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SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 20, 1993

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Taken before Anna L. Renken, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 20th day of November, A.D. 1993, between the hours of 8:30 o'clock a.m. and 12:50 o'clock p.m., at the Texas Law Center, 1414 Colorado, Austin, Texas.

SUPREME COURT ADVISORY COMMITTEE

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NOVEMBER 19 - 20, 1993

NOVEMBER 20, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Pat Beard
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
John E. Collins
Prof. William V. Dorsaneo III
Sarah B. Duncan
J. Hadley Edgar
Kenneth D. Fuller
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Tommy Jacks
Joseph Latting
Thomas Leatherbury
Gilbert I. Low
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Charles Morris
John M. O'Quinn
Richard R. Orsinger
Honorable David Peeples
Anthony J. Sadberry
Luther H. Soules III
Sam D. Sparks
Stephen D. Susman
Paula Sweeney
Harry L. Tindall
Stephen Yelenosky

MEMBERS ABSENT:

Gilbert T. Adams
Frank Branson
Judge Solomon Casseb
Judge Ann T. Cochran
Tom Davis
Vester Hughs
Donald Hunt
David Keltner
John Marks
Steve McConnico
David L. Perry
Dan R. Price
Tom Ragland
Harry Reasoner
Judge Raul Rivera
Broadus Spivey

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Doak Bishop
J. Shelby Sharpe
David B. Jackson
Hon. Doris Lange
Chief Justice Austin McCloud
Thomas C. Riney
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Paul Gold
Judge Bob Thomas
Hon Sam Houston Clinton

OTHERS PRESENT:

Justice John Cornyn
Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt, Soules & Wallace

P R O C E E D I N G S

Saturday, November 20, 1993

8:30 a.m.

MR. SOULES: I think we left off with Gus Hodges' favorite topic, inferential rebuttal. And I'm sure most of you went home and got out the little red book to remind ourselves of what exactly that inferential rebuttal was all about so that we could give this some stimulating discussion this morning.

MR. MCMAINS: I didn't get a wink of sleep last night.

MR. SOULES: That's right. And it put me back to the same nightmare as I had with it the first time 25 years ago.

So we're looking at the task force report of the jury charge task force, and we were back on 274. No. 272(2)(d) and (e). We had several suggestions on how to deal with this. Judge Guittard's suggestion was that we add a sentence to (e) that says

"disjunctive submission shall not be considered an inferential rebuttal question" or words to that effect. It may not be exactly right.

We had another suggestion to just simply delete (e) all together, and then another suggestion to delete both (d) and (e) all together. Those are the ones that I can remember. Who wants to pick up the discussion on this this morning. Nobody?

PROFESSOR DORSANEO: To state it simply, on the inferential rebuttal concept the separate submission of an inferential rebuttal matter in question form is absolutely clearly incompatible with the general requirement of broad form submission whenever feasible. Thus in my view it is completely unnecessary to have Paragraph (e) which says what you can't do again.

Now, with respect to the submission of an inferential rebuttal matter in the form of an instruction that's justifiable under the current Rule 277 only on the basis that such an instruction is proper to enable the jury to render a verdict. As

long as we continue to think that the cases like the one that recently validated the Oscillator Case will continue to be the case law. But that's the theory of submission of inferential rebuttal matters in the form of an instruction.

I don't think it's necessary to resurrect the concept and to make it plain that a question can cover the inferential rebuttal aspect of the thing that is being inquired about. I don't know if I'm saying that in a clear way. I don't think it's necessary to know about inferential rebuttal in order to deal with it adequately.

HONORABLE ANN TYRELL COCKRAN: From the discussions that I recall in our task force meetings I think everybody on the task force agreed that this really was not necessary, given, but we were again afraid of what the construction might be of our, you know, deleting something, you know, that is currently in the rules. It was really a paranoia of whether our action if we had deleted it would be taken as trying to, you know, make some dramatic change in the law, or

whether it would just be reviewed as under current practice unnecessary. We believed the latter to be true, but we were afraid somebody else with greater power of the pen would think the former were true, and that's one of the reasons that we left in that way.

HONORABLE C. A. GUITTARD: Well, I suggest that in certain kinds of cases, one of which I outlined yesterday by the contract which had an oral contract in which there were two possibilities, that the clearest way and the simplest way to submit it is to a disjunctive submission; and that doesn't have the vices of inferential rebuttal, and that the subdivision (d) should remain as it is for that reason, to permit that kind of submission.

My concern is that subdivision (e) as drawn here is inconsistent with that to the extent that disjunctive submission might be considered inferential rebuttal. So I would suggest that we either delete (e) or add to (e) the language suggested that "disjunctive submission shall not be considered inferential rebuttal."

CHIEF JUSTICE AUSTIN MCCLOUD: We've had back in several years ago of course we used to submit inferential rebuttal issues all the time. And then some years ago we started saying you don't submit an inferential rebuttal issue, but you carry it and cover it in an instruction. It doesn't take up a lot of space. It just says "An inferential rebuttal, inferential rebuttal question shall not be submitted." It's clear. A trial judge knows for certain you don't have to worry about it.

If you take that out, then you're going to -- I think you're going to have trial judges that will say, well, maybe they're entitled to a question, and he may not or she may not even be too familiar with what an inferential rebuttal question is, but start submitting that type of question. If it clearly says don't submit, you don't submit it.

We've had something like this for a number of years and it's worked pretty good, and as a trial judge you can look down there and as an appellate judge and say,

"Don't submit that."

HONORABLE F. SCOTT MCCOWN: I think (e) raises an important problem that we need to establish a principle about, and that is it doesn't take up much space, it is clear, but it has no importance except historical, and our rules are littered with provisions exactly like this that have no importance except historical.

If what we want to do is simplify and shorten the rules, we've got to gut up, take out the provisions that are of historical importance only and explain it in short comments, a short comment that says "We've taken this out not because we intend to authorize it. It's not authorized, but it's prohibited and impossible under the broad form submission, the point that Bill made. And I think we really need to adopt as a principle wherever we can in the rules taking out historical provisions.

PROFESSOR ALBRIGHT: This raises another problem that we've talked about before, is that of having explanatory notes and comments at the end of the rules. And

Judge Hecht isn't here.

MS. SWEENEY: Yes, he is.

MR. BABCOCK: Yes, he is.

PROFESSOR ALBRIGHT: Here he is, but he didn't hear me. But Judge Hecht, I know in the task force on the revision of the rules we've talked about that it might be a good idea to have comments to the rules. There are substantial comments on the sanctions rules. There are no comments to these rules, but I think this could be an instance where you could take out the inferential rebuttal rule because it's a monster that I think everybody's eyes glaze over whenever inferential rebuttals are mentioned. It is only a matter of history, and it creates problems because there are a whole lot of people who don't even understand what inferential rebuttals are. But we could take the rule out, but put a comment that we do not intend to allow inferential rebuttal questions by taking the rule out, but that they're objectionable because they cannot be attained in a broad form question.

What do you think the Court's

attitude toward comments would be?

JUSTICE NATHAN HECHT: I think it would be favorable. There has been some resistance in the past to putting too much substance in the comments, and therefore you see in the comments that have been used almost just a bare bones historical tracing of the changes; but I think particulary if we do make any of the kinds of changes that Professor Dorsaneo's group is recommending, we are almost going to have to have more extensive commentary just to show these same sorts of things.

In this particular case I think it would be a very helpful solution to the problem. I think the comments attached to the sanctions report were helpful too. I think the Court would look favorably on it.

MR. ORSINGER: I know that inferential rebuttal matters are a sacred cow in our jurisprudence, but I would like to go ahead and propose that we ban inferential rebuttal instructions. It seems to me that inferential rebuttal instructions are subsumed in the Plaintiff's or Counter-Plaintiff's

principal responsibility to secure a necessary finding or appropriate instructions, and that it's just a vestige of an earlier time, and I know that people are walking right up to it here and not going all the way, but really I mean what is the point in perpetuating that practice in instructions when we can't justify it in questions.

MR. LATTING: For example, Richard, give us an example.

MR. ORSGINGER: I don't want to give you an example, because I really don't litigate inferential rebuttals, but I can just tell you that in my conception of cases that have traditionally involved inferential rebuttal questions they seem to me to relate to evidenciary matters that would be inconsistent with the primary thrust of the charge, and to move them out of questions and into instructions allows the questions to be simple, but it still involves commenting on evidenciary aspects of the case that are inconsistent with the principal thrust of liability which is liability, causation and damages at the most basic level. And I've

never understood why that was good other than just as a political matter in favor of the party who was defending the claim; and I really wonder in light of our orientation now toward succinct instructions and simple questions where the jury can understand the charge why we ought to perpetuate the inferential rebuttal concept at all.

PROFESSOR CARLSON: I was going to say that may be the effect, Richard, of this requirement that the party with the burden to plead has to do so in order to get the matter to the jury. As I read the case law it's not at all clear to me whether inferential rebuttals need to be pled, but I assume folks will now try pleading them if they're deleted from the instructions and definitions, if that can be a continued practice in these changes, they will start pleading them.

HONORABLE ANN TYRELL COCKRAN: I would like to wholeheartedly second what Richard just said. In the traditional car wreck case, the sole proximate cause case, if you read the instruction, and particularly if

you see the way the charge is put together now with, you know, "Did the negligence, if any, of the persons named below proximately cause the occurrence in question," read the definition of negligence, read the definition of proximate cause, and if you read the definition of sole proximate cause, sole proximate cause adds no substantive, adds nothing substantive to the charge. It is a restatement of the definition of proximate cause, but lot of times it is a restatement that is phrased in such a way that it really is the trial judge singling out a particular piece of evidence, which you know, makes me just as nervous as a cat to do. And yet, you know, it's always been so well accepted, but what it does is comment on the evidence in favor of a particular side without adding one substantive difference as far as what proximate cause means.

PROFESSOR ALBRIGHT: As far as inferential rebuttal instructions I think there may be some situations where they're helpful and others that are not. Again, I would hate for us to put in the rule that you

can't have an inferential rebuttal instruction or question because that just makes the inferential rebuttal continue to live. If we feel strongly that we don't want inferential rebuttal instructions or questions, that could again be put in the comment. But I think the best thing to do is to let inferential rebuttals die as an entity and let the trial judge decide what instructions in this particular case are helpful to the jury.

HONORABLE DAVID PEEPLES: Thinking of a case like Yarborough vs Burner, how would you submit sudden emergency and unavoidable accident? Would you just not tell the jury about those at all?

HONORABLE ANN TYRELL COCKRAN: I think if you read the definition of negligence and then really analyze the instruction on sudden emergency, it doesn't add anything either. It just says that if you acted as a reasonable person would have done under the circumstances, you weren't negligent. That is what negligence is. It doesn't add anything. All it does is comment on some evidence.

MS. SEENEY: That's right.

HONORABLE DAVID PEEPLES: If we have any faith in the jury, why can't we trust the jury to answer the bottomline questions after being told several things and let the lawyers argue it?

HONORABLE ANN TYRELL COCKRAN: Well, it's the problem of telling them the same thing but shading it in favor of one party. You know, if you-all want to say that we get to start, you know, commenting on the case to our juries, if you want to start giving trial judges that power.

HONORABLE DAVID PEEPLES: It's not a matter of starting. It's a matter of stopping doing something. There are very few instances in which an inferential rebuttal instruction would be proper; and that's the sole cause, sudden emergency and unavoidable accident are the three I can think of.

I think Judge Guittard raised a real good disjunctive submission situation that we ought to authorize.

HONORABLE ANN TYRELL COCKRAN: Yes. But speaking not for the task force but

for myself, I would be all in favor of just deleting (e) out of this rule all together just like Alex said, let it wither on the vine without our comment one way or the other and let it take its natural life course.

MR. MCMAINS: The only problem I have with just the naked deletion of (e) is that you then have totally eliminated any prohibition of submitting what used to be an inferential rebuttal question, and now what you're saying is "Well, we can add 85 more words in a comment to make sure everybody understands we weren't really changing anything." That seems to me to be a terribly inefficient way of keeping something that ain't broke in the rule, which is I think what Judge McCloud was talking about.

If you take is out nakedly, unless you substitute a prohibition of inferential rebuttal matters being in the charge at all, to say simply in an academic sense "Well, it's incompatible with broad form and therefore there is no reason for us to talk about it," assumes that judges are going to follow the first part of the rule that says

you shall submit it in broad form or that they'll get reversed if they don't, neither one of which is true under the current jurisprudence.

There is nothing in these rules and never has been that reverses a case if it isn't submitted in broad form, and the Supreme Court has refused to reverse cases when they were not submitted in broad form in a situation where it was quite feasible and could have been done so and where the proper issues were tendered. And they said that's not reversible error. There is discretion in the trial judge.

So if you take this out and have no other mention about it, then you are going to give effectively discretion to the trial judges to start submitting questions on inferential rebuttal, and whether that's what you intend to do or not. And I oppose that vehemently.

HONORABLE F. SCOTT MCCOWN: I really think we have to let go of the past, and were are not going to go back and have inferential rebuttal questions whether we

delete (e) or not. If we delete (e), we're not going to have inferential rebuttal questions start popping up in charges.

And I really want to take Rusty head-on, because I think this is an important principle, not just here, but throughout the rules. We have got to have rules that are simple and clear, and it's not true that putting it in the comment clutters up the rules to the same extent as putting it in the rules. The comments have a different weight and a different purpose than rules, and we really need to have our rules simple and clear and let our comments carry the historical perspective.

One other minor point: I would hate to see a rule that said there cannot be inferential rebuttal instructions, because with broad form submission explaining what the law is it seems to me if you had a rule that said that you couldn't have inferential rebuttal instructions, it would simply give a ground of appellate point that somehow the judge's explanation of the law crossed the line into an inferential rebuttal

instruction. And I can't think of a good example. This is not a good example, but maybe it will illustrate what I mean.

I had a case where if the agreement was executed, it was valid. If it wasn't executed, it wasn't valid; and that's what the statute said. The case law said that executed did not require signatures as long as the parties intended the written document to be their agreement. So if you have an instruction that says "If this document was executed, then it's enforceable, by executed that does not require signatures if the parties intended the document to be their written agreement," you've accurately captured the law. They have to know both of those to apply the law; but the minute you put on the proviso does that become an inferential rebuttal?

I know it doesn't in that example, and that's why I started by saying that is not a good example, but I think you can see what I mean.

PROFESSOR DORSANEO: The difficulty with inferential rebuttal as a

concept is a very, very complex concept developed in a different environment. We still use it and act like its contours are still the same, and that just really doesn't help us these days. We'd be better off to just not worry about it and proceed to submit questions broadly and clearly and to have instructions that are proper to enable the jury to understand and answer the questions. And that's all we need.

HONORABLE F. SCOTT MCCOWN: Right.

MR. YELENOSKY: I just have a comment about comments. I think Judge McCown raised an important point, and I think the rule should be simple. I think there is a difference between a comment that explains a deletion and only needs to be made once and then it becomes part of the institutional knowledge, and that comment would say "We don't need this because it's essentially prohibited by broad form submissions." Once everybody knows that, I don't think it's going to creep up again. That's different from an interpretive comment, for instance, in the

Disciplinary Rules that gives examples of what is permissible and what is not, and you continually refer back to that.

Is there some way that we can make an explanation or a report that is not a cumbersome comment that follows this everywhere that only needs to be said once to explain why there is a deletion?

MR. JACKS: The problem I have with that is it will only be read once, and that's by us. And having agreed with Judge McCown from the outset yesterday, I'll start out today by disagreeing with him. I do think there is a danger that as you bring up younger judges who weren't schooled in inferential rebuttal issues and they have nothing in the rules and nothing in a comment either, that it won't be long before they'll be out there wandering in the wilderness.

MR. YELENOSKY: I'm sure Bill Dorsaneo will write about it though.

MR. JACKS: Well, that's fine. But they can't all afford his book. But, Rusty, let me ask you a question, and that is would you be bothered by the Cockran/Orsinger

approach, and that is in the rule say not only no issues, but no instructions either, and let's get this vestige of the days of Gus Hodges out of our jurisprudence?

MR. SOULES: Rusty, you may respond to that now.

MR. MCMAINS: The answer to that is I don't have any problem with doing away with inferential rebuttal matters. That was actually initially I think what was proposed at one time point during the committee work when we wound up with questions; and the issue was -- and I don't know whether it was just kind of evenly divided or there wasn't enough sentiment to do it the last time, but all we would have to do is change the word "questions" to "matters," and say "inferential rebuttal matters shall not be submitted."

HONORABLE C. A. GUITTARD: Mr. Chairman, it seems to me that if we put in a positive prohibition against inferential rebuttal instructions, we are just creating another technical ground for objections that is to be litigated and give more work to

appellate judges who some of them think they have enough to do already. The resourceful lawyers have used such a provision in the rules to raise points for appeal that really have no merit and probably in most cases will not succeed, but will just foul up the appellate process. It seems to me that along with what Professor Dorsaneo said all we need is just some simple rules that the case be submitted in clear and simple form, and that's all we need. If we go to put additional prohibitions on this kind of instruction or that kind of instruction, then we'll just be raising additional matters for controversy that can do nobody any good.

MR. LOW: I tend to think with Rusty. I mean I don't really fix something unless it's broke, and we can operate with the way this thing is written right here. Now, I'm not as smart as some of the people around this table knowing about -- maybe they know the clear distinction between disjunctive submission and inferential rebuttal, and there are lot of lawyers like me that are maybe not that smart. We state what it is we want and

what we don't want. And the judges understand what we want and what we don't want, and we live with that and can live with it; and I don't think it's broke.

PROFESSOR EDGAR: If the committee decides to recommend to the Court that inferential rebuttal be eliminated, then I have to agree with Rusty that putting it in a comment is not the way to go about doing it. I think that rather than simply omitting any reference to it in the rule would be likewise confusing for the Bench and the Bar, and I would recommend that we take a look at Rule 90. The first sentence says, "General demurrers shall not be used." And if a similar sentence appeared in the rule that "inferential rebuttal shall not be used," then I think that would be a very clear message to the Bench and the Bar that you don't submit inferential rebuttal; and I don't think that that would cause a lot of appellate concern, and I don't think that would be the grounds for many appeals if inferential rebuttals were not submitted.

MR. SOULES: Let me ask a

question about what is an inferential rebuttal. Suppose David Beck has got a case and he's on one side or the other. It's a business case. He may be the Plaintiff. He may be the Defendant. And there is some complication or complexity in instructing the jury, and you can state a proposition affirmatively, but it doesn't really seem to get the job done unless you restate it negatively. It's not all redundancy. It works to clarify.

MR. O'QUINN: I think it's an example of breach of fiduciary duty.

MR. SOULES: It works to clarify.

MR. O'QUINN: The burden is on the Defendant, and the breach of fiduciary duty is a burden on itself.

MR. SOULES: It states a positive proposition and is supposed to direct the jury, but it seems to nudge the jury the Plaintiff's way; but if you restate it conversely, it balances and neutralizes, but I say "Wait a minute," or David says, "Wait a minute. If you state it conversely, that's an

inferential rebuttal instruction becuse there it is positively and there it is negatively. That is inferentially rebutting the positive, so you cannot do that," period. I think that's what we're going to generate if we say "no inferential rebuttal," but I may be dead wrong on that.

PROFESSOR DORSANEO: You're 100 percent right.

CHIEF JUSTICE AUSTIN MCCLOUD: You're dead right.

HONORABLE ANN TYRELL COCKRAN: Don't we just get into -- I mean, there are going to be appeals to trials no matter what the rule says. There is always going to be somebody coming up with some ground for argument; and you just get paralyzed if you, you know, keep worrying about, "Oh, they'll appeal this and they'll appeal that." They'll appeal everything.

MR. SOULES: John O'Quinn had a comment.

MR. O'QUINN: I've been trying cases long enough to remember the way they were tried like David Beck remembers

inferential rebuttal. And Judge McCown, that may be part of what motivates what I'm about to say, but I believe very strongly this needs to be in the rule. (e) needs to be in the rule. Inferential rebuttal issues are a horror story. Inferential rebuttal instructions probably we should not absolutely prohibit them right now without a lot of careful thinking, because there can be occasions in which they can be important. And I strongly urge us not to change this. I think it's also important. Simplicity is important. That's pretty simple.

And secondly what is important is not to constantly be changing these rules just for some elegance. People read too much into the situation when you change rules. We have been in a turmoil of rule changes. We have most of our CLE is to keep up with all the changes in the rules. And for people in this room it's not too hard to do that, because we help write them. But for the average lawyer out there it is a nightmare. We go one way on discovery. We go another way. We go one way on sanctions. We go

another way. I think we need to also have some balance here about concern for just changing rules simply to make them look more elegant.

You take that out, and you're sending a message. You can write all the comments you want, or Dorsaneo can publish all the books he wants. You take out (e), some judge, somewhere, sometime is going to say "The reason that got taken out in Austin is because it's now again proper for me to use them, and I want to in my discretion." And we're going to have to re-sort this out on appeals and mislead a lot of litigants and mislead a lot of judges, and that's the main thing we shouldn't be doing.

MR. SOULES: If we were not going to change the law, why change the rule? That's any question.

HONORABLE F. SCOTT MCCOWN: Two things. First the little thing. One person's inferential rebuttal instruction is another person's clear statement of the law; and rather than say you don't have inferential rebuttal instructions, what you need to say

because that doesn't help advance the legal analysis, you need to say you have proper and appropriate instructions. And then the trial court and the appellate court on review say is that a fair statement of the law in an evenhanded way that doesn't push the case one way or the other rather than getting into a technical analysis of an inferential rebuttal question which is built upon a practice and a theory that we no longer employ. But then that's the small point that I really think probably the majority are in agreement with.

But the big point is that I agree that we need stability in our rules and that we've had too many changes; but if I understood our mandate from the Supreme Court, it's to try to revise these rules for the 21st Century and build a new foundation. And I think the example of Rule 90 fits perfectly with what I'm saying. We need to take out a rule that general demurrers shall not be used. When 90 percent of the lawyers cannot tell you what a general demurrer is, there is no reason to have it in your rule. And when 90 percent of the lawyers, and I bet it's at

least 90 percent, can't tell you what an inferential rebuttal is, that practice is dead.

It's past. We need to write our rules for practice we have today in a clear form. We need to preserve our history in comments.

MR. LOW: One of the things like even in Federal Court which I, you know, move sometimes back to go to comment on and say who is going to win and who is going lose and win or loose and short circuit, and then we reach a compromise and said you can condition damages on liability. Even in Federal Courts they tell the Plaintiff. They tell you the contingencies. The Plaintiff claims that the barn was red and so forth, and the Defendant claims it was green and such and such. Now, if you find that it was red, you find for the Plaintiff. If you find it's green. And everybody gets his story kind of told, and it just doesn't just say, "Well, do you find it was red" and no instructions. We don't have those general comments.

So I think we need to leave

everything like it is. I agree with John O'Quinn.

MR. MCMAINS: The problem with the notion that some general statement that you should only -- that you submit instructions that are proper, so far we have at least a half a dozen cases from the Supreme Court and the Courts of Appeals that say that the construction of the charge is discretionary in many respects, and in fact some to the point that say that only an abuse of discretion with regards to the construct of the charge. The one thing about this particular submission which was what was intended was that inferential rebuttal questions shall not be submitted. That removes it from the ambit of the discretionary argument. It has a purpose. It served its purpose, and when you take it out you will be disserving the Bar in terms of what people will do.

To say that people forgot is merely to say now that people are going to go back to the PJC1s they had a number of years ago, get the unavoidable accident stuff, and

submit it in question form, and there isn't any prohibition in these rules from doing that when you take it out, and that's going to happen sometimes. It's going to happen with people that claim that they don't have any history. And the idea that we have to remove history from our rules I think is garbage.

MR. LOW: I move that we adopt this as written.

MR. SOULES: With Judge Guittard's sentence added to it?

MR. LOW: That was yesterday.

HONORABLE C. A. GUITTARD: My sentence is "disjunctive submission is not inferential rebuttal."

MR. LOW: I second that.

MR. MCMAINS: Use the otherwise proper language that I think Sharpe had suggested. Otherwise proper --

MR. LOW: Let me move with proper language.

MR. SOULES: So you'll accept it as amended?

MR. LOW: Yes.

MR. SOULES: Or maybe it's the

other way around. Judge Guittard, will you accept Buddy's proposal?

HONORABLE C. A. GUITTARD: Yes. If he wants to leave it there with some language that would accomplish the same result and permit disjunctive permission, well, I would second the motion.

MR. SOULES: Any further discussion?

PROFESSOR DORSANEO: I have something that I absolutely have to say about this.

PROFESSOR ALBRIGHT: Does it make sense to make the first vote to get rid of a mention of inferential rebuttals, because if we're not going to mention inferential rebuttals, maybe then we don't have to add to the inferential rebuttal?

MR. LOW: We've got a motion and a second.

MR. SOULES: Okay. I'll go with this. Bill, did you have something additional to comment?

PROFESSOR DORSANEO: I am not sure I am completely following this. But as I

understand the proposal now we would authorize a question like the Limos vs. Montez question with Plaintiff, Defendant, both, neither. That is the effect of what we just agreed to. Or a question "Was the accident due to negligence or rather than unavoidable?" Now, I think that's the disjunctive submission of an inferential rebuttal matter in question form.

Now, I dislike the Limos vs. Montez opinion, because I don't see anything wrong with A, B, both, neither. I don't think that it's confusing. I think it's like an overreaction, but I think saying "Was the accident due to negligence rather than inavoidable" has a slightly different taste to it to me at least. All right. That's why I would like to see it out.

MR. O'QUINN: Which part out?

PROFESSOR DORSANEO: Inferential rebuttal let's not mention it.

MR. O'QUINN: (e)?

PROFESSOR DORSANEO: (e). And I have a separate thing to say about (d). I do think (d) is broken because it suggests that

disjunctive submission -- and I'll continue to talk about this for a second because I think it is hooked together -- it suggests that disjunctive submission is only proper when there are -- it says when there are two alternatives.

HONORABLE C. A. GUITTARD: No. That's not what it says. It says you may do it, one of the two alternatives. It doesn't say you can't do it otherwise.

PROFESSOR DORSANEO: Well, all right. It suggests. I didn't say it says it. It suggests that there is some sort of a limitation. Otherwise why say it? That you can do it when there is two alaternatives. If it means you can do it when there are two alternatives or when there is three or seventeen.

HONORABLE C. A. GUITTARD: But when one is necessarily true.

MR. GALLAGHER: Buddy, did you accept the amendment to your suggestion?

MR. LOW: Yes, I did. Right.

MR. O'QUINN: Can I ask a question? I don't want to make an argument.

MR. SOULES: John O'Quinn. Anybody can answer it.

MR. O'QUINN: If we accept what Judge Guittard wants us to add to (d), does that create the possibility for the trial judge to submit an automobile accident case in the manner "Do you find that the occurrence was the result of the negligence of the Plaintiff or the Defendant, A and B and C and D, or as a result of an unavoidable accident," because that is a possible way (d) could be read with that addition?

I am totally opposed to this.

MR. GALLAGHER: That's my concern about the amendment. My concern about your accepting that amendment to your motion is exactly what John says. And if that's the effect of it, then --

MR. LOW: All right. I agree, and I will restate the motion. Let's vote on it without any changes. I'll move without any changes.

MR. O'QUINN: I second it.

HONORABLE F. SCOTT MCCOWN: Luke, could I come back to Alex' point

procedurally? I might be willing to vote for the motion or be willing to vote against the motion on the merits, but there is really a preliminary question. If I need to get it addressed first by moving to amend the motion or to substitute, I guess that's the way to go, but the preliminary question really is whether we want (e) in our out. And in spite of Rusty's characterization of my position as garbage, I think it's a critical point; and maybe this is not the best place for me to fight the battle, because this issue may carry a lot of historical, emotional feeling, and I might better fight it with the question of whether we're going to have "general demurrers shall not be used" in the rules.

Nevertheless I think we've got to separate, we have got to decide what we're doing, and I think if we're going to -- elegance is not just an aesthetic value. It has a utilitarian purpose of making the rules usable for the Bench and the Bar, and I think we ought to get rid of the history that is no longer relevant and put the history in the comments, and I'd like a vote on that

question.

HONORABLE ANN TYRELL COCKRAN: I think that's what we're getting. I mean, the motion that Buddy made as I understand it is that we accept Rule 272 as drafted.

MR. SOULES: (d) and (e).

HONORABLE ANN TYRELL COCKRAN: That includes obviously the question of whether or not you want to do anything about (e).

MR. SPARKES: He wants an inferential rebuttal vote.

HONORABLE ANN TYRELL COCKRAN: I know. But I'm saying I know that. I don't think we need it. That's what I'm saying. But it seems to me that that's what the issue is.

MR. O'QUINN: Move a question, Mr. Chairman.

MR. SOULES: Well, the Chair does not entertain to move a question, because that's not our job here. Our job is to discuss this fully so that we make a record and get all the comments down; and when everybody has said what they need to say, then

we'll --

MR. BECK: Luke, could you tell us what the motion is?

MR. SOULES: The motion is, what we're going to vote on is whether to keep (d) and (e) just the way they are written in question 272(2)(d) and (e).

HONORABLE ANN TYRELL COCKRAN: We need a clarification, because I asked Buddy if his motion was to all of the proposal for Rule 272, not just (d) and (e).

MR. LOW: To the extent it has not be modified by previous vote.

MR. SOULES: We've been through the earlier part of it already, so we're just down to this part of it, and we've already acted on the rest of it.

MR. LOW: Right.

MR. SOULES: So that's what you're talking about, keep (d) and (e) the same way that it's written.

MR. LOW: Right. I'm not trying to re-do what we did yesterday.

MR. SOULES: In the proposal. Okay. Do we have any further comment about

that before we show hands? All right. Let's take a consensus. The motion is to leave (d) and (e) as it's written in the proposal of the task force. Those in favor show hands. Those opposed. Okay. 12 opposed. Let me see the hands in favor again. 23 in favor of keeping (d) and (e) as is to 12 against.

HONORABLE F. SCOTT MCCOWN: Well, when you-all are all dead I'm going to get rid of this inferential rebuttal point.

MR. O'QUINN: Judge, I do not share Rusty's view that your position is garbage. I want you to know I think it has a lot of merit. I'm going to be selective.

HONORABLE F. SCOTT MCCOWN: All right.

MR. LOW: We'll invite you to Beaumont if you like.

MR. HATCHELL: We're going to be up with Gus Hodges when we're dead.

MR. MCMAINS: Seniority will prevail.

MR. SOULES: Hadley Edgar.

PROFESSOR EDGAR: I've come back to the question that I raised yesterday

afternoon that the wording, and I voted against the motion a moment ago, because of the wording that is now subparagraph (e), and I suggested that we state that in the positive rather than in the negative. And what I'm trying to do is to have the rule read as the current law is, so that we should say that "inferential rebuttal matters can be submitted only as instructions or definitions."

That's the law, and I think that the rule ought to state the law, because there is some confusion about whether or not inferential rebuttals can be submitted at all. And if they are to be submitted as issues and as definitions, then I think that's the way that the rule should state.

MR. SHARPE: If we're wanting to do what Hadley suggests, that needs to go under (3) which deals with instructions and definitions and not under questions. And if he wants to have a subpart (c) and state what he just said, I think that's fine; but I think to have (e) in there based on all the discussion we've heard and the vote taken I think that needs to stay the same.

Now, whether we want to add a subpart (c) to put what he said, that's open for discussion, but I think it should go under (3), not under (2) to deal with questions.

MR. SOULES: Anyone else on this? Okay. Is there a second?

COMMITTEE MEMBERS: Seconded.

MR. SOULES: Any further discussion? Those in favor show by hand.

HONORABLE ANN TYRELL COCKRAN: What are we voting on?

MR. SOULES: We're voting on adding a subsection (c), 272(1)(c).

MR. SHARPE: It would be (3)(c).

MR. SOULES: Okay. 272(3)(c) that says to the effect "inferential rebuttal matters shall be submitted only by instruction or definition."

HONORABLE DAVID PEEPLES: "May be."

MR. SOULES: "May be."

MR. SHARPE: Mr. Chair, let me clarify.

MR. SOULES: Shelby Sharpe.

MR. SHARPE: I was not asking for a re-vote on (2)(e). (2)(e) is in.

MR. SOULES: Hadley is.

MR. SHARPE: Oh, right. Now, he was suggesting (2)(e) come out and you add (c). All I'm saying is leave (2)(e) in but add (c).

MR. SOULES: That is not my understanding of what Hadley's proposal is. He is saying leave (2)(e) in. We've already passed on that.

PROFESSOR EDGAR: That would be redundant practically to say you don't do it this way, and then you say you do it another way.

HONORABLE C. A. GUITTARD: That would be inferential rebuttal.

MR. SOULES: And it would be too clear. Then you couldn't appeal. All right. Hadley, state what your proposition is and make it in terms of 272(3)(c), if you will.

PROFESSOR EDGAR: I move that we retain the spirit of the last motion by retaining inferential rebuttal concepts, but I

move that we delete (2)(e) and substitute for it (3)(c) which would read "inferential rebuttal matters shall be submitted only as definitions or instructions." That's the current law.

MR. SOULES: Let me ask you this: Would you modify that to just add a (3)(c) and not delete (2)(e) or not? It's up to you.

PROFESSOR EDGAR: Well, I don't have any -- that's not my concern. If that's the wishes of the committee, that's fine. I don't think it needs to be there one way and then negatively another way. I don't think that's necessary; but if that's what the committee wants, that's fine.

MR. SOULES: Since we've already passed that point --

PROFESSOR EDGAR: Add (3)(c).

MR. SOULES: Okay. Add that (3)(c). Those in favor?

PROFESSOR DORSANEO: I want to make a clarification. Does he mean "may be" or "shall be"?

PROFESSOR EDGAR: "Shall be."

PROFESSOR DORSANEO: "Must be."

PROFESSOR EDGAR: No.

PROFESSOR DORSANEO: I'm going to vote against "must be."

PROFESSOR EDGAR: "Shall." I said "shall."

MR. O'QUINN: He said "shall" as in "must."

MR. SOULES: I think there is a proposition to amend your motion to say "may be" submitted that way, "may only be" submitted that way.

PROFESSOR EDGAR: I originally said "can only be submitted" or "shall only be submitted." I don't know how the English grammarians would phrase this.

PROFESSOR DORSANEO: Well, my concern is if you say that they "shall be," then the judge may not have discretion not to do it when it isn't a good idea to put that in there.

MR. SOULES: "May only be submitted."

MR. O'QUINN: Yes. That's

better.

HONORABLE ANN TYRELL COCKRAN: I would like to say that I voted "yes" on the last vote, but it was very definitely not because I was voting to preserve the institution of inferential rebuttal. I was voting to make sure nobody puts it in as a question. So I don't think that, and I oppose this proposal because it is not letting inferential rebuttal slowly die on the vine until it either dies or we do it when Scott can get his thing passed. And if we adopt the proposal that's on the table, we will never get away from inferential rebuttal ever, ever.

PROFESSOR EDGAR: Let me respond to Judge Cockran.

MR. SOULES: Yes. Please do.

PROFESSOR EDGAR: Judge Cockran, my only concern with this is that the way that it is now worded is incorrect. At most it's confusing -- or at least it's confusing, because the law is that if they are to be submitted, they are to be submitted only as instructions or definitions. And that is

not in the rule; and I think that the rules should state the status, the current status of the law. That's my only concern.

MR. SOULES: I have a question here. We say the question cannot be submitted. But then we say "The court shall submit such instructions and definitions that shall be proper and enable the jury to render a verdict." Doesn't that cover the situation where an inferential rebuttal instruction may be proper and may enable the jury to render a verdict without highlighting in a new paragraph the concept of inferential rebuttal? That's the question.

MR. HATCHELL: The answer is "yes."

CHIEF JUSTICE AUSTIN MCCLOUD: Yes. That's right.

MR. SPARKS: If we pass (c), you're saying we didn't need to do (d), because that poses a similar instruction about unavoidable accident. We need to do (e). I understand what you're saying.

MR. SHARPE: Mr. Chair, I agree with your point. I think it is covered

in (a). My only statement was that if you're going to put what Hadley is saying, it's got to go under instructions and not under the question. And I agree. I think it's covered in (a).

MR. SOULES: Any further question? Sarah Duncan.

MS. DUNCAN: Maybe I don't understand the history here. It's my understanding that what we're trying to do in the charge is give the jury what they need to decide this case. And for those of us that have spent days and days and lives thinking about proximate cause, yes, it is very clear that if (a) is the sole cause of the event, then (b) can't be a proximate cause of that event; but we're talking about a jury that may not have spent, a juror who may not have spent his entire life thinking about proximate cause. And if an inferential rebuttal instruction focuses the jury on what proximate cause isn't, what is wrong with that?

HONORABLE ANN TYRELL COCKRAN: I guess the question is, I mean, in any particular case you can debate whether or not

it's helpful or whether it's trying to nudge the jury. If we institutionalize it in a rule that encourages them always to be in instructions, then I think you're doing away with that individualized analysis of what really will help the jury in this case; and that's what (a) does, and I think we need to stay with (a) and not --

MS. DUNCAN: It's my understanding.

MR. SOULES: Sarah Duncan.

MS. DUNCAN: It's my understanding from reading the minutes from when (a) got into the rule that that is precisely why "necessary" was changed to "proper" was to give the judge the discretion to give the jury whatever instructions the parties request that will help the jury.

MR. SOULES: Anything further on this? Ready for a vote? Those in favor of adding the new (3)(c) as stated by the proponents show by hands. Those opposed? The house with three against.

JUSTICE NATHAN HECHT: Mr. Chairman, I'd like to point out that

Justice Cornyn has come by.

MR. SOULE: Justice Cornyn, welcome to our meeting. We appreciate your coming here today. We would like to hear any remarks or comments that you may have to give us direction or encouragement or incentive or disincentive.

JUSTICE JOHN CORNYN: I'm just enjoying my cup of coffee and the debate over one of the more important topics that go on. I know how controversial it is, so I don't need to give comments.

(Committee laughter.)

JUSTICE JOHN CORNYN: But I'm just here to listen. Thank you very much.

MR. SOULES: Thanks for coming and helping us do our work. Harry Tindall.

MR. TINDALL: Luke, I have a proposal for subsection (f) to the questions that would say "Advisory questions shall not be submitted." In the area of family law it's a dragon. In specialty courts it's not a problem; but outside specialty courts we have judges that want to dump everything on a jury from hours of visitation on Wednesday night,

how the property ought to be divided; and the Supreme Court -- I mean the State Bar Committee on Court Rules par visits proposal in this area have abolished advisory questions, and PJ5 strongly suggests that they not be used as an unnecessary use of judicial resources. I think it's a problem only in family law. For us it's a real problem. They need to be buried.

HONORABLE DAVID PEEPLES: I think that's a great idea. I haven't thought about it. There is no reason in the world to submit those things that the judge doesn't have to follow --

MR. TINDALL: No. It's terrible.

HONORABLE DAVID PEEPLES: -- in a family law case.

MR. TINDALL: And I so move.

HONORABLE DAVID PEEPLES: Seconded.

MR. TINDALL: There would be a new subsection (f) that would be advisory questions. You'd have a caveat. "Advisory questions shall not be submitted" period.

MR. SOULES: Does anyone see this affecting any practice other than the family law practice?

MR. TINDALL: I don't think so.

MR. SOULES: I want to be sure that we've passed that through our minds before we do this and talk about it if there is any other.

MR. TINDALL: We went through the Bar Committee on Court Rules, and there was no descent from anyone on the issue.

MR. SOULES: Okay. But I want to run it through this committee too.

MR. TINDALL: I understand.

HONORABLE F. SCOTT MCCOWN: Could I suggest that somebody check the Family Code before we vote on this, because my recollection is that the Family Code authorizes it.

MR. TINDALL: Negative.

HONORABLE F. SCOTT MCCOWN: Are you sure?

MR. TINDALL: No. Not at all.

MR. ORSINGER: Has anybody got a copy of the Family Code here?

HONORABLE F. SCOTT MCCOWN: I thought there was a reference to it in the Family Code.

MR. TINDALL: I don't think so.

MR. SOULES: Anybody who wants to have your remarks recorded needs to wait until one speaker finishes, or Anna can't get it down.

So the question is, does the Family Code authorize the submission to the jury of advisory questions. Does anyone absolutely know the answer to that one way or the other?

MR. TINDALL: I would not want to argue on something.

MR. SOULES: Well, we'll need to check that. Would you check that? Because this is going to come back. These rules the process is that the charge rules are going to go to the subcommittee. They're not going to be cast in stone until we see a complete redraft and look at it, and we'll have an

opportunity at that time to add or delete once again particularly if anyone has any new ideas.

MR. TINDALL: Well, I'd like to get it in today, because this is my last meeting, and I know what it is to get something put off.

MR. SOULES: All right. We can take a vote on it today.

MR. ORSINGER: Subject to --

MR. TINDALL: I understand.

MR. SOULES: But Richard is going to be here.

MR. ORSINGER: Yes. We could approve this subject to something contradictory in the Family Code.

MR. TINDALL: I realize it may be revisited, but it's time to deal with it.

HONORABLE SCOTT A. BRISTER: Could you explain to me what advisory questions are? I'm just concerned in other areas of law what it may be. Everybody in Family Law may know what they are, but all the rest of us don't, and somebody may consider this wiping out something that we've all been

doing.

MR. TINDALL: It could be like I say. If the judge would ask the jury "How should the property in this divorce case be divided," and the jury may be out for a couple of days haggling over how to divide assets. I mean it's crazy, and particularly in rural areas where you have courts of general jurisdiction. The judge just sort of let's everything go to the jury, because they don't try many of them. Maybe we could say this: Advise -- and I hate to do this in the rules, but I don't think it's in any other area of law. Say "Advisory questions shall not be submitted in family law cases." But that starts this peculiar, and I was instructed not to do that.

MR. SOULES: You've got that in 76a.

MR. SUSMAN: Well, I think the jurisprudence in other areas is the court should not submit advisory questions or opinions of a jury. I mean, they are not just things that a jury should decide. There is a lot of law on it. It does come up in other

contexts.

I just finished trying a jury contract case where for a declaratory judgment where the question was whether a certain tender of gas was reasonable under the Uniform Commercial Code, Section 2.306 or something like that, reasonably proportionate to the past under an output contract. One of the parties wanted to submit an issue asking the jury what would be a reasonable tender, which was improper because the only issue in the pleadings or the facts was how much had been tendered, and so it was improper for the jury I think to have a question just saying "What's a reasonable tender? Give us the amount of gas that would be reasonable."

The real question was, "Was the amount tendered reasonable or not reasonable?" So I think if you are going to say anything about advisory opinions, advisory questions not being allowed, you should not limit it to family issues, because I think the effect will be someone will come in and say "Well, we can file a declaratory judgment" and begin posing all kinds of hypothetical

questions to a jury to determine on what a contract means, and I don't think that's appropriate.

MR. TINDALL: I agree.

MR. SOULES: I guess another possibility would be "Do you find that the contract was ambiguous?" I think that threshhold question is for the Court to decide.

MR. O'QUINN: Right.

MR. TINDALL: I agree.

HONORABLE F. SCOTT MCCOWN: It seems to me like 2(a) would prohibit the example that Steve just raised because it says "The court shall submit questions on the disputed material factual issues," and that's not a material factual issue deciding a case under the law. If in the family law area there is an advisory practice, isn't that best addressed in family law forums? We don't know the extent of the practice or the extent of the problem, and it seems to me kind of beyond the purview of writing general rules of procedure.

MR. TINDALL: Well, Judge,

deal with -- we prohibit practices through our rules all the time. And I agree with the majority of this committe. I think that these rules are designed to stamp out practices that we deem inadvisable as demurrers or inferential rebuttal questions; and if we're going to get rid of inferential rebuttals, advisories are a nightmare compared to inferential rebuttals.

HONORABLE F. SCOTT MCCOWN: Well, it just seems that when you try a family law jury case on the question of who ought to be managing conservator I'm not sure that you absolutely want to prohibit the judge from asking the jury any questions at all about visitation arrangements or powers and responsibilities and absolutely prohibit advisory questions at all. It may be that you want to do that, but it just seems beyond. It's not something the task force studied. It seems beyond our ability to make an informed decision about today. I don't mind taking it up later.

MR. ORSINGER: Sarah Duncan was sharp enough to remember that this was in

a footnote in Patrick Hazel's article on proposed changes to the court's charge in the Advisory Committee Volume II. And in footnote 10 on page 20 he says and I'll quote, "Insofar as I know only family law has advisory questions to the jury. I understand the pattern jury charge folks dealing with Volume V are trying to discourage these questions going to the jury. I am a strong advocate of the jury trial in civil cases. Where however others have decided not to allow the jury to determine a matter it strikes me as illogical, unnecessary and expensive to ask a jury for its advice. One may question whether the legislature has taken this mater out of the hands of the Texas Supreme Court by enacting Section 1113 of the Texas Family Code. That provision states that court, quote, 'may submit or refuse to submit' closed quote, certain questions to the jury, and if they are submitted, the jury verdict on them is, quote, 'advisory only.' Since the court is given discretion in this matter I supposed the Texas Supreme Court could make that discretionary determination for all the trial

courts and say that these questions shall not be submitted. Of course where one of those questions is before the court a party has a right to a jury. That right has been found however not to be an absolute right to a jury on those matters because the findings are not binding." And then he cites Martin vs. Martin, a Supreme Court case is '89.

"However because of the statute we have decided to mandate not submitting these questions except as allowed by statute."

MR. SOULES: What page number are you looking at?

MR. ORSINGER: Bates 836.

PROFESSOR DORSANEO: I don't think there is a Title I case, only a Title II case, and he talks about Chapter 11 there of the Family Code.

MR. ORSGINGER: Well, yes, 1113 is a Title II section anyway and probably doesn't apply to Title I.

PROFESSOR DORSANEO: It's not what Harry is talking about adding.

MR. SOULES: All right.

Any --

MR. ORSINGER: Well, that's a good distinction Harry. I'm sorry. Can I say something on the record?

MR. SOULES: That's at 836 is where he's talking about. Go ahead.

MR. ORSINGER: Professor Dorsaneo has observed that your request is addressed at least in the divorce example to Title I to which Section 1113 does not apply, and therefore there doesn't appear to be any legislative impediment to barring advisory issues in a divorce even if there might be a legislative impediment to barring them in child cases.

MR. TINDALL: But I think by rule you remove the discretion of the trial Court.

MR. SOULES: Anything else on this? Okay. Those in favor of adding a new paragraph 272(2)(f) as proposed by Mr. Tindall show by hands. Those opposed. Sixteen to nine against.

MS. SWEENEY: Luke, what was the count? For or against? Luke, that did

not pass?

MR. SOULES: It did not pass. Let's peruse the balance of Rule 272 as proposed by the task force. Does anyone have any other comments? This is a revisit. Sarah Duncan.

MS. DUNCAN: This is a revisit to 272 subsection (2)(b), the language about "whenever feasible," and I said yesterday that at least in my practice it does not seem to work very well, and Professor Edgar suggested that this had been debated ad nauseum and that they didn't think better language was necessary, was possible.

I'd like to suggest that better language is possible, and what I would like to suggest is "The court shall submit the case on broad form questions whenever and to the extent that method of submission is practicable." "Practicable" as used in the preceding sentence means not only feasible but also consistent with the goals of broad form submission, for instance, simplifying the charge for the jury and reducing the risks of a subsequent retrial, and the party's

Constitutional right of meaningful appellate review of disputed questions of law and fact. If necessary to further one of these goals, the court may submit a claim or defense or any element thereof separately and distinctly in a checklist or in any other manner designed to further the goals of broad form submission or the party's right to meaningful appellate review.

MR. SOULES: Is that in the form of a motion?

MS. DUNCAN: If nobody wants to discuss it, no. But if it is possible that the committee might be willing to consider changes to "whenever feasible," that's the upshot.

MR. SOULE: Let's have discussion and see.

HONORABLE F. SCOTT MCCOWN: I was initially critical of this language, but I was convinced yesterday by some people who had thought about it a lot that it's the best language we can get and we ought to leave developments to the case law and not try to change it.

MR. ORSINGER: I'm intrigued by the suggestion about the appellate review, because one of the consequences of broad form has been that sufficiency of the evidence challenges have been swallowed up, and it is now in some cases impossible to figure out what theory of liability the jury chose to find liability on. And I don't know whether that was intended or whether that's an accidental byproduct of simplifying the jury charge; but the part that Sarah is saying that appellate review of the sufficiency of the evidence should be a consideration in going to broad form is a fair thing for us to consider, because we definitely lost it.

MS. DUNCAN: Or the viability of an included claim, legal viability of an included claim or defense.

MR. HATCHELL: I think, Richard, that your observation is taken care of in Rule 81(b)(1) which says that a reversible error occurs when you are prevented from sending your case to the appellate courts, and that's the objection that you either need to be making to the charge or

making in your post judgment motion. I don't think further language is necessary.

PROFESSOR CARLSON: Sarah, are there any cases construing what Mike has suggested that submission of broad forms could be a violation under 81(b) or reversible error because it impedes sufficient appellate review?

MS. DUNCAN: In a sense that's I think what the Supreme Court has been saying, for instance, in the damages cases or in the wrongly -- the not viable included claim cases; but it's very difficult, and we've had cases where we've tried making that objection; and the comeback, the easy comeback is E.B., whenever feasible means whenever feasible. If it is possible to do in this manner, the rest of it just doesn't matter.

MR. TINDALL: I'm real scared with your proposed language. E.B. vs Spate is a parental termination case. I know many of you are familiar with it, but it was a granulated issue, and our Supreme Court very clearly said that's not what we mean, and that dealt with someone where parental rights were

being terminated. They said they wanted a Constitutional determination of what conduct they had committed, and our courts said "No." And I think that what you're getting in could grow and grow and grow, and we'd be back to special issues again because I want an evidenciary review on some aspect of the case.

MR. LOW: I think when we did this we had a purpose of going back to Rule 1 which says the purpose of the rule is for simplification. We want to get away from all that stuff; and this just tells it was the philosophy when we passed this that if you do it that way, do it. We want to get away from the old forum back, and I think that was the purpose just to do away with it. And to put new language is going to put new life into something that we killed with just cause.

MR. SOULES: Any further discussion?

HONORABLE DAVID PEEPLES: I think it would be premature to act on this. The committee did a whole bunch of things and didn't even think about this.

HONORABLE ANN TYRELL COCKRAN: No.

HONORABLE DAVID PEEPLES: Well, you didn't propose anything on it.

HONORABLE ANN TYRELL COCKRAN: No. But we sure thought about it. I don't want anybody to think that this wasn't.

HONORABLE DAVID PEEPLES: It was outside their charge. It was outside their charge; and I think something this serious we shouldn't just do on 10 minutes of debate.

HONORABLE ANN TYRELL COCKRAN: I would -- this fight has been fought; and I just think that we are going to continue to be paralyzed about the work that is before us if we keep stopping to digress, to go back and you know, re-argue the very same things that, you know, other very good committees spent, you know, lots of time and people agonized over these decisions, you know, but it's done. And the system works, and you know, we're trying to make the rules so that we can improve where we can, but I just object to our going back to re-fight a very old battle.

MS. DUNCAN: If I could point out in the minutes when the committee when the "whenever feasible" language came in there are expressed statements that it is not intended to deprive anyone of a right of appellate review, and it's never referenced as a Constitution right, but it is a Constitutional right; and all I'm suggesting is that what I think was the committee's intent at the time the "whenever feasible" language was included be made clear in the rule so that we who argue charges have a leg to stand on because "whenever feasible" is cut and dry.

HONORABLE C. A. GUITTARD: I would like to support Sarah's position on it. I'm not sure that we can settle today on the exact language, and I don't suppose Sarah intends for us to, but there are cases where it would be conceivably feasible to submit broad form where there are some definite advantages to submitting it separately so that the right of appellate review could be reserved or other cases of that sort; and therefore I -- and moreover I don't think under the decisions that the "whenever

feasible" language has been literally enforced by the Supreme Court, and I think that kind of a provision in the rule would be more nearly what the current law actually is.

MS. DUNCAN: That's my point.

PROFESSOR DORSANEO: I've been listening to what everybody has had to say, and without being facetious, I think I do agree with everybody. But I think that the proper thing to do would be to send it to Joe's committee to evaluate the part of the rule that talks about broad form submission whenever feasible to see if it could be made a little clearer as to what that means in particular problematic situations, multiple legal theory cases for just as one example without trying to deal with it here now. I mean, I think everybody recognizes that we want to have meaningful appellate reviews, but also clear and simple submissions that don't confuse the jury and how we accommodate both things.

MR. ORSINGER: Just appoint that to Paula Sweeney's committee. That would be Paula Sweeney's committee.

MR. O'QUINN: I agree with the comment that somebody -- I think it was Judge Cockran. This battle has been fought and fought and fought. There is a fundamental policy issue here that we have debated, and I thought we had decided. Either we're going to have broad form submissions and that's the way we want to handle jury trials, which I frankly favor, or we want to go back towards the old system where we cross examine the jury about why they made their decision so somebody can appeal it and re-examine it, which I thought we don't want that anymore. I don't want it.

I think sending it back to committee accomplishes nothing. You cannot ride two horses at once. There will be no way to figure some way that you can ride both horses. Simplify the charge and have broad forms submissions and also have the old way of finding out exactly why did the jury say the product was defective or that somebody was negligent so we can have a fullblown appellate review of that. And I think we're just putting off deciding and memorializing frankly something that most lawyers believe in. It

should whenever feasible be submitted in a broad form manner; and I oppose sending it back to the committee.

MS. DUNCAN: I am a fan of broad form submission. It is not my intent to have a negative effect on that. All I'm saying is that we now have Supreme Court cases where people have been reversed and a new trial has been mandated because a case was submitted not just in broad form, but so broadly that you cannot segregate the reversible error from the rest of the case. And I'm not -- this is with all due respect, there is being a lot said about what broad form submissions means that is not what the committee discussed when the language was adopted.

MR. O'QUINN: May I respond?

MR. SOULES: Yes.

MR. O'QUINN: Sarah, as a Plaintiff's lawyer I understand the tension between broad form and having something in the case where some appellate court is going to reverse me because I got too broad. I am not going to ask the trial judge to go too broad

to get me in that box. If I do, shame on me. And there's no judge going to submit the case more broadly than I run at him to submit. I am always struggling to get it broad. I think the solution is inherent in the way we practice law. If lawyers are going to talk the trial judges into being so broad that it's going to cause the problems you're saying, then they're being fools and they'll have to suffer the consequences.

So in order to get the little bit of good and to keep me from making a stupid decision and asking for too broad a submission, you're going to pump some language in here that's going to scare a lot of trial judges into not going broad form because of these extra words you're going to put in there. I think "whenever feasible" is the right test. We need to encourage the new concept. We need to encourage judges not to be scared that they're going to be reversed if they go towards broad form. There is real fear out there among trial judges on that subject. I really strongly urge you to not change this language. We're sending the wrong

signal.

HONORABLE F. SCOTT MCCOWN: The inability to segregate and separately analyze reversible error is present with every general verdict, and if you go broad form, you're going to have that problem and there's no way around it. And it seems to me that there may be times when the trial judge in his discretion, for example, if he has a legal theory that's never been accepted or he has one point where the evidence is strong and one point where the evidence is perhaps not quite there, may decide to break a case down into two broad form questions as opposed to one; and I don't think that's going to be reversed if in fact the charge is otherwise proper and that reasoning is strong. And with the language "whenever feasible" while I think "feasible" is heavy on the connotation of possibility, it does seem to me to also have a practicality connotation, because they say "whenever possible." They said "whenever feasible." And I think that gives enough room for the case law to develop in this area where there is tension, and I don't think that there

is any way to write the rule to resolve the tension.

MR. LOW: All this came about just simply because of negligence cases because of Scott, Lori vs. City of Houston, Vega, all of those just kind of general charges just like we have in Federal court that were general even way back before, and because we kept this sacred cow. I have and still favor, but I won't raise it again, but if the committee wanted to consider, I would want to consider going to the general charge rather than going backwards to the other way, because we got into this box through just the negligence cases. And there were a lot of lawyers that practiced on the same side of the docket that I did, and we had contrib and all that. We fragmented it where we didn't follow Vega, Scott, and Lori and very well could have.

So I would be strongly against it. I think it's going in the wrong direction and we really ought to go the other way.

MR. SOULES: Let's get a sense of the committee before we assign Paula

Sweeney work to do that may or may not be productive. I don't know which it would be. Let's get a sense. How many feel that "whenever feasible" should be retained as the standard? Show by hands, please. Those opposed. The house to three or four.

MS. DUNCAN: Could I ask for one more thing?

PROFESSOR DORSANEO: The question is to figure out what "whenever feasible" means.

MR. O'QUINN: We'll hammer that out in appeals, Bill.

MR. SOULES: Sarah, you go ahead an speak, please. Because if I haven't done this right, I want to get it done right.

MS. DUNCAN: I have one more suggestion, and that is that we add a new subpart to the rule on the standard of reviewing charges. In my view --

PROFESSOR HADLEY: We can't hear back here.

MS. DUNCAN: In my view even though the Supreme Court said and is frequently cited as having said that abuse of

discretion is the standard for review of charges, that is not in fact what has happened. And I would like a new subpart that would separate out abuse of discretion as the standard for reviewing the structure whether it is broad enough or not broad enough, but that we have the Whopper vs Packer meaning gloss on abuse of discretion for errors of law which are reviewed de novo, number one, to determine whether there is error, but are still subjected to the reversible error test, because -- and this is to some extent very selfish -- I'm getting real tired of briefing why it is not a complete abuse of discretion standard for every aspect of the charge. And if the trial Court happened to rely on a case that incorrectly stated the law, that is not an abuse of discretion because it was with reference to a guiding principle even though it was wrong.

MR. SOULES: Okay.

MS. DUNCAN: So it's just a new subpart, up or down?

MR. SOULES: Okay. Restate the subpart, please.

MS. DUNCAN: The new subpart would be a review standard of the review section that clarifies that abuse of discretion is the standard for reviewing the structure of the charge, but --

MR. SOULES: Should that be in the TRAP Rules? Maybe I'm asking an improper question here.

MS. DUNCAN: We don't have a charge rule in the TRAP Rules.

MS. SWEENEY: Let them write one.

MR. SOULES: Do we have appellate standards for review in the Rules of Civil Procedure? I mean --

MS. DUNCAN: Oh, we do. For instance, transfer of venue.

MR. SOULES: Okay, I see. State it again. I've gotten distracted here.

MS. DUNCAN: Okay. That we include a new subpart to Rule 272 governing the standard of review.

PROFESSOR EDGAR: Would you speak up? We can't hear a word you're saying down here.

MS. DUNCAN: That we add a new subpart to Rule 272 on standard of review, and while I'm not particular about the particular language, something like "Complaints regarding the method of submission will be reviewed on an abuse of discretion standard. Complaints regarding errors of law in the content of the Court's charge will be reviewed de novo." In either case however the complaint will be subjected to the reversible error standard in Rule 81(b).

MR. SOULES: Is there a second?

MR. GALLAGHER: No. There is a question.

MR. SOULES: But is there a second?

PROFESSOR EDGAR: Luke, this is a substantial addition I think to what we've discussed, so I would like --

MR. SOULES: Well, I think Sarah intends that.

PROFESSOR EDGAR: I would like to see that in writing. I think it's too important to try and vote on it after hearing

it one time, because it does contain several different concepts.

MS. DUNCAN: I agree.

PROFESSOR EDGAR: And I would ask the Chair to defer a vote on that until it can be reduced to writing and give the committee an opportunity to discuss it. I won't be here the next time, but I think in all fairness that should be done.

MS. DUNCAN: I amend my motion that we simply refer it to the charge subcommittee as to whether there should be a standard of review, and if so, what that language should be.

MR. SOULES: Discussion.

MR. PERRY: Luke, yesterday when we decided to go with the phrase in Rule 274 about reasonable guidance we discussed putting that same phraseology in Section (3) of Rule 274 which is --

MR. SOULES: Does that have to do with Sarah's point?

MR. PERRY: Yes, it does for this reason:

MR. SOULES: Okay.

MR. PERRY: That is a kind of a standard of review of the charge. The concept would be that the standard of review would be whether the charge provides reasonable guidance to the jury. And so I would just suggest that if Sarah's idea is going to go to the subcommittee, maybe that idea could go along with it and the subcommittee can consider it all as part of their standards.

MR. SOULES: Okay. Discussion?

MR. YELENOSKY: I have a question.

MR. SOULES: Stephen Yelenosky.

MR. YELENOSKY: I just have a question. You mean to use the same term "reasonable guidance" in determining whether or not the tender was sufficient in determining whether or not the actual charge submitted to the jury was sufficient?

MR. PERRY: That was the discussion that was had yesterday, yes.

MR. SOULES: As I understand

what David Perry was proposing yesterday it would be that if the charge as a whole gave reasonable guidance to the jury to decide the case, that the case could not be reversed.

MR. PERRY: Right.

MR. SOULES: Does that answer your question? That's his proposition.

MR. YELENOSKY: Yes.

MR. SOULES: Another standard of review. Sarah has proposed a standard of review. Okay. Any other discussion on this? Those who favor Paula Sweeney's subcommittee giving this attention and draftsmanship show by hands.

HONORABLE DAVID PEEPLES: Just take a look at it?

MR. BECK: Refer it to the committee, in other words.

MR. SOULES: Refer it to the committee. Sixteen. Those opposed. Okay. 16 to 10. And everybody who is sitting on your hands hold them up.

Okay. Paula, could you give that some thought?

MS. SWEENEY: Yes. And report

back at the next meeting?

MR. SOULES: Right. And also get input from Sarah.

MR. SWEENEY: Sarah is on the committee. She's on the subcommittee.

MR. SOULES: She's on the subcommittee. And from David. Can you put that in writing, David, to Paula, your proposal, so that she'll have that to look at?

MR. PERRY: Yes.

MR. SOULES: Okay. Having chaired and received at least half a dozen votes, maybe a dozen votes to approve these beginning to end with the changes made by the committee I think I'll just not take that vote today, because it's never really been conclusive.

Has anyone else got any discussion about the charge to give Paula Sweeney and her subcommittee guidance in preparing a draft for final approval at our next meeting?

MR. ORSINGER: I'd like to raise something and maybe put Justice Hecht on

the spot. Yesterday an issue came up about whether the instructions to the jurors should be elevated from a Supreme Court miscellaneous orders to being fixed in the rules; and my concern about fixing them in the rules is that it may lock us in for three or four or five years, and I know there is expirimentation going on on jurors taking notes and even jurors asking questions, and I feel like we may cut back some of the Supreme Court's flexibility. And I'm prepared actually to move that we leave the specific instructions to be part of a Supreme Court order rather than part of the rule.

MR. SOULES: Any objection to that, Judge, as you see it?

JUSTICE NATHAN HECHT: I can't speak for the Court, but I would imagine and my guess is that they would want to keep it as a miscellaneous order, because we do get -- I know there is some work going on now to change the booklet that you give jurors, and I think we do that in coordination with the legislature or somebody. And I know we've had drafts of that that have floated around. So I

think it would probably be easier for us to keep it a miscellaneous order. I don't know if we've changed it very much; but if it's a rule, obviously it's very difficult to change.

MR. SOULES: Does anyone have any opposition to leaving that in the miscellaneous order category? Paula Sweeney.

MS. SWEENEY: A question. We drafted the general instructions which needed it quite badly. Would the Court like for us to submit the draft for informational purposes or advisory purposes, because quite a bit of work did go into that?

JUSTICE NATHAN HECHT: When this group passes on it you might just go ahead and send it over to the Court and get it done.

Also when we changed the gender references some years ago again it just seems to me that is something that you want the Court to be able to do with less process than this group entails, so I would think if you finish that up, you'd just send it over there.

MS. SWEENEY: Okay.

MR. SOULES: Paula, would you then take the work out of Rule 226(a) in the rule and make that in the form of a proposal to the Court to revise its miscellaneous order rather than as a proposal to change the Rules of Civil Procedure?

MS. SWEENEY: I will. We also re-wrote the oaths a little bit. We took out the "you" and "each of you" stuff and put them sort of into regular English so they'd know what they were swearing I'm going to do.

MR. SOULES: If you'll bring all those recommendations forward in the form of a miscellaneous order rather than a rule, then we'll act on those in that form.

MS. SWEENEY: All right.

MR. ORSINGER: This may be premature, but I would like to move that we go ahead and authorize Paula's subcommittee to move the current language out of rule status to order status and then when complete forward it to the Court, because it's not subject to any further debate, I don't think.

MR. SOULES: I think that's

not the case. I think we'll want to look at it. But is there any opposition to just separating this into a miscellaneous order, these items that have just been under discussion? There being no opposition, that's the way we'll do it, but we will take a look at it before it goes to the Court from this committee. Judge Guittard.

HONORABLE C. A. GUITTARD: I have one or two minor matters to raise with respect to the instructions. In connection with Part 1 to the jury panel, Subdivision 5 of formula 4(b), "If a question is asked of the whole panel that requires an answer from you, please raise your hand and keep it raised long enough for everyone to make a quick note of the people who responded." My concern about that is that sometimes questions are asked by counsel to parts of a panel where that still might apply. For instance, counsel may say "I want to ask all of those of the first row whether they are so and so and so," and the same consideration would apply. They are supposed to raise their hand and keep it up.

So I would suggest that language be added to allow for that which says in effect "If a question is asked of the whole panel or part of a panel that requires an answer from you," and so forth, "please raise your hands, keep it raised up."

Another --

MR. SOULES: First, any opposition to that? Paula, there being no opposition if you would include that in Part 1, Number 5.

MS. SWEENEY: Okay.

HONORABLE C. A. GUITTARD: The other suggestion that I have is with respect to the time for administering the oath. When I was a trial judge I liked to give the -- that has to do with the first part of the written instructions.

MR. SOULES: Is this in Part 2?

MS. SWEENEY: Yes. Which oath? The panel oath or the venire oath?

HONORABLE C. A. GUITTARD: To the jury panel before they take their final oath. These instructions seem to require the

oath to be given before the instructions. Now, it seems to me that the judge should have some discretion there. When I was a trial judge I liked to give the instructions before the oath so that I could tell the jury that "Now bearing in mind these instructions, will you take this oath," and then they take the oath and they've sworn that they'll abide by all those instructions. And I think that's effective, because I can remember on one occasion I did that, and one of the jurors held up his hand, and said, "Judge I don't think I can take that oath." And I didn't know what he had in mind, so I told the jury to go out and put him on the stand, brought the court reporter in. "Why can't you take that oath?" And he said, "Judge, do I have to swear that I have to decide the case according to the evidence?" I said, "Yes, that's what it says." He said, "I don't think I can do that." "Well, why not?" "Well, I think I ought to pray about it, and the Lord might tell me to do it some other way." And I said, "Well don't you think that you might ask the Lord to help you decide the case according to

the evidence?" And he said, "Yes, I could; but he might tell me nevertheless that other way."

And at that point I was pretty curious, and I said, "Well, how do you get this word from the Lord that doesn't come from the evidence?" He said, "Just like we got the Bible." And so about that time the two lawyers came up before the bench and said, "Judge, we agree to excuse him. Go ahead with 11."

That illustrates that I think the judge ought to have the discretion to give the instructions before the oath.

MR. SOULES: Give the instructions to the jury panel before the oath.

HONORABLE C. A. GUITTARD: Yes. To the 12 jurors.

MR. SOULES: That's to the jury itself.

HONORABLE C. A. GUITTARD: To the jury itself.

HONORABLE F. SCOTT MCCOWN: As a discretionary matter --.

MR. ORSINGER: No. He's talking about the venire.

HONORABLE F. SCOTT MCCOWN: -- or mandatory?

MR. SOULES: Or are we saying go forward with 11, talking about to the jury?

MS. SWEENEY: He's talking about the jury.

MR. ORSINGER: Oh, I'm sorry. Excuse me.

MR. SOULE: Is there any opposition to rearranging the Part 2 ultimately with what will now be an administrative order, put that so that the judge can give the jury the oath before or after the instructions? Any opposition?

HONORABLE SCOTT A. BRISTER: To do what?

MR. SOULES: Judge Guittard's proposal is that the trial judge be given discretion to give the jury, the 12, the oath either before or after the instructions in Part 2, or whatever instructions are given, before or after the jury is instructed. Is

there any opposition to that?

MS. SWEENEY: We'll draft it that way.

MR. SOULES: No opposition. Then that will be part of your work, Paula.

All right. Any other comments now to give Paula direction in her work? Tommy Jacks.

MR. JACKS: I have a question of Paula. And that is, why did you take out the part of the preliminary instructions to the panel where the Court tells them that the lawyers aren't meddling when they ask them all these questions? I've always found that a helpful part of the instruction, and I'm just curious why it was deleted.

MS. SWEENEY: I think there is still something in there to that effect.

HONORABLE ANN TYRELL COCKRAN: I don't think there is.

HONORABLE F. SCOTT MCCOWN: Because it's not true.

MR. JACKS: I know that. It's what we call a legal fixture.

MR. SOULES: Let's try to find

that in the old 226(a) and look at it.

MR. ORSINGER: Luke, the deleted language is in the handout.

MR. YELENOSKY: Right on the page with Part 2 at the bottom.

MR. SOULES: Okay. Let's go back to the...

HONORABLE ANN TYRELL COCKRAN: It's at the very back.

MR. SOULES: At the very back of the --

MR. ORSINGER: It's about five pages from the end, six pages from the end.

HONORABLE ANN TYRELL COCKRAN: Okay. It is on Subparagraph (4) of Part 1 on the top of the second page of (4) where the current language says "In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors." On this last part I thought it was a lie. All lawyers admit that they want somebody who is on their side in the questioning.

But the part about meddling I don't think was taken out intentionally. If

you want to suggest --

MR. JACKS: If you'd be open to putting it back in, I for one would like to see it back in.

HONORABLE ANN TYRELL COCKRAN: I think we'd be happy to work on some language about meddling.

MR. LATTING: Say "May not be meddling."

MS. SWEENEY: How about "Lawyers are meddling, but it's permitted."

MR. SOULES: Okay. This language is on if we start from the back of the task force report, it's six pages back in the top paragraph. It actually begins on a previous page. If you're looking at the language, it says in questioning you -- let's see. "The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular

case."

That's been deleted or recommended to be deleted by the task force, and Tommy Jacks is suggesting that that or some of that be put into Paula's work for the administrative order.

HONORABLE ANN TYRELL COCKRAN: I think it could still go in the current Paragraph 4.

MS. SWEENEY: Yes.

MR. SOULES: Just reinstated rather than deleted.

MS. SWEENEY: Yes.

MR. SOULES: Is there any opposition to that? All right. Then all of that language would be restored rather than deleted.

MS. SWEENEY: All right.

MR. SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: Mr. Chairman, I have a question with respect to Rule 279, Subdivision (2) which doesn't concern the committee's work except that they brought forth the same concept, and it has to do with these omitted elements of issues.

I wonder whether the committee has considered what is an element of an issue. I'm concerned with, for instance, suppose there is just one theory of recovery and the judge just submits a damage issue, no liability issues. Can the judge then if there is no objection make findings on the liability issues if there is a disputed facts issue there?

PROFESSOR DORSANEO: Judge, I think a damage issue that is a standard one, probably the type you're thinking about would not be necessarily referable to any particular ground of recovery or defense.

HONORABLE C. A. GUITTARD: But it would be if there's only one ground of recovery or defense in issue.

PROFESSOR DORSANEO: I don't think so.

HONORABLE C. A. GUITTARD: Okay.

PROFESSOR DORSANEO: Though that maybe is a hard question.

HONORABLE C. A. GUITTARD: Well, I just wondered whether the comittee has

considered that question and determined whether or not there is a problem there.

MR. SOULES: My understanding from Judge Cockran is that the committee did address this, and that Mike Hatchell gave it some input. Do you want to speak to this, Mike?

MR. HATCHELL: Not particularly.

MR. SOULES: All right.

MR. HATCHELL: We did consider it.

PROFESSOR DORSANEO: The case law would indicate to me that a damage question that doesn't on its face disclose what kind of a claim it relates to is not necessarily referable to any particular claim, hence no deeming of other elements would be permissible assuming they weren't conclusively established.

HONORABLE C. A. GUITTARD: Maybe that's the answer.

MR. HATCHELL: That was the task force's belief. One needs to read Transco however where it appears that

Judge Ray has held that an entire liability theory is necessarily referable to a damage question, but we didn't want to tackle that bear frankly.

HONORABLE C. A. GUITTARD: You've thought about it.

MR. LOW: Luke, if you only had one theory and you submit damages, I just can't even imagine any lawyer unless he's just saying, "Well, I've admitted liability," I mean, I just can't imagine that not being brought up and hashed and rehashed for just one theory. I just don't think in practicality it's going to be a problem.

MR. SOULES: Any other discussion to assist Paula Sweeney's subcommittee in their work? All right. Paula, it's in your hands.

I want to thank Ann Cockran and the task force. This is an enormous piece of work. It's taken a lot of time, and it's a great job. Thank you, Judge, and to all the members of that task force.

MR. LOW: Before we leave are we leaving 274 for good now?

MS. SWEENEY: Yes.

MR. LOW: I wanted to raise a question.

MR. SOULES: Well, we really aren't leaving anything.

MR. LOW: No. I wanted to bring up something I'd like you to think about. I don't know what their intent was, but down here where they say "A claim that has no evidence to support the submission of a question and answer may be made for the first time after the verdict," and then they go down here to something else, and it says it was against the great weight, and preponderance of the evidence must be made after the verdict.

Okay. Are they meaning can it be made also for the first time after verdict, or does it mean -- I mean, what do they mean there? What was the intent? Because one of them may be made for that first time after verdict, and other one says must be made after verdict." But what about before verdict? Can you make it?

PROFESSOR ALBRIGHT: Factual sufficiency you have to raise by motion for

new trial.

MR. LOW: I understand. But I'm just saying I'm not questioning the law in that area. I'm just questioning whether that was what you intended to do, and if it accomplished the purpose.

MR. ORSINGER: Yes. A comment over here.

MR. SOULES: Isn't the direction here don't bother the Court at the charge conference --

MR. ORSINGER: Exactly.

MR. SOULES: -- with factually insufficient complaints.

MS. SWEENEY: Yes.

MR. SOULES: The Court can't do anything about them at that stage. You must make them. I suppose now you must make them after the verdict in order to preserve your appellate complaint, and the complaints made like that at the charge conference preserve nothing.

PROFESSOR ALBRIGHT: That's right.

MR. LOW: I know that. But on

the against the great weight and preponderance of the evidence I mean, you know, everybody just puts that in routinely, you know; and if it's so against, do you want to burden the trial court with that and say that it may need to be made for the first time after verdict? That was the only thing I wanted to know.

PROFESSOR ALBRIGHT: So you're saying great weight and preponderance in addition to factual insufficiency?

MR. LOW: Right. I understand.

PROFESSOR ALBRIGHT: Factual insufficiency covers both insufficient evidence and against the great weight and preponderance.

MR. LOW: I understand that. And I'm not arguing the point. I'm merely asking is that clear in your mind, take a look at it. I'm satisfied with it if it does what you intend it to do.

MR. SOULES: I'm trying to assimilate this. Okay. Richard Orsinger.

MR. ORSINGER: I think Paragraph 5 provides that both the factual insufficiency and a great weight point must be

made after the verdict, so it's not inferential. It's really explicit.

HONORABLE ANN TYRELL COCKRAN: I think the intent of the committee was to use some mandatory language to make lawyers stop making objections at the charge, objections that the trial court cannot legally do anything about at that period, which is why we wanted to do a "must" so that it would try to encourage lawyers to stop doing that.

MR. SOULES: I think Buddy is seeing something we're not seeing. Help us see what you're talking about.

MR. LOW: What I'm saying is that, you know, you talk about no evidence, insufficient evidence, against the great weight and all that, and every objection lawyers always put all that. And it looks like to me the committee is trying to say, "Look, don't burden the trial judge. He knows whether it shouldn't be submitted and so forth" like that. So you could make that complaint for the first time after the verdict.

Okay. Now, here is one of

them where you tell them a part of that you may make for the first time after verdict. The other part says "must be made after verdict," but it doesn't say "may be made for the first time after verdict."

If that's the way you wanted it, that's fine; but to me I mean I realize that some of those the trial judge can't do anything about, but when you're trying to get around and point out that the judge there is just -- against the great weight or --

MR. SOULES: I think this changes the law with that first sentence.

MR. LOW: And that's what --

MR. SOULES: It doesn't say that a complaint made before the verdict, no evidence complaint made before the verdict is good; and the law is now that it is good. You can complain no evidence at the charge stage and you can protect that.

Would it work if we said "may be made before or after the verdict"?

MR. O'QUINN: What are you talking about?

MR. SOULES: Just the first

sentence. We're talking about legal insufficiency.

MR. ORSINGER: Let me clarify.

MR. SOULES: Is that what you're talking about?

MR. LOW: No.

MR. O'QUINN: He's talking about the second sentence. But I think your point about the first sentence is a good point. He's saying in the second sentence that when you read the second sentence in the context with the first sentence somebody might get the impression that there is a doubt about whether you should also make that objection before the verdict. I think what Buddy is saying in the second sentence for total clarity it should read "You must make it after the verdict," and it seems to be saying "And you may not make it before the verdict."

HONORABLE C. A GUITTARD: That's right.

MR. LOW: You may or may not. What I'm saying is that --

MR. O'QUINN: To make sure we

don't waste the judge's time you must make it after the verdict; and Buddy is making double clarity, and you may not make it before the verdict. Is that right?

MR. LOW: Exactly.

HONORABLE C. A. GUITTARD: I suggest some language that may be not necessary, but I think may clarify the matter. The first sentence "may be made before or after the verdict." The second sentence, a claim that is factually insufficient to support the jury's answer to a question, or that the answer would be against the great preponderance and weight and preponderance of the evidence. Instead of "must," say "may only be made after the verdict," mandated to make that objection after the verdict.

MS. SWEENEY: You're right.

HONORABLE ANN TYRELL COCKRAN: So the first one would be "may be made before or after the verdict." And the second would be made -- "only be made after the verdict."

MS. SWEENEY: Yes.

HONORABLE C. A. GUITTARD:

Yes. Instead of "was" you say "would be" or "has to be."

MR. SOULES: Let's hear from Mike since he has the task force history, and then Hadley Edgar.

MR. HATCHELL: Well, just so everybody understands why the sentence reads the way it does, and I have no objection to what Judge Guittard was saying, we are trying to avoid the claim that if you do not make your no evidence claim before the verdict, you have waived it. And as long as we preserve that, you're preserving the integrity of the tack force's recommendation.

MR. O'QUINN: It seems like that would accomplish this.

MR. HATCHELL: I don't know whether it will or not, but I just want you to know what we were trying to do.

MR. SOULES: Well, Mike in addressing that if it says "may be made before or after the verdict," do you see that -- what do you see there that may be a problem?

MR. HATCHELL: I think it's probably covered. I think it's probably

okay.

PROFESSOR EDGAR: It certainly is an improvement over the way it now reads and the way it has read previously; but if you really want to help the lawyer to know when he or she can or must do things, then why don't we put in there with respect to legal insufficiency that it may be made either by directed verdict, motion for directed verdict before or after your case in chief, or after the parties close, or by a motion from the judgment NOV or motion to disregard, just set them out in there. Those are the times you do it.

MR. SOULES: But also you can object to the charge on that basis too and preserve it.

PROFESSOR EDGAR: And also objection to the charge. That's another grounds. And then with respect to factual insufficiency put in there "can only be made after the verdict by a motion for new trial," and that way there isn't any doubt about what you have to do and when you can do it or when you must do it, if that's what you want to do,

if you want to clarify it.

MR. SOULES: Let me get Judge McCloud on that and then Pat Beard.

CHIEF JUSTICE AUSTIN MCCLOUD: The only thing, I would be a little concerned about that because we have some case law out there to the effect that you can raise a no evidence point even at motion for new trial. Now, you wouldn't be entitled to a rendition, but you would be entitled to a remand if the Court bought it.

PROFESSOR EDGAR: You're right.

CHIEF JUSTICE AUSTIN MCCLOUD: So I'd be a little bit concerned you're maybe getting a little bit too specific unless you include every thing. It bugs me a little bit.

PROFESSOR EDGAR: It depends on whether we want to do that or not.

CHIEF JUSTICE AUSTIN MCCLOUD: Yes.

MR. SOULES: Buddy Low, and then I'll get Richard.

MR. LOW: What I was

suggesting, I thought that maybe what the committee was trying to do is cut down on all these lengthy objections, because I have never found that objection. You can call it. You can hit the evidence from topside to bottom, insufficient, factually unsupportable, all those things. Whether the trial judge can do something about it or can't I've never found those objections to really help the judge. He's thought about that; and I thought maybe what you were trying to do is say in all those evidence objections you can just wait until after the verdict to make motion for new trial or something. If that wasn't the intent of the committee, then that's fine.

MR. HATCHELL: That is a subsidiary intent of what we are trying.

MR. LOW: But if that were true, then you could say that all of these claims tell the lawyers don't make them now, make them -- they may be made after the verdict, all of those evidence claims, and then you get out of the box of "Wait a minute. It's factually insufficient. Is that no evidence or against the great weight," and

you eliminate all that line. If it's about the evidence, then and as a practical matter lawyers are still going to say, "Judge, they don't have any evidence on that point." But to preserve error it looks like the evidence points you ought to be able to raise those. Maybe I'm wrong.

MR. SOULES: This is permissive of raising all those after verdict.

MR. LOW: I know. But, see, but is doesn't say that you also must -- like where it says "must be made after verdict," all right, that doesn't tell me. That tells me I have got to do it then, but it doesn't tell me I don't have to do it before verdict.

MR. SOULES: Judge Guittard has suggested on that and said "may only be made after verdict." Is there any opposition to that piece of it?

CHIEF JUSTICE AUSTIN MCCLOUD: Yes. I have a little bit. I'm still concerned about that, because we still see lawyers who in their motion for judgment NOV will have a no-evidence attack and then

they'll have a great weight attack, a factually insufficient attack; and of course as you would read this you might think, "Well, it's after the verdict, and we'll file a motion for judgment NOV, and I'm going to attack it because it's against the greater weight and preponderance of the evidence," and that's not improper. Because of other substantive and procedural law that is not a proper place to have that.

And I think it can be confusing. You said "must be made after the verdict." Well, that doesn't help you even though it's after the verdict if it's a great weight. What you're really saying is "Go look at the new trial rule, and you better have it in your motion for new trial." I'm a little bit concerned about what we're doing here. We may be giving some mixed signals.

MR. SOULES: We may be then in this second sentence expanding where you can preserve factual insufficiency --

CHIEF JUSTICE AUSTIN MCCLOUD: That's correct.

MR. SOULES: -- and moving it

to anything after the verdict.

CHIEF JUSTICE AUSTIN MCCLOUD: That's right. Someone might take that position. They'd say, "Well, this rule says that I can do it after the verdict. That's what the rule says." But I think other rules will say, "Yes, you can do it, but the court cannot grant you anything there. It can only grant you a new trial."

MR. SOULES: Well, would it help to say "may only be made after the verdict in a motion for new trial"?

HONORABLE C. A GUITTARD: Right. I think that's good.

CHIEF JUSTICE AUSTIN MCCLOUD: I think that would clarify it.

MR. SOULES: That is the only place that you could raise that.

CHIEF JUSTICE AUSTIN MCCLOUD: That is the only place.

MR. HATCHELL: No.

MR. SOULES: Mike says "No."

MR. HATCHELL: It's arguable. There is this amorphous rule called motion to correct, modiy or reform the judgment.

HONORABLE F. SCOTT MCCOWN: Aren't we confusing "when" and "how"?

MR. HATCHELL: You may be able to make it in there.

CHIEF JUSTICE AUSTIN MCCLOUD: Maybe so.

MR. SOULES: Do we want to permit a broader preservation of error by saying anyplace you put insufficiency after the verdict it's considerable?

CHIEF JUSTICE AUSTIN MCCLOUD: You'll run into a lot of other problems if you do.

MR. SOULES: Okay. Scott McCown.

HONORABLE F. SCOTT MCCOWN: This is just a "when" rule. It's not the "how" rule. The "how" rule is the motion. Post verdict motions; and again I think that we need to keep our rules simple, not try to put the entire body of rule in every rule. This is just the "when" rule. Other rules are the "how" rule; and I think Judge Guittard's suggestion solves the problem perfectly. It gets to the task force point exactly, and I

don't think there is any opposition to it, and I think it's all we need to do.

MR. HATCHELL: That was the reason we wrote it the way we did.

HONORABLE F. SCOTT MCCOWN: Right.

MR. ORSINGER: I'm troubled by Hadley Edgar's discussion simply because I think it may take a lot of debate for us to figure this out, but in addition to the motion to modify judgment which may be a proper place to preserve legal sufficiency a motion for remittitur for excessive damages probably preserves factual sufficiency, and we haven't mentioned that so far. And since this includes the party with the burden of proof establishing something as a matter of law, a motion to enter judgment when the record closes may also preserve error on the fact that you establish something as a matter of law.

And before we start running a laundry list of the only ways to preserve sufficiency of the evidence attacks we better set aside a few hours for us all to sit around

and argue about what they are. I think that's a very dangerous road to go down, and I would rather just go with Judge Guittard's suggestion about when you can preserve error and then let's let everyone figure out later on under different rules how you do it.

PROFESSOR ALBRIGHT: I think Judge Guittard's language is fine, but just as an alternative for the committee or whoever to think about what if you said "A claim that there was factually insufficient evidence or against the greater weight and preponderance of the evidence shall not be made as an objection to the jury charge"?

HONORABLE F. SCOTT MCCOWN: Luke, Judge Guittard's suggestion is elegant and parallel in both sentences, and we've got to trust these lawyers to be able to understand English at some point without loading up the rules.

MR. SOULES: Okay. As I understand where we are now we would change the first sentence to say "may be made before or after the verdict."

MS. SWEENEY: Right.

MR. SOULES: We would delete the words "for the first time."

HONORABLE F. SCOTT MCCOWN: No.

MR. SOULES: Yes. And insert in the place of that "before or after the verdict. "

MS. SWEENEY: I thought we were leaving "the first time" and saying "for the first time before or after."

MR. SOULES: What does "for the first time" add? What does that do?

MS. SWEENEY: So they don't feel like they have to do it before and after.

MR. O'QUINN: "Or."

MR. SOULES: What you're saying is we ought to say may be made one time and only one time.

MS. SWEENEY: Well, because otherwise you're going to have people saying "If I don't do it before," you know to cover themselves they're going to keep doing it before and then figure, "Well, I can do it after also and clean it up" or whatever.

MR. SOULES: We're not getting a record here. Judge Cockran.

HONORABLE ANN TYRELL COCKRAN: No. That's all right.

MR. SOULES: Buddy Low.

MR. LOW: I move to accept the language of Judge Guittard and move on.

MR. SOULES: All right. Well, let me state it so that we have it right. That's what I'm trying to do here. As I'm understanding this in the first sentence we would delete the words "for the first time" and put in the place of those words "before or." Okay. And then in the second sentence we would delete the word "must" and substitute there "may only be made after the verdict."

HONORABLE C. A. GUITTARD: That's it.

MR. SOULES: All right. Any other discussion on that?

MR. SPARKS: Just a practical question, Luke. I don't do a lot of appellate work, and so it gets to be this problem: I'm if front of a judge and I really do believe there is no evidence or a factually

insufficient evidence, Judge McCown's, and so I object. "Judge you shouldn't give them that issue, because there is factually insufficient evidence here." So he says, "Well, we can handle that later. I'm just going to go ahead and give it." That's what most judges in real life do. So after it's over I don't include a factual insufficiency point in my motion for new trial on whatever in my appellate work. I've lost it?

MR. HATCHELL: Yes.

MR. SPARKS: So now you've made a read good trap for the unaware.

MR. HATCHELL: Read the case of Owens vs. Rogers which has been on the books for 25 years.

MR. SPARKS: I said I don't do much appellate work.

MR. SOULES: Pardon me. As I'm understanding the way that I just restated this, not that it's mine, but the way I restated it, it does not change the law.

MR. HATCHELL: It does not.

MR. SOULES: It does not change the law.

HONORABLE F. SCOTT MCCOWN: Could I make a point here on the term "the first time." I agree that the way that it's restated is better draftsmanship, and that's fine with me; but this is a good example of the usefulness of comments, because the present Rule 279 says "for the first time." We're deleting the words "for the first time." The Federal Rule requires for an NOV a directed verdict. Texas has already rejected that practice and we're different than the Federal Rule; and this would be a useful place for a comment to flag that by deleting the words "for the first time" we're not adopting the Federal practice.

MS. SWEENEY: Then put them back in.

MR. SOULES: Put them back in.

MR. SOULES: So we don't delete "for the first time" and say "may be made for the first time before or after the verdict." All right. Go ahead, Hadley Edgar.

PROFESSOR EDGAR: That's confusing. Say let's forget about the words

"or after" and just look at the word "before." Then you're going to say "the first time before verdict." Does that make sense?

MS. SWEENEY: Sure.

MR. SOULES: For legal unsufficiency, yes. Doesn't it? What do you see about that that doesn't make sense, please?

PROFESSOR EDGAR: Well, in my mind if you do it for the first time in many instances you are going to be doing it before verdict. If you -- it seems to me like those two terms are in some way duplicitous; and I think you're far better off just saying "before or after verdict." I think "for the first time" doesn't add a thing on earth and might be confusing.

MR. SOULES: The thing that bothers me about "for the first time" is do you have to do it again --

MR. SPARKS: That's what I --

MR. SOULES: -- in order to preserve error? And I don't know the answer to that. It's just a question.

HONORABLE C. A. GUITTARD:

Mr. Chairman.

MR. SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: Mr. Chairman, I think I agree that it's better to delete "for the first time," because you can make the claim that there is no evidence to support submission of the issue in a sense but a motion for directed verdict, and that may be for the first time. I guess "may be for the first time" -- "may be made before or for the first time after the verdict" might be a solution to it.

MR. SOULES: Discussion? "May be made before or for" --

HONORABLE C. A. GUITTARD: No. I take that back.

MR. SOULES: Now, Judge. Go ahead. Pardon me.

HONORABLE C. A. GUITTARD: "May be made for the first time after the verdict," it indicates it might not be made for the first time before. I think maybe just deleting "for the first time" would be better.

MR. SOULES: Okay. Judge

McCown.

HONORABLE F. SCOTT MCCOWN: I think deleting "for the first time" and just going with "before or after" is plain English and captures what we want to do. The only point I was trying to make is "for the first time" has a history to it, and the history is it was the express rejection of the Federal Rule in favor of a Texas alternative, and that's the kind of place where comments are useful.

HONORABLE DAVID PEEPLES: But Rule 301 allows for judgment NOV or to disregard after verdict; and maybe we can just add a clause there that says even if you didn't make that motion before verdict. In other words, you didn't have to do anything before a verdict to preserve your right to move for judgment NOV. That's what we're talking about, isn't it?

MR. SOULES: Well, I think that Richard has stated a problem he sees with that. Richard Orsinger.

MR. ORSINGER: Maybe I'm just too familiar with it, but I don't see any

confusion here at all. If you say you can do it before or after, that means you can do either one, the other, or both; and I don't see why we've got to have all kinds of sentences to say that you can do one, the other or both. "Or" means one or the other or both and means both. That's a convention we're all familiar with.

I really don't think this is confusing, and I think some of the proposals we're writing are confusing.

MR. SOULES: Okay.

MS. SWEENEY: Is there any sentiment to do "before and/or after"?

MR. ORSINGER: Let's make it disjunctive.

MR. O'QUINN: There's sentiment, but --

MR. SOULES: It would say "be made before or after verdict," and the other one would be "may only be may after verdict," and that's the proposition. And Judge McCown, if you could give Paula some language that you propose for a comment by letter or make a note today and give it to Paula, she and her

subcommittee can consider whether that's something they want to propose, and we can talk about that again.

Okay. Now, as stated those in favor show hands. Okay. Those opposed. I believe that's unanimous.

Anything else now? Is there anything else that anyone sees to give direction to Paula's subcommittee? Paula, it is in your good hands. Thank you.

MS. SWEENEY: When is our next meeting?

MR. SOULES: I think January. Probably not until after the holidays. Maybe this is a good time to talk about that. It looks to me like with the workload that we've got that we need to meet every other month until we get our work done. Once a month we've tried before, and it was just impossible to get a good group here; and to some extent this is going to require those of us in trial or those of us who get assigned to an oral submission in appellate courts to advise judges that we need to be away for a day, for a Friday.

I have found the courts to be receptive to that, very receptive to that when it has to do with important CLE work as I know Richard has and this kind of work, but we need very much to have a full contingent here. Otherwise we -- you can see the debate. I don't think the debate when it's resolved has ever come down to a partisan decision or even a division on partisan lines as to how these rules ought to read.

The problem is that if there is a contingent of partisanship on one side and the others are not here, we don't hear the other side, and we don't get the benefit of their perception. And this committee is made up of lawyers from rural communities, lawyers from urban communities, professors and judges, lawyers that primarily practice in the Plaintiff's personal injury area, lawyers that primarily practice in the defense personal injury area, lawyers that are business lawyers, a court reporter, district clerk, justice of the peace, county clerk; and we really need the input from the whole committee to get a good work product to accomplish what

the court wants us to accomplish.

I think once a month is too often, but I think if we meet twice a month (SIC) every other month, we can probably get this --

MR. SUSMAN: Once a month?

MR. SOULES: Every two months. Thank you. Every other month is probably enough for us to get the job done. And we've got the -- most of these materials we now have and there can be some review, and the subcommittees can meet in the interim which may mean that there is a meeting every month because the subcommittees may need to meet. They can meet by telephone, or they can meet some by correspondence where the agenda is short in the subcommitte, or in some cases they may need to meet face-to-face.

What do you-all think about the prospect of meeting every other month? Joe Latting.

MR. LATTING: I like the prospect, but I was going to suggest that we might perhaps start meeting in February, because I don't think much is going to get met

about rules in this month of December. I don't think my subcommittee can get together and do the work we need to do and be ready to come back and present it in January.

MR. SOULES: Well, if your agenda is not ready in January, we've still got two volumes of materials to go through some of which may not take a lot of attention.

MR. LATTING: With that understanding then.

MR. SOULES: And Paula's group may or may not be able to meet.

MS. SWEENEY: We'll be ready.

MR. SUSMAN: I think it's a good idea that we meet every other month, but I agree we probably ought to begin meeting early January and pick the same Friday every other month, like the first Friday of every month beginning in February every other month so it would be the first Friday in February, the first Friday of April, the first Friday of June or however it goes, and you'll know to put it on your calendar when you know what Friday it's going to be.

MR. SOULES: That's my question.

MR. SUSMAN: That's what I would suggest.

MR. SOULES: I think we ought to set it on a set schedule. Is Friday a day that is better than some other day?

MR. LATTING: Yes.

MR. O'QUINN: Yes.

MR. SUSMAN: Yes.

MR. SOULES: In order to really get our work done I think we also need to meet on Saturdays. This committee has attempted to meet all day Saturday on a number of occasions, and we wind up really losing membership, and those are members that some of who are not here any longer. So I need to get direction for these people from you people whether you feel that we can give this a full Saturday when we meet rather than just half a day on Saturday.

MR. LATTING: No.

MR. SOULES: Those in favor of half days on Saturdays show hands. Okay. That's almost unanimous. So we would meet

Friday and Saturday morning. Start time worked very well this meeting at 8:30. That meant that a lot of people had to come in on Friday night, but when we've had the start time any later it seems to encourage people to come in that morning and many of them don't get here until 10:00 o'clock because they catch flights from wherever or come in.

Is 8:30 a reasonable start time?

MR. MCMAINS: Yes.

MR. SUSMAN: Yes.

MR. SOULES: Anyone opposed to that? Okay. Which Friday? Shelby Sharpe, you had your hand up.

MR. SHARPE: Luke, could I suggest that we have our next meeting the last Friday in January. I think that will give us sufficient time. It will also give us at least a week up on going to February. Going January, March, et cetera I think would be better than waiting all the way to February.

HONORABLE PAUL HEATH TIL: Agreed.

MR. SHARPE: I'd like to see us

go the last Friday in January.

MR. SOULES: Does anyone have a calendar?

MS. WOLBRUECK: January the 28th.

MR. SOULES: Somebody look and see whether the last Friday or the next to last Friday seems to conflict with more holidays than that other date.

MR. SHARPE: It should not.

MR. SOULES: The 28th if it's the last Friday all year long, is that going to conflict with holidays worse than next to last Friday?

MR. SHARPE: It's not going to hit Easter this coming year, so the last Friday of the month should be clear.

MS. SWEENEY: Luke.

MR. SOULES: Paula Sweeney.

MS. SWEENEY: I'm new to the committee, and I don't know the history. But has there ever been any sentiment expressed to moving to Dallas and Houston periodically as opposed to everyone having to come to Austin? It's easier to get to those cities, and it's

more attractive to a lot of folks to every once in a while be at home and make an 8:30 meeting than be in Austin making one.

HONORABLE F. SCOTT MCCOWN: I think the meetings ought to be in Austin.

MR. O'QUINN: History. Judge, history.

MR. SOULES: We haven't tried that with this committee. I know that other bar committees off and on have tried that, but we seem to get more attendance in Austin. Also I think it's important to have the opportunity for the judges to come and participate or listen, and this is certainly more convenient for the Supreme Court if they want to come.

Over the years I think the committee's work has been more understood and more acceptable to the Court the more members of the Court that come and participate or listen for a while; and I think they get an impression, better impression of what we're doing, and so that may be a plus for doing it in Austin.

MR. MCMAINS: Luke, the only

one is probably if you start in January, then you wind up in May, January, March, May. That's Memorial Day weekend is the only one that probably --

HONORABLE PAUL HEATH TIL: Also if you go up through the end of the year, you'll end up in November a year from now it will be the wrong weekend too. You need to be the third week.

MR. SOULES: Does that conflict with Thanksgiving in November?

HONORABLE PAUL HEATH TIL: It sure does.

MR. LOW: Why don't you give us a schedule, and if a holiday conflicts, substitute it in, and we can just have our schedule amended.

HONORABLE PAUL HEATH TIL: The third Friday doesn't conflict.

MR. SUSMAN: I just I mean there are a lot of new subcommittees and there are a lot of new people and there's a lot of work to be done. Now, we're going into Thanksgiving, and Christmas, you know. December is out; and my concern is if you make

it too early in January, I mean, the subcommittees will not have an opportunity to meet and function truly as a subcommittee and do work. And I don't think particularly we have a big subject with discovery coming up that everyone is interested in, and that task force has not even finished its work, and I would suggest we begin the first Friday in February which gives us one more week.

HONORABLE PAUL HEATH TIL: Then we get caught with the month thereafter. Because every other month that's just going to mess up everything anyway. Then we'll end up in December.

MR. SUSMAN: I don't understand that. The first Friday.

MR. LATTING: What is wrong with that?

MR. SUSMAN: I'd like to go to all first Fridays, the Friday in February, the first Friday in April.

MR. SOULES: We're either going to the third Friday of the month which will commence in January or do it the first Friday of the month which is going to commence

in February. Okay.

HONORABLE C. A. GUITTARD: Leave it to the discretion of the Chair.

MR. SOULES: No. We're going to decide it now. Those who favor the first Friday of the month beginning in February which will put us on Good Friday in April. That will put us on Good Friday; is that right? Let's do it the third Friday of the month. Apparently that doesn't conflict with any holidays all year long. January 21st, and then Holly will send everybody a notice of the meetings, and we'll set them that way. Justice Hecht.

JUSTICE NATHAN HECHT: Several of you have asked about reimbursement of your expenses; and you may apply to the Bar for reimbursement of those. We don't usually have the forms here, and I know many of you historically have paid your own expenses. Used to you had to. In fact we had to pay even the cost of materials which is a very significant cost; but we asked the Bar to pay for this and they agreed. So you can apply to the Bar for reimbursement of your expenses as

you would an ordinary committee meeting.

MR. SOULES: Holly, when she sends out the schedule of the meetings for the year, will also send an expense. You can get it from the State Bar, and we'll send you the expense reimbursement form that you may submit if you wish. Should that go directly to the Bar?

JUSTICE NATHAN HECHT: To the Bar.

MR. SOUES: Should it be addressed to any individual?

JUSTICE NATHAN HECHT: On their form they have who it's supposed to send it to.

MR. SOULES: Okay. David Beck.

MR. BECK: Luke, could I make a suggestion? I guess, and I know this meeting is not typical because you have the old committee, the new committee. You've got the task force proposals, but I really think it's -- our subcommittee is really backed up on suggestions made by lawyers; and I really think we need to do something to try to cover

as much material as we can at the meeting.

What I would suggest is if the subcommittees who are dealing with whether to amend specific rules to deal with discrete problems can somehow circulate something to all the members of this committee before the meeting, and I would suggest that the way to do it is set forth what the perceived problem is, what the rule is, and what the suggested amendment to the rule is so that the subcommittee chairman at least before we ever get to our meeting has at least some rough sense of what this committee wants so we don't spend, you know, an unusual amount of time discussing three words in an amendment to Rule 18a, for example.

I just think it would make things go a lot quicker when dealing with just discrete problems. I'm not talking about, you know, conceptual problems dealing with discovery and things like that. I don't know if that makes sense or not, but I sure would suggest it.

MR. SOULES: That is precisely the way the subcommittees are supposed to

operate, but you only need to send me your report, and I'll reproduce it, and --

MR. BECK: And send it to everybody on the committee.

MR. SOULES: -- and send it to everyone. Okay. What we will want -- and this is addressing David's point -- what we will want from each subcommittee is for the committee to go through, subcommittee to go through the materials that are in these volumes and review them and prepare a change that would address whatever the issue is that's been raised whether you like it or don't like it so that we can look at it in a form that we could act on it if the committee likes it; and that has really sped up the process before.

In other words, you will give us a red-line version of the existing rule with a change that addresses whatever has been requested, and then you can recommend that we don't do it or that we do do it; and then if we decide to do it, we'll have the draft there, and we may be able to use it just the way it is or with slight change, and then that

will be history we can go on. That will be something we can put into our report for the Supreme Court, and be past that rule and on to something else.

If we just take the letters or the inquiries that come in and address them here at this committee and we have no drafting done, then that goes to the next meeting which is the first meeting at which we have some drafting to consider, and then we go back through a lot of the same debate. So if you understand what I'm saying, we need a red-line version from the subcommittee of every rule addressing ever inquiry; and some of that is makework, because some of these suggestions are really not very significant or are really misguided, but they are few. Most of them have some substance and will need some drafting.

MR. LATTING: Where do we get those?

MR. SOULES: This is just my set of materials that Holly Bates stamped and put them together.

MS. DUDERSTADT: That's

what's in your big volume.

MR. SOULES: That's these two books (indicating).

MR. LATTING: Okay.

MS. DUDERSTADT: It comes from everywhere.

MR. SOULES: Volume I and Volume II. That's your subcommittee agenda and your rules here and stuff, that 13 is out of 114; and that will be in Joe's work, because it's what the task force dealt with.

HONORABLE C. A. GUITTARD: Mr. Chairman.

MR. SOULES: Mr. Guittard.

HONORABLE C. A. GUITTARD: Can you give us some indication of the sequence of the task force's reports that you're going -- the order in which you'll probably take them up? I think the appellate rules will have if we give attention to these new suggestions which our committee has had before, we're not going to be able to complete or present suggestions and go through those and add them to the report in January. And so I would like some guidance as to when our

report will probably be reached for action by this committee.

MR. SOULES: Given what you've just said, I think that probably would be in the March meeting.

HONORABLE C. A. GUITTARD: Okay. We'll shoot for that.

MR. SOULES: I'm hopeful that we will have the discovery task force report. I'm told it will be here in three weeks; and I can get that to -- it's you're committee, isn't it, Steve, and you-all be prepared to report on that. It's going to be a general discussion I know, because it's going to be broad. We'll take the broad subject. We'll take that up as we've taken up sanctions and the charge.

That will be probably first on our agenda in January. Then if your report is ready, Judge Guittard, we'll do it. If not, we'll postpone --

HONORABLE C. A. GUITTARD: We can have at least a part of it ready.

MR. SOULES: -- we'll postpone it to March. I do think it's

important that whatever your subcommittee reports on that it include the suggestions that have come from whatever quarter and not work on it as it now is and then have to revisit because we later take up what has come from the public.

And that's -- and Bill, can you work with Judge Guittard to get that done? You're going to do the TRAP Rule?

PROFESSOR DORSANEO: I think he's planning on me working on that with him.

MR. SOULES: And I want to get Bill on today for a discussion at least of where he is with his work. So bringing this to closure, we would start with discovery. Then if the appellate materials are ready, we'll deal with those. If they're not, we'll put that off until March. If the sanctions materials are ready, we'll deal with those. If not, we'll put them off until March. We'll certainly come back to the charge rules. Paula, you'll have those ready for us in January.

MS. SWEENEY: No problem.

MR. SOULES: No problem. And

then we'll just begin with Rule 1 and start through the book, except we will have already covered discovery and subject to what I've already said. Steve Susman.

MR. SUSMAN: One question of clarification. The discovery task force is still working. There is a discovery subcommittee of this committee many of whose members are not on the task force. Does it make sense for -- I mean, what do you want? The subcommittee to have no involvement with the tax force now, or should we come to them and say, "Well, we'll go to your meetings" to kind of for information, or just wait until they report and then? I mean, what is the drill given the fact that they're still working?

MR. SOULES: Given the progress of that committee I think we better leave it alone and let it come to closure without any involvement from here. And as soon as I get that report I'll get it to you, and you may or may not be able to have a report in January. It will probably be very difficult, but we can at least talk about the

task force report.

MR. SUSMAN: They said three weeks?

MR. SOULES: That's what they say. But there have been some -- that has been a little bit slow, so I don't know what we'll have, but at least we'll have the task force report. Hopefully David Keltner will be here. We can talk about it. And if that's all we do is get the task force report and talk about it, that should give you guidance to go forward from there.

Okay. Any other questions about logistics? David Perry?

MR. PERRY: Let me comment, Luke, that we have got some drafts of the discovery task force work. Some of it is almost final, and some of it is pretty rough; but I'll just make copies of it, Steve, and send you what we've got so you can be looking it over and starting to think about it.

MR. SOULES: Is that what I have here?

MR. PERRY: I don't know, because I haven't seen what you have got.

MR. SHARPE: That's court rules. Stuff we've done so far.

MR. SOULES: The court rules subcomittee on discovery?

MR. SHARPE: Yes. That's what it's done so far on things it's considering.

MR. SOULES: Okay. Shelby's committee for the State Bar has some materials that we didn't have in the book, and I'll pass these around. And Steve, these are going to be mostly --

MR. SHARPE: This is very preliminary stuff on discovery.

MR. SOULES: Holly, will you pass those around and give them to the right people?

Okay. Now, we have got a sign-in list. Has everyone signed up for yesterday that was here yesterday and everyone signed up for today that was here today?

Pat, we're going to meet on the third Friday beginning in January every other month.

MR. SUSMAN: The dates for your information are March 18th and 19th, May 20th

and 21st, July 15th and 16th; and then we move to September, but I didn't get September.

PROFESSOR EDGAR: This might be a premature question but kind of ties in with this as far as the Bench and Bar generally are concerned. Does Justice Hecht have any idea about what the Supreme Court's thoughts are with respect to periodic publication of these rules, or does the Court envision maybe waiting until you're through with your entire project and publishing one change, or what is the Court's thought on that, if it's thought about it at all?

JUSTICE NATHAN HECHT: Three of us were on a panel for the appellate section back a month or so ago and were asked that very question; and the three of us on the panel seemed to think that if there are areas which we agree on fairly early on and would be helpful and ought not to be delayed until the end of a lengthy process which may result if we undertake Bill's recodification proposal, then probably the Court would want to go ahead and do those.

If on the other hand it's all

sort of funneling together and it's not going to take very long and we may know something by the end of next year anyway, then it would probably be better to delay it and do it all at once; and I think we can't make up our minds on that until we see how the committee goes along. But we're open to doing it in stages, but we also may want to just do it at one time.

MR. SOULES: Okay. Robert Meadows.

MR. MEADOWS: One housekeeping question: Since we're going to have a set schedule throughout the year, would it be appropriate to approach the Court about getting an order that would protect us for each of those dates?

MR. SOULES: After all, they are the Supremes.

JUSTICE NATHAN HECHT: Well, I'll mention it to them. We have had this request come up a time or two in the past with respect to the president of the State Bar, and I can't remember all of our discussions on that subject, but I'll ask them. We also have

Federal State Relations Committee, a formal committee that operates in Texas, and it has district judges on it and two members of our court, and some Federal district judges and a couple of members of the Circuit, and we may want to take it up with them too. I don't think it would be any problem with them generally speaking if that's what we -- if we wanted to do it ourselves I think we'll just have to talk about it and see. I can't tell you for sure.

MR. SOULES: How many feel that's needed?

JUSITCE NATHAN HECHT: I would hope that the judges of Texas would accommodate us on this without anything formal.

HONORABLE C. A. GUITTARD: Just say the Supreme Court looks with favor upon it.

JUSTICE NATHAN HECHT: Yes.

HONORABLE ANN TYRELL COCKRAN: Let's also state that the trial judges also look with favor that you tell us in advance instead of the day before you're going.

JUSTICE NATHAN HECHT: The problem in the past has been we don't want any games-playing with the district judges and particularly with our Federal brothers and sisters, and so we have kind of tried to stay out of it in the past.

MR. SOULES: Another thing that I found helpful is to request if I'm going to be in trial, to talk to the other lawyers and explain what it is, what the need is and ask them if they'll agree to, if they will permit me to submit an unopposed motion to be off on Friday even during trial. I have never had anybody decline; and when that's submitted by a letter or by a motion to the trial judge I've never had a trial judge say no. So maybe that's an idea that may help.

Okay. Bill, why don't you give us some introduction and understanding about your project. This is in a book. I don't know whether you have all gotten your copies. It looks like this (indicating). It says Report Of Texas Supreme Court Task Force On Rules of Civil Procedure. Has everybody got one of these?

PROFESSOR DORSANEO:

Simultaneously with the appointment of the task forces on discovery and the task force on the jury charge the Court appointed a task force to consider the desirability and feasibility of recodifying the Texas Rules of Civil Procedure with or without substantive change. The members of the task force met on several occasions, and naturally the first thing that we did was to take a look at the organization of the Texas Rules of Civil Procedure the way that they had been structured originally.

You have or don't have the report that we have submitted. You'll note if you have it and even if you don't that the general original organization has been impaired because of the adoption of the appellate rules. The overall organization of the Texas Rules of Civil Procedure was an organization that began with general rules, then went to rules of practice in district and county courts, and then the third and fourth parts involved practice and procedure in the Courts of Civil Appeals and the Supreme Court

respectively.

When we adopted the appellate rules a large hole developed in the middle of the procedural rules beginning at Rule 330. In addition to that the adoption of the appellate rules meant with respect to the overall organization that the rulebook now begins with a general rule section in Part 1, and then in Part 2 Rules of Practice in District and County Courts another general rules section such that we have two general rule sections adjacent to each other although one of them is a subpart of the second part that both deal with the practice in district and county level courts.

These rules all together number approximately 30, so we begin our rulebook with 30 general rules in two sections. The general rules in these two sections of general rules cover a multitude of topics including some provisions concerning costs which are dealt with elsewhere, some provisions concerning clerks which may correspond to provisions in the rules elsewhere, some provisions concerning counsel,

leading counsel, and a variety of identifiable matters.

We believe organizationally at the beginning part of the rulebook that something could be done better to organize the general rules into a more workable unit. The specific suggestion is to take most of them and put them in a part of the rulebook at the back that deals with a variety of specific subjects, counsel, courts, clerks, court reporters and court costs such that if you have a general rule, for example, that relates to costs or security for costs, you could find it without looking through all of the general rules. Moreover, these types of rules tend to be relatively technical, particularly the ones concerning clerks, and it seemed to us that they would go better at the back of the book rather than at the beginning of the book.

Maybe this is just an example of the overall conclusion that you reach when you look at the Texas Rules of Civil Procedure as they exist right now, because in addition to the adoption of the appellate rules since their promulgation, the Rules of Civil

Procedure, more than 50 years ago, there have been a number of other things that have happened. We have revised and changed, or the Court has revised and changed rules concerning venue practice, concerning pretrial discovery, concerning the jury charge which we're still working on, concerning findings of fact in Bench trials. We have modified our procedural rules with respect to how you serve papers including notices on other parties.

Parenthetically I might note that that information is contained in this general rules area without being put with the service information that relates to other things. Rules concerning post judgment motions, durations of trial courts plannery power, and other things, even the adoption of a special appearance practice, summary judgment practice, mental and physical examinations. Even the adoption of the interrogatory rule came later.

So we've had a lot of things that have happened in the period of time that we've had this rulebook. A number of rules have been repealed for a variety of reasons.

Some because of the adoption of the Rules of Civil Evidence, some because we no longer have a practice of appealing from county level courts to district courts. Yet other rules have hung around even though they probably should have been repealed because in the case of some of them they relate to those appeals from county level courts to district level courts.

So from the standpoint of an analysis of the rulebook that we have today it looks like there have been so many changes to it that it's about time to try to organize it in a more coherent fashion. It's just been affected by a lot of ajustments over time. And if you take the time to look at individual parts of it, I think you'll probably believe that some work would make the rules better than they are right now. It's been caused by a lot of the changes that have transpired over time.

Some of these changes have been of larger scale changes than others. Changes in discovery practice have been not just adjustments. They have been major

changes from a conceptual standpoint. In our rulebook now we don't even have a section that's called "Discovery." We have the paper discovery rules in a pretrial section, and then we have the deposition rules in a section called evidence and depositions that contains some evidence rules, but not too many because most of them have been moved to the Rules of Civil Evidence or repealed.

We have in this developmental stages continuing developmental stages activity concerning pretrial practice, pretrail orders and what role they play in the practice; and although that was in the original game plan, it's not really in there in the same fashion with the same attitude that we might take as things move along.

But the bottom line is with respect to the rules of practice in district and county level courts our conclusion was that they could be reorganized more coherently in an overall fashion, that they should be reorganized at some point into a different, more modern pattern, and that frankly the organization, the overall organization of the

Federal Rules of Civil Procedure was serviceable; and that's what we tentatively recommend as a way to organize the rulebook overall.

That would mean with respect to practice in district and county level courts that we'd have a section talking about commencement of the action, service of process, and service of pleadings, motions and orders, a section on pleadings and motions rather than a section merely on pleadings which doesn't mention motions leaving that to the coverage of the general rules which our current rulebook does, a section on parties. We have a section on parties, but a better section on parties perhaps could be put together, a section or two sections on discovery and pretrial procedure depending upon how you divide it up, a section on trial, a section on judgments, motions for judgment and new trials, and then sections thereafter dealing with provisional final remedies, special proceedings, and I'll need to get back to those in a minute, a particular section on counsel, courts, clerks, court reporters,

court records and court costs along with some closing rules.

Not so much of a big deal to reorganize somewhat the particular subparts of the rules of practice in district and county level courts, but we could improve the overall rulebook by doing so.

When you start looking at individual sections and in specific rules you get -- I think at least I get, and I think the committee members and other people who have looked at it get a clear motivation to do something. The original rules of procedure pick any place, almost any place are short, sometimes one-sentence, one-paragraph rules with relatively uninformative subtitles with the exception of the things that we've worked on over the years, venue and discovery, for example. Most of the rules numerically were copied from the Revised Civil Statutes of 1925 verbatim. And if you went and checked, I think you would find out that most of those were copied from earlier codifications without change.

So we have just copywork up

through 1993 of short rules, uninformative titles, and something that looks very different from Rules of Procedure that we've picked up later such as the discovery rules and the venue rules. And what we believe as a task force is that our rulebook would be a lot more user friendly, it would be easier to find things if some of the district rules were combined together when they deal with essentially the same subject, and if the titles would be rewritten and made into subtitles such that our rulebook would look more like the rules that we did adopt recently or the rules that we copied initially from the 1937 version of the Federal rules, for example, the rules concerning parties, joiner of claims and parties.

I guess bottom line the task force concluded that for a large part of the rulebook we have things that have been done copywise in the same way for more than 100 years, and there hasn't been an attempt really to examine them for anachronistic commentary, bad manner of presentation, redundancy, lack of clarity, or any of the kinds of things that

have been done for much, if not most of the rest of the Revised Civil Statutes of 1925 during the recodification process.

From my perspective perhaps the most important code has received the least attention in this respect. The reorganization would be partially driven by an attitude that longer rules with more informative subtitles would be something that counsel and courts could use to function with at a higher level of professionalism; and you almost have to take a look at the table of contents which is Appendix A of this report. You have to take a look at the disposition table which indicates where things would be placed and what they would be called and to take a brief look at Appendix C, a longer look if you like, to get an idea of what it would look like if it was done in the manner that I suggest.

Our task force believed rather than doing this abstractly that if we could take a shot at following this plan, you and others could get a much better idea of where we would ultimately end up and why it's perhaps worth doing. For me to try to explain

it generally doesn't really do justice to it.

There is another subject that I'll mention with respect to the special proceedings and ancillary remedies. One of the things that happened when the original rules were promulgated at least from the standpoint of looking back to see what went on is that a lot of things were taken out of the statutes on the basis that they were procedural, but a component of the same subject was left in the statutes on the basis that that part of it was substantive, hence now we have coverage in the Rules of Civil Procedure of things that are also covered in the Civil Practice & Remedies Code, and on some occasions not only in the Civil Practice & Remedies Code, but in the Rules of Civil Procedure, the Civil Practice & Remedies Code and the Property Code.

The task force believes this needs to be reexamined to see whether these things ought not to be combined together again either in these other codes or in the Rules of Civil Procedure rather than to have the same subject covered in several different places.

For many if not most of those things as events have happened there are procedural parts of those codes that have been enacted later, so we either have duplication, contradiction along with some truncation of coverage from book to book.

I think our preference would be to send -- our initial preference would be to send a lot of what is in the current rulebook back to the -- after Rule 330 back to the Revised Civil Statutes Of 1925 as subsequently recodified. I believe we would want to keep the important subject of injunctions and perhaps all of execution in the procedural rulebook. Other provisional remedies, attachment, garnishment, distress warrants that's debatable. Other special proceedings toward the back, yet forcible detainer, forcible entry and detainer, they are covered in two places, and that would need special attention or could get special attention.

Now, of course it's not necessary to do anything about anything after Rule 330 in order really to reorganize the

first 330 in some fashion or another, but the ultimate project suggested to us looking at those and reevaluating decisions that were made in 1939 and 1940 about coverage.

If anybody wants to ask any of us a question, I'd be glad to try to answer it. How long could it take to do this? In my view it would take a while to do it right; and it ought to be done right, and it ought to be done with some commentary, but it wouldn't take an eternity to do it.

PROFESSOR EDGAR: Bill, I would like to congratulate you on what you've done thus far. You've done a fine job getting this thing started. I just have a couple of questions though. I was looking here on page 115 where the Court's charge is to be inserted, and you've left for example I think six rule numbers, but let's just assume that we wind up with nine court charges rules. Do you envision going to a decimal system with respect to additions? How are you going to handle that?

PROFESSOR DORSANEO: This is another matter that I perhaps could have

talked about. If you look at our rules, the answer would be "No." The answer would be to develop a numbering system that we would use coherently and that would be one that would easy to use.

Right now we have in our rulebook, if you go and look at it, we have a number of rules numbered 3a, 14a, 14b, 14c, 18a, 18b, and yet in other places we have gaps. There is no Rule 187. There is no Rule 189. There is no Rule 181 or 182. In addition to that from rule to rule we have different numbering schemes. We have some rules that begin Rule 201, and then the first numbered paragraph or the first paragraph is one, right. And then on other occasions it's 329b, and the first paragraph is (a). And this is indicative of changing things over a period of time without any reference to the rulebook as a whole, and we would plan on having the rules numbered consecutively.

When we did the Appellate Rules however we left some gaps on purpose. If you look at the Appellate Rules, there are some places where there is a gap that a

particular section of rules begins with or ends with an odd number of 29, and the next section begins with 40. So we could leave some gaps if we expected some changes or anticipated some likely changes if people thought that that would be desirable.

But part of the cleanup process would involve renumbering, would involve cleaning up the numbering scheme. And I don't think it would involve trying to follow the Federal numbering pattern as distinguished from the overall Federal organizational pattern.

PROFESSOR EDGAR: My second question then is do you envision or have you considered whether to publish the rules in a bound volume or in looseleaf so that we won't have to get a new book each time like we've done with pattern jury charges?

PROFESSOR DORSANEO: No. I haven't really thought about that. Frankly I would be sufficiently optomistic to say if we did this and did it right, then that would be more of an academic question.

MS. DUNCAN: My only

concern -- I believe you mentioned this yesterday. My only concern is research. And we've all experienced the lost evidence rules. Have you had any discussions with any of the publishers about at the same time we do the recodification also changing the annotations so that they can be found and we can get rid of --

PROFESSOR DORSANEO: No.

MS. DUNCAN: -- six volumes of statutes?

PROFESSOR DORSANEO: I had thought about this. And in this draft that you have here you will note that our working draft contains the comments to the rules that we have in the rulebook already. I've been making further adjustments myself. When the Appellate Rules were done the comments to the old Rules of Civil Procedure were discarded, see, that the Appellate Rules replaced. In my view that was because of a person power problem. Really I was doing it. Okay. And I think we ought to go back and try to --

MS. DUNCAN: Recapture.

PROFESSOR DORSANEO: --

recapture some of that. And it can be done, of course, if you have the right people working on it. And I think in addition to that we could do more, but to rely upon a publisher to do it is especially -- like West is not my best friend. I'll say especially West to recognize the source of that comment, okay, is not a good idea.

We should do more of that. We should find the resources to do it together with doing some commentary when that makes sense in order to solve these problems that will come up. And none of us will remember everything. And when we we did the Appellate Rules I thought I would remember, and I don't remember what exactly happened.

MS. DUNCAN: But yet that was my question was not to delegate to the publisher; but if we have people that know, we might go get down because right now you have to keep your old evidence statutes in order to have the cases, and the cases and the evidence only starts whatever year that was.

PROFESSOR DORSANEO: I think we could do that if we had people dedicated to

the task and the right resources. This has all been volunteer work over the years, as it is now, and most of the time it's been done relatively unsystematiclaly in comparison to how it could have been done. Not being critical -- certainly not being critical of anyone. As the report indicates, a tremendous amount of good work has been done. Much if not most of it can be retained, and I applaud the members of this committee now and the prior members as leading legal citizens in this jurisdiction and reject the idea that it's being -- that this is being done on some personal advantage basis or for some other reason.

MR. LOW: I commend you on the work, and I sometimes am a little slow picking something up, but if I understand what you did, it looks like to me -- correct me if I'm wrong -- you have just taken the rules you have and you've organized them in the places they ought to be. The next task was you've eliminated rules that were duplications and so forth. The next task is you have polished up the language and don't say you do things like

that. But you have not taken, made controversial changes. You only polished up, eliminated, so that based on what you have we can put in numbers or whatever, and the work that we're doing now will be compatible with exactly what you're doing here and with you having eliminated those rules we don't need and so forth. Is that correct?

PROFESSOR DORSANEO: The answer to that is primarily "yes." And we won't be able to do this until the other things are taken care of.

MR. LOW: I know. But what you've done now will be compatible with us putting this in it.

PROFESSOR DORSANEO: There are some things in this draft that are things that are being worked on by other committees right now. I'm kind of anticipating that something may come of it. The pretrial rule that is from the Committee on Court Rules that didn't even pass that committee but it's still on the table as a draft is in this draft.

MR. LOW: And you do have things like a new rule, maybe a source that's

a Federal Rule, you have a few of those.

PROFESSOR DORSANEO: Right.

MR. LOW: So you have done some adding of new rules.

PROFESSOR DORSANEO: The main ones would be Federal Rule 12 without a 12(b)(6) motion but just organizationally.

MR. LOW: Yes.

PROFESSOR DORSANEO: No general demurrer. Federal Rule 7 which talks about pleadings and motions, but these are rules that I consider to be essentially structural and organizational rather than controversial.

MR. LOW: What I'm trying to do, and I'll shut up, is brag on you a little bit.

MR. SOULES: I don't know if this will answer any questions that may be in your mind, but one of the things I would like to do, and this is subject to Justice Hecht's approval since actually this committee is to report to the Court before we take it on, but if we take it on, it will be to of course make Bill the subcommittee chairman of this

committee and to make every chair of every other subcommittee a member of his committee so that, for example, for what are now numbers 1 through 14 which Alejandro Acosta is the chair of, he would be on this committee and assist Bill as something of a watchdog over those rules to see that they get in there; or if they don't get in there, what gets omitted, and if they get changed, what those changes are so that both Bill and Alejandro can give us a report that we can inquire into about have we -- do we have an adequate transition of the rules as they existed before. And then anyone else who wanted to volunteer would also be on this committee if you wish.

Now, we don't have authority for that yet, but that's my concept of how we could do it if we get that authority. Does that sound all right with you, Judge?

JUSTICE NATHAN HECHT: Yes, generally speaking. But it's important that whoever joins in the actual work process of this be committed to doing it, because there will be a lot of work involved, and it won't be fair to everybody who is on there unless

all are pulling on it equally, so this is not a title to have. This is some work to be done.

MR. SOULES: I know Bill needs to go. He has got to go to an airplane, but we can still discuss this a few minutes, if you wish.

MR. LOW: I think the appeal rules of evidence, nothing to do. I should not be on the committee. Just talking about the chairman of the subcommittees on these particular rules. That way should be a bigger committee and the committee more difficult to work.

MR. SOULES: That may be. However the TRAP Rules since some of them were rooted in these rules, that chair may be, and there may be some evidence points too. I don't know.

MR. LOW: That's fine.

MR. SOULES: And then like Tony Sadberry's rules we got to those or the extraordinary writ rules, how we deal with those. Of course, that's not really responsive to your question.

Does anyone have any -- you had your hand up, David.

MR. PERRY: Luke, I was just going to comment that it looks like a tremendous amount of work has already been done, and I had wanted to ask Bill, and maybe you can answer the question. We could partly hear down at this end of the table some of the conversations you-all were having up here. We couldn't hear at all very well. Am I correct that this is almost entirely a reorganization of the rules without a textual change in the rules themselves?

PROFESSOR ALBRIGHT: If I can respond, I'm on the task force. And what we have done is primarily reorganize. I think the way Buddy described it was exactly what we did. We took the rulebook. We developed a new organization. We took the rules and fit them with the existing rules and fit them in within the new organization. We then took rules out that were redundant or antiquated that weren't needed anymore. We revised current rules to make them more readable or to take out redundant language.

There are some substantive changes, but I think what we anticipate, this is a very early working draft I would say. This is an organizational draft. We really haven't had anything before now. We have not -- our committee has not met since this draft has come out, so we haven't had anything in front of us to really see it all together. And I think there will be more revision, and there may be substantive revisions; but if there are any, they would certainly be brought before this committee to discuss just like any other substantive revision would be. So right now it is -- the effort is primarily organizational, and a readability type thing.

MR. SOULES: Are there any other members of this task force on this committee?

MS. ALBRIGHT: Elaine Carlson has been working with us the last few meetings. I think I may be the only one that's been on it the whole time. Is there anybody else?

PROFESSOR CARLSON: Judge Hughes.

PROFESSOR ALBRIGHT: Judge Hughes is on it, but he's not on this committee.

MR. PERRY: I was just going to comment that one of the problems that we had with the nonsubstantive revisions that produced Civil Practice Remedies Code was that the language changes from going to the old statutes to the new were so great that oftentimes it took an awful lot of time and effort and work to see if the change was nonsubstantive or not.

The impression I have is that you-all have avoided that problem by making only very minor textual changes that I suppose can be easily seen with red-lining and underlining and that sort of thing. But I haven't really looked through here enough to verify if that's right. Is that basically correct?

PROFESSOR ALBRIGHT: Yes. I think that when we do make textual changes we are trying very carefully to keep track of what we are doing so that you-all can see what the changes are so that we can discuss them

and see whether people agree with those changes or not. But there is a lot of -- some rules we have taken and completely rewritten, because they are so redundant, so misorganized, disorganized; and so they have been completely rewritten.

Other rules we have not. People like Judge Hughes want -- Judge Hughes, for instance, wants to go through and completely rewrite every rule in plain English and see what happens to that, so there may be -- towards the end there may be some proposals of lots of revision that are not substantive, but I think when that happens, you know, this group is going to have to discuss it.

MR. SUSMAN: Is it possible to get a red-line copy, something that shows what the changes have been made in these rules? Do you have that?

PROFESSOR ALBRIGHT: We do not have it now. I think we need it. I think it's just been a matter of time and manpower; and I'm going to propose -- I've always thought we needed one. Right now I think the

best that we have is this --

MR. SUSMAN: Grid.

PROFESSOR ALBRIGHT: -- is the disposition table where you'll see things like, for instance, on Rule 44 it says "significant wording change." So what I'm hoping to do is get a research assistant or somebody to go through and really do a red-line version, because I think it will be -- I think we're going to need that and it will be significant.

MR. SUSMAN: One more question. That is, Luke, I mean is the proposal to have these things come out at the same time the changes we are discussing? I mean what's the relationship between this project and all these other things we've been discussing for two days? I mean should the new discovery rules, for example, be in this format to fit in here in a reorganized format, or as if we're going to stick them in the old book, or do you want both versions?

MR. SOULES: Well, we're going to work forward now in the subcommittees, the assigned subcommittees as though this project

were not ongoing --

MR. SUSMAN: Yes.

MR. SOULES: -- so that we can have our options and the Court can have its options to either go ahead and change the sanctions rule if it wishes or the discovery rules or the charge rules or some of these other rules that may badly need fixing at some interim date. Then that work would be folded into this project when this project is finished. Is that responsive to your question?

MR. SUSMAN: (Nods affirmatively.)

PROFESSOR ALBRIGHT: And you'll see that we did not touch sanctions, discovery, jury charge. Discovery, for instance, I did some reorganization of the discovery rules, but I used the exact words of the current rule, because I thought there is no point in doing any changes in the discovery rules until the discovery task force report comes out and this group discusses it.

MR. GALLAGHER: Just a question. Would it be possible for us to

obtain a listing of all Federal Rules that have been extracted from the Federal system and incorporated into the draft that on which you're currently working just so that we can have a quick reference to what Federal Rules are being brought over?

PROFESSOR ALBRIGHT: I think if there are, there may be a couple, but they're not significant. They would be in here.

MR. GALLAGHER: Is that in here?

MR. LOW: Yes. Page four from the back.

PROFESSOR ALBRIGHT: They would be in the disposition table if there are some. We did not do a major effort to incorporate Federal Rules into the State Rules.

MR. GALLAGHER: "Major" is the operative word.

PROFESSOR ALBRIGHT: We did not. I guess whenever we were revising we would take other alternatives whether they be Federal Rules, other State Rules, but I don't

even think --

MR. BABCOCK: You took some Rule 11.

PROFESSOR ALBRIGHT: Did we do Rule 11?

MR. BABCOCK: Some of it.

PROFESSOR ALBRIGHT: I think your best bet is just to look at the disposition table. Each person on the task force was in charge of specific rules, so it may be that that particular person said, "Gee, the Federal Rule does a lot better job than the State Rule to accomplish the same purpose," but that should all be in the comment or in the disposition table.

MR. GALLAGHER: There is someplace, though, that if there are some of us who are concerned about the number of Federal Rules that are being incorporated, there is somewhere in this draft where we can find that information?

PROFESSOR ALBRIGHT: It should be in the disposition table, Appendix B and/or in the comments following the rules. Again, this is still a very early working draft; and

I think that is an important -- I think when the final report comes out it is very important that everybody know where the proposed rules came from.

MR. GALLAGHER: Was Rule 11 brought over?

MR. BABCOCK: Somebody is telling me that there is --

MR. BABCOCK: Some of it was. It's in new Rule 24.

PROFESSOR ALBRIGHT: See, I didn't realize that. I didn't think we had worked with Rule 11 -- I mean Rule 13, because that was part of the sanctions task force, so it may be. I know the original Rule 13 has a comment that it's based on Rule 11, so that may be where that came from.

Yes. See, if you look on Rule 24 on page 29, it has a comment, "Original Source Federal Rule 11." That came from when Rule 13 was first written. But in any event I agree that when the final proposal comes out that the source of all these be identified.

MR. GALLAGHER: (Nods

affirmatively.)

MR. SUSMAN: I mean this seems like such a worthwhile project. It's incredible. I mean why don't we really push it through and get it done? Is this something the Court might actually adopt?

JUSTICE NATHAN HECHT: Yes. I think so.

MR. SUSMAN: I mean without regard to any substance changes, I mean, just the reorganization seems so wonderful to do it.

JUSTICE NATHAN HECHT: That's why we formed this task force was to look at this and see, because I think the prevailing feeling the last time we talked about this was that this would be a worthwhile project and would really make a big difference particularly as old as the rules are and for a whole lot of other reasons.

On the other hand, we are sensitive to the very significant criticism in the Bar already that this is going to screw up research from now on, there will be a great divide here at a point in time, and Sheppard

won't work anymore, and the Digest won't be the same, and that we ought to just try to patch and mend and keep going. And I mean I think there is some substance to that criticism, but I still think the prevailing feeling is to go ahead and try to do this; but we want to hear what the committee thinks about it.

MR. SOULES: And that's what is on the floor now. I think we can put that on the floor. What do you think about it? Is the gain worth the gamble?

HONORABLE F. SCOTT MCCOWN: It depends on how it looks.

MR. SUSMAN: What?

HONORABLE F. SCOTT MCCOWN: It depends on how it looks at the end. I think the process is worth doing, but to tell whether the disruption is worth the adoption is going to depend on how good the final product is.

MR. SOULES: Say that, as an example, say this is the final product. Of course, it needs work. But is it worth it? If you look back here in Appendix C they have

reorganized the rules in the order that the disposition table sets out, and so we know it can be done. It's a matter of a lot of work. The work shouldn't be done unless we're very inclined, I think, to go along with it, unless the Supreme Court is very inclined to go along with it, because this is going to be a massive undertaking.

MR. LOW: Luke, I think it doesn't present a big profit. You put the source it was old Rule such and such, and you could even put notes; but to say that we shouldn't go forward with something that needs to be done I think definitely I agree with Steve.

MR. PERRY: I think that there are really two different things that are being done at the same time. One is the reorganization and the renumbering. It appears to me that that is almost complete and very beneficial and almost entirely noncontroversial.

The other thing that is being done is textual rewriting to one degree or another. It appears to me that the more of

that that is done, the greater is the danger of becoming involved in a morass where it is hard to figure out what is going on and hard to be sure of whether the change is substantive or nonsubstantive; but that in terms of practicality if the task force or the committee adopted the approach of keeping the textual changes minor where you could readily see on a red-line what had happened, that this project might be 50 or 75 percent complete now.

MR. BABCOCK: What has been the experience with the codification of the Civil Practices & Remedies Code, Nathan? Has that caused a big problem with research and Sheppardizing?

JUSTICE NATHAN HECHT: No. My sentiment is that it hasn't, although it's all happened since I've been on the Bench, so I haven't had the same problems that you-all have had. But my sense of it is that the legislative recodifications have been favorably perceived. There have been problems as David points out. There is a statement in the front of recodifications that says this is

supposed to be nonsubstantive, but sometimes it is pretty hard to take some of those changes as being nonsubstantive.

And here the effort is originally undertaken to try to be nonsubstantive, although I know the Federal Rules are involved in a plain English type of rewrite, an editorial type of rewrite where some of the language is restructured. In some of these rules you can't hardly rewrite them without changing the language pretty dramatically. They are very confusing rules. But in some cases it's possible not to do that. So I think we're going to have to see about that as we go through.

MR. SUSMAN: The only objection I've heard to doing it is the difficulty it presents for research, but I mean with computerized research today can't that be overcome fairly easily? I mean, my sense is that basically you tell the computer, you know Weslaw or Lexus to do anything. It's not a big deal.

MR. SWEENEY: Do you do a lot of your own research?

MR. SUSMAN: I have never done it.

MR. SWEENEY: It is a big deal.

MR. SUSMAN: It's a big deal? Is it a real big, bad deal?

MS. SWEENEY: It's not as easy as it sounds.

MR. ORSINGER: I've got several comments. I practiced through the adoption of the Rules Of Appellate Procedure which were on a smaller scale than what we're talking about here. But I didn't really find it that cumbersome to go from old rule to new rule numbers and with the derivation tables; and I think the TRAP needs to be restructured a little bit, but we have already lived through that, some of us, and we survived that all right.

Computer research, I was interested in Hadley Edgar's suggestion of why not use the decimal system or at least noting that they didn't use the decimal system. If you're going to use computer research right now and run an old rule number and it's going

to pick up a new rule number that deals with the different subject matter, your electronic searches are going to pull up the old rules and the new rules. One way to avoid that is to go to a decimal system with the new rules, so that if you want to run the new rules, you run Rule 3.1 rather than Rule 3a, and you won't pick up the old rules that way. That way you can when you do a computer search if you want to search the old rules, you use our old numerology. If you want to search the new rules, you use our new decimal system and you won't be picking up old rules that are on a new subject matter and vice versa.

I'd also say that if we're going to redraft for modern language, which I think is a worthy goal, that we ought to do it at the same time that we renumber so that we can all suffer through the mental change of the new system and not just adopt renumbering now and then maybe three or five years down the road come in and write clean language. Maybe it's not realistic for us to write the clean language right now, but it seems to me that if there is virtue in making the rules

more clearly written, and I personally think there is, then we probably ought to let that hit at the same time that the restructuring hits so that we can all memorize something we're going to live with for the next 15 years rather than setting ourselves up for a pretty major change just three to five years down the road.

MS. DUNCAN: I do all my own research, and it's a tremendous problem, but I think there is -- what I've seen, there is a big difference between the statutory recodifications and the rule codifications. West had tried to move the annotations in the statutes to the new codification, but they've made absolutely no effort to do that on the rules. And what I was suggesting to Bill is we've got obviously the people who know where they should be moved. All I'm suggesting is that it all be done at once, because the problem from my perspective is not so much that I can't find the annotations for the old rules. I know where they are. It's that we're all going to have to have two separate sets of books, which is what we have to have

now. The actual Black Statutes are probably no more than about 15 volumes now, but you can't get rid of the other 40 volumes without getting rid of the annotations that have not been moved.

MR. YELENOSKY: Well, I originally raised my hand to say what Richard has already said, which is we're making substantive changes, and that's a great time to recodify, because there isn't going to be old case law in some of the changes we'll be making. And if you have a new substantive change, you want it in the new codified version.

As far as computer research I don't know how many people do computer research, but that is increasing, and conceptually of course it's entirely possible that Lexus and Weslaw could program their computers that when you put in a new codified number it would pick up the old number as well. I mean, that's just a question of programming, but obviously we don't have any control over them. I don't know if that can be done, but to the extent that there is

greater computerization I mean that really isn't the problem.

MR. SOULES: We can build a detailed --

MR. YELENOSKY: Right. Right. No. I mean --

MS. DUNCAN: Computerized research is still considerably more expensive than sitting with the book.

MR. YELENOSKY: Sure. It's not a problem for a programmer, I mean, for a computer to do that.

MS. DUNCAN: Right.

MR. SOULES: We can build a detailed disposition table and put it in the book, and people should be able to understand how to use that. The issue of nonsubstantive we'll have to pass on this another day, but I think that we should not include any statement like they did in the Civil Practices Remedies Code that is not a substantive revision. It ought to say these rules are what they say, and they mean what they say. The Supreme Court in Atchinson said that we didn't change the discovery rules that we did change, and

the record of this committee was that we were deliberately making the change, but the Supreme Court wrote in Atchinson Allen vs. Humphrey controls because the changes were nonsubstantive, and "We're going to ignore the language in the rule," and they've done that ever since. And I've never understood why they did that, but somebody wrote that opinion and said so, and the Court went along, and there are going to be some changes.

There are going to be some changes that are generated out of Steve's work, all our work here that will roll into this, and the new rules ought to be clearly I think labeled that these rules mean what they say, and these are the rules and they should be interpreted accordingly according to their own language. Judge Guittard.

HONORABLE C. A. GUITTARD: I noticed in some of these notes in the draft there is references to whether or not a substantive change is made, and I'm wondering whether the task force intends to systematically point out or identify those rules that do have substantive changes so that

that won't be a matter of uncertainty.

MR. SOULES: I think the task force needs to point out every change and verbiage by red-line and then give its view as to whether or not it's a substantive change. Then every subcommittee chair needs to take up that piece of the recodification and pass on itself on whether or not there is a substantive change, and then we'll all look at it together so that we have several layers of people saying this is or is not a substantive change. If it is, we want to know about it and pass on it. If it's not, then it's not. That would be my concept of how this would develop. And I think that's yours too, isn't it, Alex?

PROFESSOR ALBRIGHT: Yes. My concern with giving this out early is because I think it does look somewhat unorganized, because we don't have a red-line yet. I think we have got to have a red-line and really track every single change and what it means, and I think we have got to have comments to it too.

MR. SOULES: But this is a

tremendous piece of work of Bill and Alex and Elaine, and that committee has not functioned fully. About one third of its members have done all the work, and I know that, and appreciate Bill and Elaine and Alex what they've done to contribute to this. And one thing Bill requested of me was to see that whatever committee is formed here if we get the authority to go forward is going to be a real working committee, because he needs a lot of assistance, and three people can't do it by themselves. Shelby Sharpe.

MR. SHARPE: I move that committee be formed.

MR. SOULES: Well, we've got to get clearance from the Supreme Court first, but based on -- I think we need a sense, consensus vote. How many feel that is a worthwhile project? How many are ready to go with it and see it through if this work is done? Who is not? That's unanimous. That means we are committed to do this.

PROFESSOR ALBRIGHT: If I can make a comment about that, I think that may be unusual with this group as far as the whole

Bar is concerned, because I think there is a lot of resistance in the Bar to changing rules and rule numbers, and "You-all have been messing with the rules so much. Now this is just going to make our lives harder." I think if we do do this, it's going to be a sales job, and this group is going to have to go around and do the sales.

I know if you look back at the Bar Journal from 1941, they all went out doing sales jobs at local Bar associations; and we may have to do that.

MS. LANGE: I would respectfully request that Bonnie Wolbrueck, the district clerk, be appointed to this committee since procedures does affect clerks.

MR. SOULES: Fine. We would like to have you on that committee.

HONORABLE F. SCOTT MCCOWN: To follow up on Alex' point, that is exactly what I was trying to say in terms of selling it to the Bar. If all we do is take our present rules and move them around, then the Bar is not going to buy into it. This version not only has to be a reorganization, but it has to

trim out the dead wood and provide clarity, and so the Bar can see, "Yes, we're paying a cost, but it's a one-time cost because these rules are so good they can last 100 years." If all we do is produce a poorly drated set of rules wonderfully organized, there is no point in it.

MR. SOULES: The disposition table has to be made very easy. That has to be easy for somebody to pick up. That may be the biggest sell we have is this is easy to go from one to another.

MS. DUNCAN: That's just one part of it.

MR. SOULES: Okay. Sarah, go ahead.

MS. DUNCAN: Just even if you have -- we've got disposition tables for some of the rule codifications that have been done. But if you don't work into some arrangement with West to move those annotations, people are buying, and I have my own library, and I pay individually for it. My firm does not pay for it, and I have probably half of the books on that wall are

absolutely useless except that I have to have them to find the annotations under the disposition table. And if we are going to cause that kind of expense to individual practitioners around the state when we don't have to, I think we're going to stand a good chance of losing the fight for the recodification, but I think it can be done. We just need to work out those kinds of little things before trying to push it on anybody.

MR. SOULES: As far as changing the rules the Supreme Court and we get a bad rap on a lot of that, I think. If you go back as far as you can in the Texas Southwest 2nd to about 1990 and just start from there and look across all the books it says "Court Rules," "Court Rules," "Court Rules." Those are not changes in the Rules Of Civil Procedure. Any time the 5th Circuit changes a local rule they put it in the Texas cases and they put a label "Court Rules" on the spine of the books, and I get comments "Look at all the rules changes. Just look there on your bookshelf, and there's a change every third volume."

And that is not our responsibility, so we're not at fault on that, because those don't have anything to do with anything that the Supreme Court has done or we've done. But anyway, we're going now to what will be significant change, and we have got to deal with that with the Bar.

HONORABLE C. A. GUITTARD: Write an article.

MR. SOULES: Write an article. We probably will have to. And if the Supreme Court follows what it did last time, there will be some public hearings on this when it's all done before it's put into effect anyway. I don't know whether they'll do that again or won't. That's of course up to them.

Any other comments or suggestions? Justice Hecht, do you need anything more from us by way of responsiveness to this?

JUSTICE NATHAN HECHT: No. This is very helpful.

MR. SOULES: Do you need anything further from us on any matters that

we can address maybe today?

JUSTICE NATHAN HECHT: I think this is what we needed immediately.

MR. SOULES: I think I failed to express the appreciation of the committee to Chuck and his task force for the great job they did on the sanctions rule. There is still obviously work to be done, but that was a tremendous undertaking; and development of all the materials that you have put together I don't know how you did it in the time you did; and his was the first task force to report. I'd add that I commend you and thank all of you for your work. I think we're adjourned unless somebody has got anything else.

HONORABLE DAVID PEEPLE: I think Holly has done an awful good job of putting this together; and Anna has been the most uncomplaining, long enduring court reporter I've ever seen.

MR. SOULES: That's true. Thank you.

STATE OF TEXAS)
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COUNTY OF TRAVIS)

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