elements of the fraud are and doesn't need any help to go write them down.

And essentially all the committee was saying is, you ought not to have that kind of advantage. If your position is "I'm going out on a limb this is not a fraud case in my judgment, and I'm not going to give you fraud," then that -- you object to the

omission of fraud; you have given, crossed the threshhold, given them a fraud definition that has got four of the six elements.

Now, if we forget the fraud definition or fraud instruction or if you ask a question that has no elements, probably we're in the same line. It just asks "Are they bad fellows?" And your position is "That's a fraud case; that's a fraud submission." I probably don't think we are going to have a problem resolving that there is no reasonable guidance. "Are they nasty guys? Should they be penalized," that sort of stuff.

If you asked however the question of fraud given the modernday patterned jury charge, et cetera, it's highly likely in my judgment that the Court will look to your objection if you have requested a question on fraud, whether you have any definitions or instructions or not, if there is a reasonable basis, if you give the judge the PJC pact for that matter, or four, I don't personally think that that appellate court would necessarily have any problems saying "He

should hae given fruad" if there is evidence. And you go back to the merits of the objection, which is all we're trying to get to.

CHIEF JUSTICE AUSTIN MCCLOUD: I do want to take just a minute to defend some of the courts of appeals, because --

MR. YELENOSKY: Which one?

CHIEF JUSTICE AUSTIN MCCLOUD: Some of them. I know it's been quite, quite accurate, because there's been a large discussion about the hypertechnical courts of appeals; and I think that if you go back and check most of the cases and the things that most of the lawyers are concerned about, and as a judge I've been very concerned about for years, involves things like whether or not the definitions are on separate pieces of paper, whether or not they're tendered properly, whether or not they are endorsed, denied, granted. Those are extremely hypertechnical matters; and the reason the courts of appeals have been extremely hypertechnical about those is because that's what the rules have said, and they've been following Supreme Court

opinions for the last 50 years on that.

Now, and again in defense I don't recall, and you may have a multitude of them, but I don't recall the courts of appeals getting all bogged down in this business about substantially correct. I know all about the courts of appeals getting all bogged down on all of this other business about when you tendered it, where you tendered it, who signed it, who was in that room, and when you did it. But and I suppose that what you're telling me is that there is just a multitude of cases out there or I assume you wouldn't have done it, wouldn't have changed the language where the courts of appeals have said, what, an "and" is missing, or somebody said "a comma." I've never seen a case like that.

MR. MCMAINS: But as a for instance suppose the --

CHIEF JUSTICE AUSTIN MCCLOUD: Again this is I'm just defending them for a few minutes.

MR. SOULES: Who wants to respond?

CHIEF JUSTICE AUSTIN MCCLOUD: Go ahead, please.

MR. SOULES: Okay. Sarah Duncan.

CHIEF JUSTICE AUSTIN MCCLOUD: I'm talking about the discussion about how hypertechnical they were, and I've been looking at all these cases for 20 some odd years; and you know, I don't see -- I have not seen that tremendous technicality when you start talking about the definition.

MS. DUNCAN: There is at least one Court, perhaps more, where if it can be either a question or an instruction, and this is pretty much what happened in Payne, the Court will say, "Well, it has to be an instruction. Yours looks like a question. It's not substantially correct. And even though we all knew that what you were trying to get to, you haven't preserved error." Or there will be a phrase that may or may not turn out to be the law by the time you get to the Supreme Court. That can defeat all review for the complete omission of that affirmative defense, element of a claim, whatever it is.

CHIEF JUSTICE AUSTIN MCCLOUD: Well, I don't think the judges on the court of appeals are going to be the least bit concerned about the fact that you've changed this language. They're just going to try to comply with it.

MS. DUNCAN: In my opinion, Judge, a judge like you it won't change your life at all.

CHIEF JUSTICE AUSTIN MCCLOUD: I sure hope it won't.

MS. DUNCAN: You've been living by reasonable guidance all along. The problem is substantially correct has taken on a life of it's own and can be manipulated if that's the choice.

CHIEF JUSTICE AUSTIN MCCLOUD: Thank you very much. Otherwise they'd want to know what I said.

PROFESSOR EDGAR: Rule 274 generally. One is a matter of form and the other is a matter of some substance, I think. And I'd like to ask the committee and subcommittee in Rule 272 we talk about submitting questions, and now suddenly in all

of Rule 274 we talk about giving questions or the failure to give. Is there any significance, because some lawyer is going to attach some significance to it if there is an intention? We always used submission and now we're talk about giving.

HONORABLE ANN TYRELL COCKRAN: I think that was unintentionally, unconsciously in.

PROFESSOR EDGAR: I would suggest then that the word "giving" or "give" in Rule 274 be changed to "submit" or "submission" wherever indicated.

MR. SOULES: Are there any objections to that. No objections.

PROFESSOR EDGAR: The second point goes to the second sentence in new Rule 274(2), "An objection is required even if the objecting party is required to tender a request." I know that that is basically the rule we have now. However as I read State vs. Payne the court stated there that anything that calls to the appellate -- to the trial court's attention will preserve error whether it is an objection, or whether or not

it is a tender or an objection.

Now, we are kind of caught in a paradox here it seems to me. If it is the desire of the subcommittee to suggest to the court that it modify State vs. Payne in that regard, even though the current rule carries out the essence of the proposed rule, that the comment, that there really needs to be a comment here that this is intended to modify State vs. Payne in that record, because this is going to cause a lot of confusion if you don't.

MR. HATCHELL: I think Hadley is absolutely correct, because the intention is to modify Payne in that respect and a comment should say so.

JUSTICE NATHAN HECHT: And given the change in the rest of the rule, it almost has to. It seems to me it almost has to be this way.

PROFESSOR EDGAR: Yes. I'm not concerned about the merits. We don't want to confuse the Bar and Bench. That's what we want to try and avoid.

MR. SOULES: Any other

comments on 274?

MR. LOW: Number (1) says "A party may not assign as error the failure," and the second one says "no party may assign," and it's just two different ways of stating it. I don't know if we want to state them the same way both times. It makes no difference, but why state it? You know, somebody is going to wonder why did they state it this way "a party," and then the other says "no party." Somebody will just say, "Well, they mean then no multiparty lawsuit" or something.

MR. SOULES: Which way do you suggest?

MR. LOW: I don't know.

MR. SOULES: Make a suggestion.

MR. LOW: "The party may not assign" --

MR. ORSINGER: Let me respond to that. In the first instance there it's referring to the one party who had the burden to plead --

MR. MCMAINS: Right.

MR. ORSINGER: -- has that

burden to tender; but in the second question everyone has the burden to object, and so it's multiple, so you've got plural in one and single in the other, and the phraseology supports that distinction.

MR. LOW: Okay. But you say -- how would it be different if you went down to the second, "A party"? I mean, somebody, one of the parties is going to be assigning error. It doesn't mean more than one.

MR. ORSINGER: The problem with "a party" is --

MR. LOW: Okay. If you're satisifed with it, I can live with it.

MR. ORSINGER: "A party" means one. "No party" means everyone.

MR. LOW: I'll yield.

HONORABLE DAVID PEEPLES: As long as we're talking about wording, in number (1) we talk about the judge in a couple of places and the trial court in another place, and it ought to be consistent.

MR. SOULES: Where does it say "trial court"?

HONORABLE DAVID PEEPLES: Well, in number (1) about five lines down, and at the bottom we say "judge." A couple of times we say the "trial court." We should say the same.

MR. SOULES: It's the judge. It's not the court. Where does it say "the court"?

HONORABLE DAVID PEEPLES: Four lines up. I was going to suggest that we make these wording suggestions to the subcommittee and not deal with them on the floor.

MS. SWEENEY: I'm writing them down.

HONORABLE DAVID PEEPLES: In number (4) in paragraph (4), "Rulings," do we mean objections? "The rulings shall be made in open court or on the record." Can you make it on the record in chambers? Don't we really mean "on the record"?

MS. SWEENEY: Yes.

MR. EDGAR: Changing "in open court" to "on the record"?

MS. SWEENEY: Yes.

HONORABLE DAVID PEEPLES:

Well, I was wondering what we mean. And, Luke, I want to say I detect from some of the discussion and from Rusty's use of the word "sandbag" that there is some sentiment here that judges play games.

Let me just say: If it's so easy for the judge to know what the law is on everything someone has pleaded, why can't the lawyer who has nursed this case along for years know what the elements of every cause of action are that he's pleading? That's the judicial point of view, and I just wanted to state it.

MR. SUSMAN: See, I'm not sure I understand. I understand there is a problem with the "substantially correct" and that the appellate courts have written, construed it too strictly, and that now all you want to do is make it "reasonable guidance." If the requested instruction gives the judge reasonable guidance, then that's enough. That's one point.

Isn't it an entirely different point though to say that the party who doesn't have the burden of pleading has no duty to do

anything? You were talking about the person who --

MR. MCMAINS: He has the duty to object.

MR. SOULES: The party that does not have the burden to plead must object by according to the standard that's articulated here.

MR. SUSMAN: But he has no duty to submit a request that gives the trial judge reasonable guidance.

MR. SOULES: That's correct, according to this rule.

MR. MCMAINS: That is if he didn't have -- if it's on an issue he didn't have the burden to plea.

MR. SUSMAN: Now, what is the justification not requiring him to give the trial judge reasonable guidance of a proper instruction? I mean I understand you don't want to do work for the other party. But is that all that we're talking about? We aren't now in word games. We are not substantially correct.

MR. MCMAINS: What we're

raising right now is we've got two things. Number one is the fairness of whether or not you are required to do the other party's job.

MR. SUSMAN: Right.

MR. MCMAINS: That historically the committee consistently has taken the position in the last few years that that is not a fair allocation of the burden and this committee I think only continued, so that is nothing new really, but that is what has been the consensus of the committee in the past.

Secondly is that the courts have seized upon the providing of that information as being an invitation, invited error if you will, like for instance, you don't know. Take the example I gave of good faith and fair dealing. You don't know a good faith and fair dealing issue for some reason or another is coming exactly. I mean you're dealing in a real estate land sale transaction, and somebody wants to bring in an issue of real estate. You haven't prepared anything. You had no idea that was coming, and yet you now have the burden if it's

undefined in order to attempt to circumscribe the jury in any fashion whatsover and get into the other side's head as to what it is they have in mind, and they may not tell you. You have to try and fashion an instruction.

Well, if you fashion that instruction, and it happens to help out the other side rather significantly, there are no complaints you can make about it for the mere fact that you did it under our current practice the way that things are going. And so we haven't had a way, and that's basically on the notion that you can't lead a Court into error. You can't encourage them to do something and then complain about it.

And the problem, that's fine if you're talking about your case and what you've got a burden to plead and prove. It's something else again when you're talking about somebody else's case, something they left out. And why do you have to do their work and then get penalized for having done it?

MR. SUSMAN: But there are two distinct issues, are there not, Rusty? I mean one is the substantially correct versus

reasonable guidance.

MR. MCMAINS: Yes.

MR. SUSMAN: And the other is do you have to do work for the other side.

MR. MCMAINS: Yes.

MR. SUSMAN: You could agree with one and not with the other.

MR. MCMAINS: Yes, but they are related issues in the sense that the substantially correct stuff filters in to your doing the other side's work as well.

MR. SOULE: This objected to, the requirements for the objection to be good are lax in this rule, and there is a Supreme Court case which I can't recall the name of -- it's an older case -- that gives a more complete, requires the objection to be more complete. We had that in our draft before this came out, and it pretty much requires that the objection tell the judge what is wrong with the omission, in other words, what specifically is being omitted. "You're omitting fraud, and you're omitting the six elements of fraud, and here's what they are." What's that case? Do you

remember?

MS. DUNCAN: I don't remember the case.

PROFESSOR DORSANEO: Brown vs. American Transfer and Storage.

MS. DUNCAN: No.

MR. SOULES: No. It's not that either. We can find it; but this is pretty lax, this objection that we've got right here, the parameters of this objection.

MR. SUSMAN: That's what I would like to see --

MR. SOULES: And it was in our draft that was here before; and I didn't bring it, but I can get it.

MR. MCMAINS: That's because we did not -- because with that in that draft we had no request practice, so what we actually put in was the statement that the objection must state specifically the matter objected to, the grounds, and how to fix it.

MR. SOULES: That's right.

MR. MCMAINS: The how-to-fix-it language was in the earlier draft that we had, but then we had no request

practice, and that's what everybody complained at; and so the how-to-fix-it sort of theme got shuffled into the request practice.

MR. SOULES: This seems to me to be deficient. I think the objection should have to give the judge the instruction orally that you're saying is omitted even though it's not my burden. At least you ought to tell the judge that; and this doesn't require that. Sarah Duncan.

MS. DUNCAN: Two points.

MR. EDGAR: Are you talking about giving the Court substantial guidance rather than reasonable guidance? I'm just trying to find a term.

MR. SOULES: I'm not arguing about the standard for what you tender. I'm talking about the standard for the objection. This objection is you state the matter objected to and the grounds of the objection, but it does not require you to give the judge guidance to any kind of information about how to cure the problems that you are objecting to. You just state the grounds, the matter objected to and the grounds; and the existing

law governing what an objection has to include has more requirements than this language has. Okay. Richard and then Sarah.

MR. ORSINGER: There were several district judges that met with us that had exactly that concern; and one of the examples we discussed is the Plaintiff who submits a charge or anyone whether seeking it by counterclaim would apply as well, with a damage question and no instructions on what compensible damages are. Now, then the Defendant or the party defending the counterclaim would say, "I object because you are not instructing the jury on the proper measure of damages," and you have just alerted the judge that the charge is deficient because it doesn't give the measure, but you haven't taken the risk or taken it upon yourself to tell him what that measure is, because that's really the party seeking affirmative reliefs, that's their burden to come in with that case law and to come in with that proposed language.

MR. SOULES: We're to a policy issue here right now. Should we have to tell

the judge what the correct measure of damage is at least orally if we are going to be able to preserve that ground?

MR. ORSINGER: But you see if you make them state the correct submission in an objection, then we still have tender, tender. It's just that your tender is oral instead of being written. And what have we accomplished? All you've done is put us right back to where we are now which is that the good lawyer has got to put together the case for the bad lawyer so that it doesn't get reversed on appeal. And you've got to ask yourself in an adversary system like this should we be making the good lawyers put together the case for the bad lawyers so the case doesn't get reversed on appeal?

MR. SOULES: He stated a policy question. We can just go through here. I didn't want that to be missed.

MS. GARDNER: Can I ask a question?

MR. SOULES: Yes. Anne Gardner.

MS. GARDNER: It has always

been the law that the lawyer even, say, representing the Defendant objecting to the Plaintiff's damage issue would have to on the ground that did not present the proper measure of damages would have to point out verbally in his objection what the proper measure of damages was in order to preserve his complaint.

PROFESSOR DORSANEO: No. There's a split.

MS. GARDNER: Is there?

PROFESSOR DORSANEO: Yes.

MR. HATCHELL: This is a case where there is no measure of damage given.

MS. GARDNER: No measure is submitted.

MR. HATCHELL: Not a defective measure, but no measure.

MS. GARDNER: Right. An issue on damages is submitted where it's --

MR. ORSINGER: A question.

MS. GARDNER: -- just a general damage question on damages and no instruction is submitted on the question of what measure of damages is. Well, there's a

substantial body of authority that says that the objection must specifically point out what the proper measure of damages is. And I'm wondering if that since the language on what the objection in the amended rule, the new rule would include is almost identical to the old language, isn't it? It must point out distinctly objection. "Must state distinctly the matter objected to and the grounds of the objection" is the same language as the old case law. So could the Courts still hold that the Defendant has the burden to point out what the measure of damages is under the new rule? Does that make any sense?

MR. SOULES: Well, I think the policy issue --

MS. GARDNER: It doesn't change the law, in other words --

MS. SOULES: I think this does.

MS. GARDNER: -- on what the objection has to include.

MR. SOULES: And I can get the case. I just can't bring it to mind, but we had that standard in what was drafted

before. It did require at least orally telling the trial judge how to fix your objection. It had to be sufficiently specific that it informed the judge what step he could do to fix it.

MR. BEARD: Luke, why don't we vote on the reasonable guidance standard and get that out of the way.

MR. SOULES: How many -- have we done enough debate on that?

MR. PERRY: I have some questions about that before we vote.

MR. SOULES: Okay. David Perry.

MR. PERRY: If the reasonable guidance standard is adopted in terms of what the lawyer has to tell the trial court, would that standard also be adopted over in Paragraph 3 to the effect that "A judgment shall not be reversed so long as the charge" seen on Paragraph 3 on the next page "provides the judgment shall not be reversed because of failure to submit shades and phases"?

Now, wouldn't it make sense if you adopt the reasonable guidance standard to

add into that sentence that "The judgment would not be reversed so long as the charge submitted provided reasonable guidance to the jury" so that you don't put a heavier burden on the trial court than you do on the lawyers?

MR. SOULES: That's a different question I think than we're talking, than somebody wants to vote on.

JUSTICE NATHAN HECHT: Judge McCown made that point earlier, that same point earlier.

MR. BEARD: Let's vote on reasonable guidance.

MR. SOULES: Let's vote on whether or not the words, the standard "reasonable guidance" in fashioning a correct question, definition or instruction should be used for future practice rather than "substantially correct form." Those in favor of the language in the proposed 274 hold your hands up, please. Those opposed? That carries heavily.

MR. SOULES: I want to get to your issue.

MR. PERRY: Is it agreed to add "reasonable guidance" to the last page of Paragraph 3 on the next page?

MR. SOULES: Not yet I don't think. It may be. And that does come up before Judge Peeple's point about "on the record" or "in open court." So if we want to go to that, that is fine.

MR. SUSMAN: Luke, isn't the next issue what the party without the burden must do to preserve the error in terms of providing an instruction, in terms of objecting and how specific the objection has got to be? I mean, isn't that kind of the -- I mean, the next issue is we now know what you have to do if you've got the burden, if you have had the burden to plead something.

MR. SOULES: If you'll permit me to do this, I'll get that case before our next meeting and we can look at that and see what the Supreme Court has said the language in the old rule meant. I just don't have it here.

MR. SUSMAN: My only

feeling --

MR. MCMAINS: He's still asking about the fundamental change that we were talking about.

MR. SUSMAN: My only feeling is that it's not sufficient for us in this day and age to say, "Well, the guy, you shouldn't have to do it because it's not -- you shouldn't have to make the other guy's case." That's inefficient. I mean that's just going back to the old gamesmanship that, you know, "You shouldn't have to do anything to help the other guy out or the Court out. It's his burden. If he can't do it right, tough, because I'm an adversary and that's what the adversary system is about."

Well, it's changed, and the public is going to make us change it.

MR. SOULES: And we've had the trial and spent the money for the trial.

MR. SUSMAN: And we have got to do something so we don't have to do it again. Now, whether it's in terms of requesting an instruction that gives reasonable guidance whether I've got the burden or not, or making

an objection that makes it pretty damn clear to the trial judge what is wrong and what he has to do to fix it, I think you have got to do something other than just remain, just say "I object" as to those things on which you do not have the burden.

MR. SOULES: Going back four or five years, and of course we've got a newly constituted committee, but the feeling of the committee has been that an objection should fix something that's not your burden to do something, to plea, is what we finally came down to. If it's not your burden to plea, the objection plea should be sufficient to preserve error, and that's really been worked through very thoroughly.

MR. SUSMAN: Okay. Well, not vote.

MR. SOULES: But I think we do need to look at what must the objection include, and at least the judge should as some of us sitting here think, should be told what are you to do to fix this, at least told orally. Richard thinks that that is doing -- maybe he thinks that that may be

doing the other side's work; and your view on that is let's have a trial and get it over with. And I think that is a policy decision that we need to make; and there is language in a case that requires more than what this rule does in terms of advising the trial court in your objection how to fix the problem.

Are you suggesting that the objection should include telling the trial judge what it is that you need to do to cure the objection that I'm making?

MR. SUSMAN: Yes. You said it perfectly a while ago, because you said orally, you have got to do it orally. You don't have to put it in writing, but orally you have got to tell him "Here's the right way to ask the question, judge."

MR. ORSINGER: What if you're wrong? What if you're wrong? What if you do it orally and you're wrong? Did you waive error?

MR. SOULES: May be. Sarah Duncan.

MS. DUNCAN: It seems to me that we are confusing the fix with the

problem. The problem has been in my view not that we didn't require a litigant to help the trial court put together a correct charge. The problem has been, one, does it have to be in writing, or does it have to be oral; and two, what happens if you miss a little bit? And the previous proposal of the Supreme Court Advisory Committee I think was premised upon a feeling that it is the trial judge's responsibility to fix a problem in the charge, but it is the lawyer's responsibility as an officer of the court to assist when called upon or when he's complaining about something, to assist the trial court in putting together a correct charge.

And if the rule is going to be you have to tender no matter how bad it is really, if we can just define the court that will say "reasonable guidance," we're going to have the same kind of games we've got now. And we're going to have the same kind of games with appellate lawyers, and we're going to have the same kind of games with appellate courts, which is why I would prefer a rule initially that says everybody files the charge

that they think the case should have, all issues, all questions, whatever. "We'll sit down and we'll work with that charge. We'll object with it; but if you're going to object to something in that charge, you tell me, lawyer, as a trial judge how to fix it," because I personally don't see the charge. It's the court's charge that we're working on, not a particular side's charge, and that the objection, Luke, in that case was you've got to object enough in whatever words are necessary that any reasonable person would say that trial court understood what the problem was. You've got to tell them what the problem is, and then you've got to tell them how to fix it.

HONORABLE DAVID PEEPLES: Is the language, you know, "knew what the objection was and consciously chose not to do it"?

MS. DUNCAN: Yes.

HONORABLE DAVID PEEPLES: Is that what you're looking for?

MR. SOULES: No.

MS. DUNCAN: That was part of

it.

MR. SOULES: That's a different case, but that's a piece of it.

HONORABLE DAVID PEEPLES: Yes.

MR. SOULES: If the Plaintiff is submitting the wrong measure of damages because he wants to or whatever reason and the objection made is the wrong measure of damages, and the Defendant knows what the measure of damages is, why shouldn't the Defendant have to say "This is the correct measure of damages"?

MR. YELENOSKY: But how do you sort that out from the Defendant who doesn't know but is then required to submit something at his own peril?

MR. SOULES: The consequence I guess of what we're saying here is the concern that Richard had.

MR. YELENOSKY: Right. Exactly.

MR. SOULES: If I'm the Defendant and I say, "And this is the correct measure of damage," and I'm wrong too, then I'll waive it. The Plaintiff doesn't have a

good verdict, and the case is over, but it all goes to what? Objection to his incorrect measure of damage, or do you waive it all together?

MS. DUNCAN: If you truly don't know, he could just say "I really don't know what it is, but judge, if you want me to, I'll try to figure it out." I mean, we are there to help the judge in this instance.

MR. YELENOSKY: What's the appropriate response? It's an inappropriate response to say, "I know, but I'm not telling you," of course. I guess it would be appropriate to say, "I don't know." But what do you do? Write a rule that says you can say "I just don't know, but you can't really know and not tell us." I mean, how do you write that rule?

MR. PERRY: Isn't the issue that the objection where it refers to stating the grounds of the objection, isn't the issue that that statement needs to go far enough to distinctly inform the trial court of the nature of the defect that is beling claimed to be in the charge, not that the person who is

making the objection really has to tell him in detail how to fix it, but he has to go far enough that it's clear what it is the objector is claiming is wrong? Isn't that where we ought to be?

MS. DUNCAN: And if that happens, if we have no measure of damages with the damage questions and I'm the Defendant and I say, "Judge, they have to have a measure of damages; there has to be some guidance given to the jury," then isn't the judge's response "Mr. Plaintiff, Ms. Plaintiff, go get me a measure of damages"?

MR. PERRY: Sure.

MS. DUNCAN: And you're going to live with it whatever you bring back.

MR. PERRY: If the Plaintiff tries to submit the damage question with no instructions on the elements of damages, it ought to be plenty good to say, "There has to be an instruction on the elements of damage, and there's not."

MS. DUNCAN: And it's their burden.

MR. SOULES: Right. But he

said "There is a measure of damages. Now go to the next step."

MR. PERRY: But if there is a measure of damages there and the objector sees that he thinks it's wrong in some respect, it shouldn't be enough to say, "The instructions submitted do not correctly state the measure of damages." "Well, in what way do they not?" "Well, I think I made my objection. Thank you." That shouldn't get you there.

MR. HATCHELL: I think David has put his finger on sort of a two-tier level of objections. In the instance where there is a complete omission from the charge, for example, the measure of damages, the purpose of the objection ought to be to identify the error. The error is the failure to give any measure of damages whatsoever. Why should I have to in order to preserve that objection tell the judge what the measure of damages is? It's his charge anyway, and it's my oppenent's. But if he overrules my objection, that's fine. We just go on up and decide if you can submit a charge without a measure of damages. If he decides, yes, your objection

is good and if he gives one, then Luke, I think it's at that point that the specific type of objection is the only objection you could probably make. Although I would argue that that is probably already -- I think the language that we used is probably sufficient to take care of that, but I don't think we ought not confuse the type of objection necessary to preserve the error complained of.

MR. PERRY: Shouldn't it be a requirement that the objection must point out distinctly the error which is being objected to?

MR. SOULES: That's what they took out.

MR. ORSINGER: No. It's still in the rule.

CHIEF JUSTICE AUSTIN MCCLOUD: It's in number (2) right down there.

MR. ORSINGER: What is not in here is an oral tender, and that's what we're really debating.

MR. SOULES: My mistake. It's here.

MR. YELENOSKY: Just no oral

tender.

CHIEF JUSTICE AUSTIN MCCLOUD: It seems to me like we've got several years of interpreting the old rule 274 and its predecessors using language stating distinctly the matter objected to and the grounds of the objection. That's probably as specific as we need to be. I mean, we've been that specific for all of these years; and the courts have looked at it and they've looked at your objection, the one you just used in your hypothetical and said, "Well, I don't think that was distinquished specific enough," or they say, " Well, I think you did a good job. You informed the court of what the problem was, and you complied with the old Rule 274." It looks to me like that's clear and distinct. It says distinct and the grounds of the objection. If you go any further, I think we get in trouble.

MS. DUNCAN: Can I make a picky point --

MR. SOULES: Sarah Duncan.

MS. DUNCAN: -- about what Buddy was saying earlier? The way I read (2)

or that can read (2) is that no party may bring forward the error unless all the parties object, "that party." "No party may assign as error unless that party." What party? The party bringing it forth? To me it just makes more sense to say "A party can't do this unless that party has also done this." And it's just a picky little error.

MR. ORSINGER: I'm going to withdraw my objection to that change, because if that's a reasonable interpretation, it's certainly not what we want.

MR. SOULES: It should be "A party may not."

MS. SWEENEY: How do you-all want that? "A party"?

MR. SOULES: "A party may not." Hadley Edgar.

PROFESSOR EDGAR: Does this cover it here in 274(2) where we start with a deletion, and it says "stating distinctly" and then include here "the nature of the objection, the matter objected to and the grounds thereof."

MR. SOULES: It may.

MR. EDGAR: Just include in the third, "the nature of the objection, the matter" -- or you could say "the matter objected to, the nature of the objection and the grounds thereof" or something like that. But I think we need to include the "nature of the objection."

HONORABLE DAVID PEEPLES: "Error objected to."

PROFESSOR EDGAR: Well, I'm just -- what's what is here in the rule now.

MR. ORSINGER: Could I ask what do you mean by "the nature of" that adds to what is here already?

PROFESSOR EDGAR: There is no measure of damages. That is the nature of the objection.

MR. ORSINGER: Why isn't that the objection itself?

MS. SWEENEY: Or the grounds of the objection.

PROFESSOR EDGAR: Let's look at it this way. The matter objected to is the charge on the damage -- the damage question, that's the matter. And then the nature of the

objection is that there are no -- there is no measure of damages.

MR. ORSINGER: What's the guidance?

PROFESSOR EDGAR: And then the grounds objected to would cover the situation at least in my mind where you've left out two elements out of four or out of six. I can draw a distinction in my mind between the nature of the objection and the grounds of the objection, and I'm just trying to figure out a way to cover that second tier that Mike was talking about a moment ago.

MR. SOULES: That may get it, Hadley. I'm sorry.

PROFESSOR EDGAR: It's getting late.

MR. SOULES: Okay. Anything else on this?

MR. ORSINGER: What is "this"?

MR. SOULES: Are people satisfied with the language, "this" being the language describing the requirements for an objection to be good? Hadley, you're

suggesting adding what now? Stating distinctly?

MR. EDGAR: I was just trying to insert the term "nature of the objection" wherever it might be deemed appropriate and trying to distinguish between that and the grounds of an objection. And it's something we might just think about overnight.

MR. SOULES: All right.

HONORABLE C. A. GUITTARD: Have we passed over 272, or are we going back to that?

PROFESSOR EDGAR: We haven't covered it yet.

MR. SOULES: We can certainly look at that. I think we might be able to fix this in the next couple of minutes, this number (4) on 274 maybe we can go back and pick up there in the morning. Judge Peeples had a question about "in open court" or "on the record."

PROFESSOR DORSANEO: "On the record."

MS. SWEENEY: "On the record."

MR. ORSINGER: "On the

record."

MR. SOULES: "On the record," okay.

MR. SPARKS: Shouldn't it say "the judge" instead of "the court"? Another one of those matters.

MS. SWEENEY: Yes.

MR. SOULES: One of the problems with using "judge" is you don't know whether it's a he, she or it, and the court is an it, and that's how you get into these drafting problems.

MR. SPARKS: Isn't the judge a he or she?

MS. SWEENEY: Not always.

MR. SOULES: Then which do you use for the pronoun? It's really a pronoun selection.

HONORABLE C. A. GUITTARD: Just use the noun, repeat the noun.

MR. ORSINGER: Right. Go ahead and use the pronoun.

MR. SOULES: We'll have to do that where we fixed this before. Judge Guittard, what did you want to look at on

Rule 272?

HONORABLE C. A. GUITTARD: Well, I was concerned about (d) and (e) and the possible conflict between the two as interpreted by the Supreme Court and whether we could resolve that some way.

PROFESSOR ALBRIGHT: I have the same problem. I would say let's get rid of (e) inferential rebuttals. I think it's time to bury and without mourning inferential rebuttals. Inferential rebuttals can be objected to because they misplace the burden of proof or because there are various objections you can make to inferential rebuttals, and all we do by leaving them in the rule is making them seem more important than they really are.

PROFESSOR DORSANEO: They're certainly not broad form submissions.

PROFESSOR ALBRIGHT: Right.

MR. SOULES: The discussion of the committee that I have heard about this is that the worry about taking this out may resurrect submitting inferential rebuttal questions.

PROFESSOR ALBRIGHT: How can it? Then it would be phrase or shade of the same question, or it would not be broad form.

MR. SOULES: Not under the old practice.

PROFESSOR ALBRIGHT: Well, right. Under the old practice it was always a very narrow question that was an inferential rebuttal question, and it cannot be a broad form question.

MR. SOULES: That's the words I heard discussed.

HONORABLE C. A. GUITTARD: Are you ready to hear the discussion about (d) and (e)?

MR. SOULES: Yes.

HONORABLE C. A. GUITTARD: It seems to me that (e) as interpreted by the Supreme Court is in conflict with (d), because as I recall the Supreme Court decision if the alternative submitted, if the disjunctive language submitted inferentially rebuts the primary language submitted, then that's an objectionable and inferential rebuttal submission.

Now, my concern with that is this: First of all, I think it's a very convenient and clear way to submit questions where the Plaintiff relies on one fact, the Defendant relies on a rebutting fact that rebuts the Plaintiff's fact. You ask them whether it's this or that and then give a proper instruction on the burden of proof. That's a very clear way to do it.

The reason that inferential rebuttal issues were outlawed is, number one, they were confusing. Number two, they led to negative conflicts. Neither of those objections applies when you submit them disjunctively. For instance, suppose the Plaintiff it's a contract case. It has to do with what was the oral contract. The Plaintiff says it's one thing. The Defendant says it's a different thing. Why can't you submit an issue saying "Did the parties agree to X," or "Did they agree to Y?" Even though Y rebuts X inferentially, that ought to be a permissible way to do it. It ought not to be subject to an objection that it's an inferential rebuttal submission.

So I would propose that either in (d) or (e) this language should be added: "Disjunctive submissions shall not be considered inferential rebuttal."

PROFESSOR DORSANEO: I don't know if I end up agreeing with the remedy exactly, but I agree with Professor Albright that there is no need given the fact that we have a requirement of broad form, the submission of broad form questions whenever feasible to have a sentence, a subparagraph in the rule that inferential rebuttal questions shall not be submitted.

I agree with Judge Guittard that if that sentence is interpreted the way it probably has been in Limos vs Montez as not authorizing the disjunctive submission of inferential rebuttal theories, that that's not a good idea, because there is nothing unclear about disjunctive submission of inferential rebuttal matters. Limos vs Montez the Muckleroy Stovall submission in negligence cases is very good from the standpoint of I've always thought from the question; but from the standpoint of Limos vs. Montez saying that

both and neither as alternatives is a bad way to do it. Frankly I think the suggested answer blanks in Limos vs. Montez now are more confusing to the person from having to select among alternatives.

In terms of the disjunctive submission paragraph itself it's up above (d). It's a related point, but it's perhaps not as closely related. When the original rules committee grappled with this question of separate and distinct submission in its draft that was promulgated as a rule that never went into effect because it was changed before it went into effect by the Supreme Court there wasn't authorization to proceed as a general proposition by disjunctive questions. You could ask in a question a broad form question if you like according to the specific language of the rule as adopted and then repealed before it went into effect whether there was negligence in speed, brakes or lookout, a disjunctive submission in broad form of those three theories.

That was changed, and the disjunctive authorization which is really an

exception to separate and distinct submission that we have retained now was added. In other words, the disjunctive authorization in the current rule came into existence as an exception to a required separate and distinct submission. That's what it was in there for. If became a very limited exception, because it's an either/or kind of a deal. And now we have it, and you could either read it as being possibly a limitation on broad form submission requiring either/or. You say, "No. We wouldn't read it that way." Or as just kind of an extra, unnecessary statement. I read it as an extra, unnecessary statement, because that is not the only kind of disjunctive submission that is appropriate of broad form submission.

So in my view the proper fix would be to just delete (d) and (e) and that that would take care of it maybe not as clearly with respect to my own criticism of Judge Pope's opinion in Limos vs. Montez, but as far as textual rule language it would.

MR. SHARPE: In response to what Judge Guittard said and in meeting what

Bill Dorsaneo just said, I think the easier way to cure the problem without creating confusion would be to add one sentence to (e). And that sentence would be that "A disjunctive submission shall not be considered an inferential rebuttal question." If you add the one sentence there, you've cured the situation in my opinion and you don't create any confusion or clarity problem.

HONORABLE C. A. GUITTARD: That's my proposal.

MR. SPARKE: He was going to put it up above, and I just say put it in (d) instead of -- put it in (e) instead of (d) where he was wanting to put it.

HONORABLE C. A. GUITTARD: Well, I have got it penciled in here to put it in (e). I don't care where it goes. I think (d) is all right.

MR. SPARKE: That's what I suggest.

PROFESSOR ALBRIGHT: But why do we need inferential rebuttals mentioned at all? I think all they do is create problems of who has to plead and, you know, do you

really have to plead an inferential rebuttal. In business cases nobody knows what an inferential rebuttal is. The example that Judge Guittard used is a perfect example where people don't recognize inferential rebuttals where in negligence cases you can look in the pattern jury charges and you have this list, and you create traps because something may be called an inferential rebuttal because it's a theory raised by the defense, and then it can't be put in a question.

And I just think it's just a strange creature that the Texas Rules created many years ago. And why do we have to keep it in the rules just because we always have it? I think it's just time to get rid of it.

HONORABLE C. A. GUITTARD: We haven't always had it.

MR. HATCHELL: I think we talked during the break, and I think Ann would want me to tell all of you-all that the task force considered that this area and any aspect of broad form submission to be off limits and out of its parameters, so nothing that anybody is talking about is treading on anything that

we have done; and I just wanted you to know this is not an essential aspect of our report.

HONORABLE C. A. GUITTARD: This is an additional change in existing law.

MR. HATCHELL: I also know that Hadley has some concerns about the same thing and he has some positive fixes too.

PROFESSOR EDGAR: Well, my concern was not whether or not we should submit inferential rebuttals in any form or not. That's another question. My concern was paragraph (e) reads in the negative. That's the only rule I know that says that you don't do something. It seems to me like the rules ought to say what you can do rather than what you can't do. And I was just going to suggest that if we retain even inferential rebuttal, that what we say is that inferential rebuttal matters shall be submitted only as instructions or definitions.

That's what we mean, and that's what the rule means, and it doesn't say that though. It's been confusing. It's confusing to lawyers, law students and everybody else; and if we're going to retain

inferential rebuttal, then I would suggest that we say what we mean here rather than what we don't mean. That doesn't speak to the issue of whether we have inferential rebuttals or not. I'm just saying that if we do have it, it ought to read "Inferential rebuttal matters shall be submitted only as instructions or definitions."

MR. SOULES: Apparently we've got two ways to fix this problem. One is to add a sentence (e) that was suggested by Judge Guittard, and the other would be to delete (e) and possibley also (d). How do you want to approach this?

HONORABLE C. A. GUITTARD: I would suggest that inferential rebuttal questions are determined to be inappropriate. Now, it's a fatal objection that it be inferential rebuttal. It seems to me that we should clearly say that that objection does not apply to otherwise proper disjunctive submissions.

Now, if we simply take (e) out, well, I think that would be a step forward, and I would agree with Professor

Albright, but then we've got all these -- we've got Limos vs. Montez and other decisions which say that inferential rebuttal questions are improper and even disjunctive submissions are improper if it would be considered inferential rebuttal.

Now, on the point of the alternative theories of recovery, that would be ruled out I suppose by the language of present (d) which says " when the evidence shows as a matter of law that one or the other of the conditions or facts about necessarily exist." And I suppose that is why that was put in there.

Now, there are other types of disjunctive submission that may be proper including the Muckleroy submission. If (d) would as written here would outlaw that sort of thing, if we want to keep it, we ought to make that clear. We ought to amend (d) to make sure that it's not so construed.

MR. SOULES: Let's think about it overnight. Thank you for all of your good work today. I appreciate it.

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, ANNA L. RENKEN, court reporter in and for the County of Travis, State of Texas, do hereby certify that the above and foregoing statements were made before me by the said parties, and same were reduced to computer transcription under my direction; that the above and foregoing statements as set forth in computer transcription are a full, true, and correct transcript of the proceedings had at the time of taking said hearing.

GIVEN UNDER MY HAND and

expiration of office: _____ day of _____

GIVEN UNDER MY HAND and seal of office on this 9th day of DECEMBER, 1993.

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Certification No. 2343
Certificate Expires 12/31/94

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CERTIFICATE OF CHARGES:

Charges for Preparation of

Transcript (Orig) $2055.34

Mileage..... -0-

TOTAL FEES

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Anna L. Renken

#001,493AR