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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 10, 1996

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 10th day of May, A.D., 1996, between the hours of 12:50 o'clock p.m. and 5:30 p.m. at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

MAY 10, 1996

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Hon Ann Tyrrell Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring, Jr.
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
John J. Marks Jr.
Hon F. Scott McCown

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon William Cornelius
Paul N. Gold
O.C. Hamilton
David B. Jackson
Doris Lange
Michael Prince
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
W. Kenneth Law
Hon Paul Heath Till

Also Present:

Rosemary Kanusky

MAY 10, 1996
AFTERNOON SESSION

INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

May 10, 12:50 p.m.

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CHAIRMAN SOULES: Okay. If everybody wants to take a seat, get some cake or whatever and then take a seat, we will go back to work; and, Don, is there anything else we need to do now on these series of rules under your jurisdiction, other than we need to look at the inquiry disposition chart at a later time? But I wanted to get to the petition for review rules while Justice Hecht is here and available if we are -- are we close to done with your rules?

MR. HUNT: Yes, Mr. Chairman. With your leadership we have made it, and we do not need to revisit one of these again ever.

CHAIRMAN SOULES: It seems to me that the changes that we made here are fairly straightforward, uncomplicated in their verbiage, and if you would like to check your notes against those of Lee Parsley or Holly or me just to be sure you have got them, that's fine; but unless someone objects, we won't ask you to bring back the revision for further

consideration. We will consider them done.

MR. HUNT: They are done.

CHAIRMAN SOULES: Okay. So Rules 296 through 329b as reported here are complete.

MR. HUNT: 331, include that, too, not that we have done anything to 330 or 331.

CHAIRMAN SOULES: Okay. Those as well are complete and done except for the disposition inquiry table that we have later for our public that we will need to address.

Justice Hecht has given us a charge from the Court here. He's given us several pages entitled at the top, "Section 9, Petition for Review and Response in the Supreme Court," and I have asked him to introduce this project to us and asked him to tell us what he would like for us to do for the Court on this project.

JUSTICE HECHT: Let me give you a brief history of why this is being proposed. Some of you may know, some of you may not, how we handle cases that are filed in our court. Whenever a case is filed, whether it's an application for writ of error or for

extraordinary relief or whatever kind of case is filed, it's assigned and numbered in the clerk's office, and the computer at that time designates one of the nine judges at random as the judge to take the responsibility for presenting a recommendation to the other eight judges on whether relief of any kind should be granted or not.

The file is taken to that judge's office, including the record, if there is one, and briefs that are filed, and all of the papers are taken to those chambers; and inside that office the briefing attorneys and staff attorneys decide who among them will review the case and write a memo explaining the case and making the recommendation. They divide those up and do that memo.

The memo sets out basic information about who the trial judge was, who the appellate judges were, who the parties are, who the lawyers are, basic facts of the case, what's happened in all the various courts that it might have come through. It tries to analyze the arguments that the parties are making on particular issues and then discuss those

arguments as to who has the better argument, whether cases have been cited properly, whether there is other considerations, whatever the discussion may be, to try to indicate what should be the result in the case.

Those memos tend to run on the average about seven to ten single-spaced pages, but in a case that is just very simple and doesn't have much merit to it at all it may only be a couple of pages; but in a very complicated case it may be 25 or 30 single-spaced pages. The judge to whom the case has been assigned is supposed to read that memo, do whatever initial work the judge thinks is necessary to be certain that the work that's been done on the memo is thorough and right and represents that judge's point of view and then circulate that memo along with a copy of the court of appeals decision, if there is one, to the other eight members of the court.

Then, periodically, usually every week, a list is made up of those which have been circulated, and the judges have time on which to vote on whether to accept the

recommendation that's been made or not. Usually it's about four days, but sometimes it's a week or two. Any judge who has questions about the case can ask to see the briefs or the record or do as much work as they want to on it. They can ask to have the case discussed in conference.

Any judge who's interested in the case may work as much on it as he or she wants to, so there is no exclusivity in the assignment to one judge; but then when the vote is taken if the application is granted, then the case is reassigned to another judge, usually, for handling the opinion in the case. Now, as this system has developed -- and Luke and I were talking about this at lunch -- nobody sat down really and thought this up. This just kind of happened over the years.

When I got there, when I got to the Court in 1988, the Court still discussed all of the cases that were filed at least for a few seconds in conference. We went down the list and then called each case by name, and somebody said something about it. The memos were there, the same paperwork was there, but

there was a little more discussion. In the time that has passed since then we only actually talk about maybe a fifth, maybe about 20 percent of the cases that are filed, so that the -- as this process now exists in our Court it has two great disadvantages.

One of them is that it is unusual for more than one judge to actually read what the lawyer has written in the case before a decision is made on whether to grant relief or not. I don't mean the ultimate relief, but the initial determination of whether the application should be granted is usually made when only one judge -- and, frankly, this is not any secret, but even the judge may not have looked at the briefs very carefully. There is a heavy reliance on first year law students to summarize the briefs of the parties and to make recommendation.

Now, I don't feel that that's -- the worst part of that system is not that these young lawyers are not capable of doing that. It's just that either they spend a whole lot of time working on cases that are never going to get granted, and the judge can look at it

in 90 seconds and realize that there is not a chance in the world that anybody on this Court is going to be interested in granting this case. So they spend a lot of time writing up five single-spaced pages in a case that the judges are going to collectively spend, all nine of them, less time reading the memo than it took to write it; and so the judges are insulated from what's actually being written, what's actually coming in the door; and the lawyers are spending a whole lot of time synthesizing stuff that is of little utility to the Court.

So as we begun to notice the amount of time that was devoted to this effort, which is about 70 percent of the lawyers' time is devoted to these memos, we decided to poll the other Supreme Courts in the United States to see how they did it; and so we wrote to all of them and got letters back from about 40 of them, and needless -- I suppose it comes as no surprise that no one else in the country does it this way.

So they all -- and several of them were shocked to find out that Texas was this

backward, but almost all of them have some sort of preliminary screening procedure, which I will call a cert petition because that's what it amounts to, where the case is presented in an abbreviated form at the beginning, outlining the essential issues and the basic arguments and then if the Court decides to give the case plenary consideration, then the Court asks for more briefing, and the parties brief it as thoroughly as the rules allow, so that there is that two-step process.

And after talking with a bunch of our colleagues in other states and looking at our own operation internally we decided that we should move to a similar form of -- a similar operation. So that's what you have here, the basic idea being that an application would be very short; and the page length is negotiable, but in other states it's as few as seven pages and as many as 35 or 40. I think the U.S. Supreme Court is 30, and I can't remember what's in our rule either, 12 or 15. 15, I guess. We talked about anything from 10 to 15.

When that petition comes in, there would be no, in essence, cert pool anymore. Each judge would be responsible for voting on each application without memos being written by other chambers. So when the case came in it would be split up, go to all nine chambers, within a certain amount of time the case would be designated to be disposed of on a certain date. Judges would then vote. If anybody wanted to discuss it further, take further action on it, then they could do that.

If two judges, I think it is, want further briefing -- we hadn't decided exactly on the number -- then they could do that; but if nobody is interested in the case, then it would be denied; and the advantage is to -- the goal is to try to correct the disadvantages on the other side.

So the goals are to make it possible and actually put some pressure on every judge on the Court to read something about every app. that comes in. They may not read all the way through it, but at least either the judge or someone on the judge's own staff is going to have to look at it to make a decision about

what that judge's vote is going to be; and the second thing is to free up the staff's time to work on stuff that they are better at than synthesizing other people's writing, such as research and looking up the cases and see if they really say that and the kind of work that needs to go to support the decision rather than this other set of work.

So that's what we propose, and the basic rule we worked on, we're working on the internal procedures now for how or actually where the papers would go from step to step; and there are a lot of fine points that need to be worked out like should the record be available initially, should the exhibits be available initially, what kind of things should be in the initial petition, what kind of things should be in the response, how long should it be, timing, and all of those sorts of questions; and we have kind of a rough feel for how we think it should work from our side; but not having been in practice most of us, except for Judge Owen, for several years, we rely on this committee and others to give us some advice about how it's going to work from

the lawyer's side, and so we would like to have your comments on that.

We are going to do something like this, and so what we need is your help to make this work as well as it can. Some lawyers already know about this in some detail and have raised the question, I mean, are the judges really going to read applications under this new system? And the answer to that is I think most of them will. In fact, I think virtually all of them will. Just because if you saw a stack of applications you would realize how easy it is to kind of get a feel for reading through them and deciding pretty quickly that this is one of the 30 percent of the cases in our Court that's got a chance or that somebody might be interested in or this is one of the 70 percent that is just not going to get granted.

But in any event, even if a judge chooses not to read the applications as they come in but to assign staff members to do it, at least it will be the judge's own staff who is making the recommendation as opposed to staff members that the judge didn't hire and doesn't know

and doesn't have the same working relationship with that he has with the lawyers in chambers.

So, Luke, that's what we need.

CHAIRMAN SOULES: Okay.

JUSTICE HECHT: I'm happy to answer questions. Yeah.

MR. HUNT: Judge, currently depending on the year, there is some 10 to 12 percent of the applications for writ of error that are granted. Now, presumably under this system there might be more briefs on the merits; but does going to a brief on the merit mean there will be an oral argument and a decision by the Court, or does it merely mean the Court may receive longer materials, longer briefs?

JUSTICE HECHT: I'm sorry. I didn't understand the alternative.

MR. HUNT: What are the choices here to the Court when you decide to grant something here, decide the case is worthy of a brief on the merits? Once you have decided that a case is worthy of brief on the merits, what are the choices available to the Court then? Do you hear oral argument?

JUSTICE HECHT: To deny it, to grant it, to PC it. We might do anything. Our tentative thinking is that two or three judges, it would take the votes of two or three judges to ask for additional briefing; and then when additional briefing comes in, if it's -- it may persuade you that the case was not as good as you thought or that it was better than you thought, but there wouldn't be any limit to the alternatives.

One question that also has been asked is, will this mean that there is less error correction and fewer per curiam opinions? Right now our per curiam opinions are running about half our output. Per curiams are generally shorter opinions and are supposed to be on issues that at least six judges and usually eight or nine of us think are so clear-cut that one can scarcely argue about them, and so will there be fewer of those, and I don't think so. I think there will still be the same thought that if the error that's being complained about is that plain we would still want to PC it. Now, we might ask for more briefing before we did it, but I don't

look for that number to change.

MR. HUNT: So the rate of granting of a petition would be greater than an application because a granting would mean you would get a shot at briefing on the merits before you are turned down.

JUSTICE HECHT: There would be petitions that you would ask for briefs in that would go ahead and get denied.

MR. HUNT: And you think maybe two votes on that?

JUSTICE HECHT: I don't think we have decided on two or three. It takes four to grant it, and you wouldn't want just one judge to be able to ask for additional briefing because that would turn too much on the particular personalities. So it would probably need to be two, but you don't want it too high because that ought to be a fairly low threshold.

Yeah. Steve.

MR. YELENOSKY: Yeah. Judge Hecht, we just got this yesterday, and I am just comparing the part that says "petition for review" with the part that says "brief on

the merits," and it seems to contain basically all the same elements except that actually the petition for review, the first step has an additional section, the issue of -- the jurisdictional issue, of course, which would only be appropriate in the first instance.

But at a quick glance this seems to cover the same areas, so is the difference going to be primarily the reduced page limit that will be the practical difference? I have never filed a writ for cert with the U.S. Supreme Court; but you know, what I hear is when you file that you are basically filing your brief on the merits or arguing everything that you would argue if you were on the merits, and that may not be true; but in this context what would the practical difference be between the two steps from the lawyer's duty and what is going to signal to the lawyer what the difference is?

JUSTICE HECHT: There are several aspects to that. Obviously there is a jurisdictional aspect of appealing. You don't want to leave things out that you think you might have a shot on, but you don't think the

shot is very good, and in this petition you could try to make that decision without prejudice to yourself. I mean, you can list the points in there that you want to raise, but if you think several points are not as strong as others, you don't have to worry about not briefing them fully or that sort of thing.

This will preserve your right to argue whatever you list in the petition; but, yes, I suppose the primary aspect of it is to focus the lawyers on stating what the issue is, not in point of error terms, but in real terms. What's this case about, why should it be granted or not granted, and then trying to outline as cogently as possible the real complaint that the lawyer has about the case.

So what it sort of is, is an expanded summary of the argument that lawyers typically put in briefs, and typically it runs two or three pages, and this would be that kind of summary; but by the same token, arguments that you make that really need further explication, that you would like to list more things about, would have to wait for the briefing. You

might say in the petition, for example, that this is the rule in 13 other states, but for purposes of length of the petition you wouldn't list all the 13 other states; but in a brief you would, and you might even talk about some of the other cases in the other states.

So this is an effort to try to focus in on our real question, which is given that we are only going to grant eight to ten percent of the cases why should this be one?

CHAIRMAN SOULES: Okay. Judge, my understanding of what you told us is that the Court has already decided that it's going to go to a petition for review process that's going to be an abbreviated appeal to the Court or request to the Court for relief, and that request is just going to be telling the Court that there is perceived error and they want an opportunity to present their case to the Court and brief it, and that what you're looking to us for assistance is not the decision whether to brief from the initial stages forward as we have right now but to assist in the structure of this abbreviated process.

JUSTICE HECHT: Right.

CHAIRMAN SOULES: That decision is already done.

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: Okay. Anybody? Judge Guittard.

HONORABLE C. A. GUITTARD: May I ask, after the writ is -- the petition is granted, still there is no right to file a brief on the merit. The only time that briefs on the merits are to be filed, whether before or after the petition is granted, is at the Court's request and that, likewise, the Supreme Court will not have the record before it unless either before or after the petition is granted a specific request is made for that. Is that the proposal?

JUSTICE HECHT: Although, again, now, these are the -- the policy decision that the Court is pretty firm on is that there will not be full briefing of the case unless the Court asks for it. The rest of the matter, whether the record should be there at the beginning or only if the Court asks for it, how much of the record, all of it

or not the exhibits or whatever, those are some of the details that we would like counsel on. We have some thoughts about it, but...

Rusty.

MR. McMAINS: Judge, what is the -- I, frankly, have not read the rules from this standpoint. Is there a limitation on the ability to reply?

JUSTICE HECHT: No. There is a limitation on length.

MR. McMAINS: I don't mean the answer to the petition. I mean, now it's not uncommon for people to file reply briefs. There aren't any rules about it, but they just do it, and we kind of theoretically assume that it's governed by the same page limit as the other one; but we don't really have any rules one way or the other, and some people just continue to file things weekly, as I'm sure you know. Are there any kind of those limits in there?

JUSTICE HECHT: Yes. The rule calls for the petition, a response, and then a limited reply to things that have been raised in the response that weren't covered in the

original petition.

MR. McMAINS: I mean, are they limited to things not covered in the original petition?

JUSTICE HECHT: And I think when we have got cases granted for argument people file things, they file a presubmission brief, and that's kind of the latest rage, and they file a postsubmission brief, which are usually helpful, and the Court hardly ever turns away any help; but these will be on such a faster track that you would have to be high behind it to get in more briefing than the rule allows before the Court considered the petition and voted on it.

HONORABLE SARAH DUNCAN: That was one of the few things I found confusing, just from a drafting standpoint, is on page two, subsection (c)(5), it says, "The respondent's argument needs to be confined to the issues raised by the petitioner," but in (e) it references independent grounds for affirmance being a basis for a reply. So it seems implicit that you can raise independent grounds for affirmance in a response, but that

seems to conflict with (c)(5).

JUSTICE HECHT: You may be right about that.

HONORABLE SARAH DUNCAN: I also wondered, is there a reason the Court wants the statement of reasons for exercising jurisdiction as a part of the argument as opposed to a part of the statement of jurisdiction?

JUSTICE HECHT: Yes. The jurisdiction is just the formality of saying this is under -- since our Court has limited jurisdiction in most cases, this is under this provision of the statute, this is the provision we are proceeding under; but what we want in the argument is, but why is this important to me? Even though you are claiming that the Court has jurisdiction over this because it's important to the jurisprudence of the state, why? Why is it important?

Briefs now have a statement of jurisdiction, but it varies between "Jurisdiction is invoked under this section of the government code" to 15 pages of argument about why there is a conflict in the courts of

appeals or there isn't.

MR. HUNT: Judge, in that same vein, under argument in the petition for review do you contemplate that there will be a separate subdivision of the argument entitled "Statement for Reasons" or "Statement Regarding Importance," or is this merely a recommendation that these matters be included within the argument?

In other words, it might be helpful for purposes of telling the average practitioner what should be in there to know whether this is a signal that you must have a part labeled this way or merely that the argument should cover these matters.

JUSTICE HECHT: We have tried to move away from formal structure of briefs to give the parties more of an opportunity to present it the way they think is most persuasive. So the reason that it's this way is to try to do that rather than have a separate section, which if the lawyer thinks, well, I have got to have something that's actually called this, but it overlaps with a whole bunch of other things that I want to say

and breaks up the flow, and I wish I didn't have to do that. I wish I could just put, "The 18 reasons why this case ought to be granted are as follows," and make that my argument.

So we are trying to allow some flexibility there, but we do want the argument to focus in on and an important part of it to be why should this case be granted.

MR. YELENOSKY: Judge Hecht?

JUSTICE HECHT: Yeah.

MR. YELENOSKY: On Sarah's point, Sarah, were you talking about (c)(5) and then (e)? Because I thought (c)(5) is referencing "points also asserted by the respondent," was referring back to (3) where you can -- the respondent can state independent grounds.

HONORABLE SARAH DUNCAN: Maybe so.

JUSTICE HECHT: There is no restriction, and we don't mean to change that aspect of the practice. Obviously the respondent can raise whatever he can --

MR. YELENOSKY: Yeah.

JUSTICE HECHT: We don't want him to be able to raise less than he can raise now.

MR. YELENOSKY: She was just pointing out there might have been a drafting error, but I think it is taken care of in (c)(5) where it talks about the respondent being restricted to the points presented in the petition or the respondent's -- or respondent's statements of the issues that's under (3).

HONORABLE SARAH DUNCAN: I don't think so.

MR. YELENOSKY: Does that not take care of it? Well, that may be too detailed.

JUSTICE HECHT: In any event, those are the kind of things we need help with.

CHAIRMAN SOULES: Yeah. That's the level of detail that the Supreme Court wants feedback, is to work through the words here to get to the policy that they are going to, which is an abbreviated request for relief or request to be heard in that Court. Really

that's what it is. It's a request to be heard.

Justice Duncan. And then I will get to you, Bill.

HONORABLE SARAH DUNCAN: Well, on that level of detail, on page 3 in subsection (g)(1) it says "if a motion for rehearing is filed." Is the Court thinking that maybe a motion for rehearing is going to be optional?

PROFESSOR DORSANEO: Uh-huh.

JUSTICE HECHT: Yes. I think.

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: My personal preference would be to talk about the reasons the Supreme Court should exercise jurisdiction in the same place as the statement concerning jurisdiction, and that can be done either place; but I find it easier to do it there, especially if you are going to talk about the conflict in decisions there. And if it's just going to be a one-liner like, you know, a Federal complaint, then I would make it a one-liner altogether and talk about the conflict of decisions and the argument,

too; but I am going to be talking about both of those things many times, and I don't like separate -- I don't like doing it here and there, and I think I have kind of gotten into the habit of doing it all in the statement of jurisdiction over the last several years, although that's a new habit. That's not an old habit.

JUSTICE HECHT: Again, that's not something that we have really strong feelings about. It's kind of whatever works best for lawyers. Mike.

CHAIRMAN SOULES: Was that pitched over to argument because of --

PROFESSOR DORSANEO: It is argument.

CHAIRMAN SOULES: -- the statement concerning jurisdiction is not counted in the pages?

JUSTICE HECHT: It's not going to be counted.

CHAIRMAN SOULES: It's not going to be counted.

JUSTICE HECHT: And I am not sure that's clear here.

CHAIRMAN SOULES: It is clear.

JUSTICE HECHT: But subsequently we are going to make this first part, the pro forma part, an actual form that you -- a prescribed form that you use in the front of the brief that actually ticks it out in order, the parties, the lawyers, the trial judge, the court of appeals, the disposition, all of that, so that that doesn't -- that's not taken out of the argument, the pages allotted to argument.

CHAIRMAN SOULES: Okay. So if I'm hearing Bill, I mean, one through six are not counted in the pages. Somewhere it says that.

HONORABLE SARAH DUNCAN: They are.

CHAIRMAN SOULES: What?

HONORABLE SARAH DUNCAN: They are.

CHAIRMAN SOULES: They are not.

HONORABLE SARAH DUNCAN: Well, as written now, they are. If you look at --

CHAIRMAN SOULES: Well, that's not what I read.

HONORABLE SARAH DUNCAN:

-- subsection (f) on page 3, it does not exclude the statement of jurisdiction.

MR. KELTNER: Sarah, say again. I didn't hear.

HONORABLE SARAH DUNCAN: Well, I may be reading it wrong, but on page 3, subsection (f), "shall be no longer than 15 pages" and then it's got "exclusive of" like we have now, but statement of jurisdiction is not included, and I would argue that it shouldn't be excluded because I think it is part and parcel of the argument in large measure in the Supreme Court.

I mean, yes, you have to establish error. That's sort of a beginning threshold, reversible error, but I thought the whole point of the petition system was to sort of focus on the discretionary nature of the Supreme Court's jurisdiction; and for me, it was an old habit, and I think it was an old habit that grew up because most of what I did -- a lot of what I did was in the Fifth Circuit. It seemed to make more sense there, and it's a hard thing to weave into an

argument in an explicit form, even though it's implicitly a part of every sentence in the argument; but it would be hard for me to write -- I could do a separate section, but it would be a lot easier to do it as a part of the jurisdiction because it just flows from that.

PROFESSOR DORSANEO: Unless the jurisdictional statement is just simply "boing," you know.

JUSTICE HECHT: But I think the answer is we want both. I mean, we want what sections of the statute are you -- do you claim under; and, for example, we are getting an increasing number of interlocutory appeals in cases with official immunity that the legislature passed, in some libel cases that the legislature passed, and historically the jurisdictional door on our Court in those kind of cases is very narrow as opposed to just our general jurisdiction over appeals that come up through the court of appeals.

So if you are claiming there is a conflict in the courts of appeals and that's how come this case is important and we ought

to hear it, we take a very broad view of that. I mean, we kind of look for general philosophical conflicts, but if it's to trigger our interlocutory jurisdiction, like in an official immunity case, then our position has always been it's got to be a head-to-head conflict, class action certification. It's got to be a head-to-head conflict, not just kind of a general conflict.

HONORABLE SARAH DUNCAN: But that seems to me why I at least would want it all in one place, is I may be relying on the section of the government code for official immunity interlocutory appeals or denial of summary judgments; and that may be what gives me technically some access to the Supreme Court, but you can say that in a sentence, and if it's an official immunity case and it's a denial of summary judgment, it's not a big secret that that's initially where jurisdiction is going to spring from; but the real gist of jurisdiction in the Supreme Court in one of those cases or pretty much any other is, so why should we hear it? Just a thought.

CHAIRMAN SOULES: Well, I'm

thinking here. Mike, go ahead while I'm trying to develop a thought.

MR. HATCHELL: I have some concerns about the integrity of the process that I don't think would cause any radical realignment of this, what's been proposed; but I don't want to get off into a discussion of my views of the candor with which appellate counsel treat records and adhere to the truth, but I think unfortunately it is deplorable either from the standpoint of outright fabrication or untruth to the standard of review; and one leavening process is that a court always has a record, and two, I have the right to rebut. And it seems to me like the scenario that's been presented is I don't have a right to reply to somebody's response to my petition and you don't have the record, and I know you can get the record; but I do have some concern about how simply to keep integrity within the process from the standpoint of both the standard of review and what is actually true in the record.

JUSTICE HECHT: Okay.

CHAIRMAN SOULES: Justice

Duncan.

HONORABLE SARAH DUNCAN: And on the standard of review I wondered if the Court had considered adopting the Fifth Circuit/Ninth Circuit kind of practice of requiring a statement of the standard. It seems to me just in the little bit of time I have been doing this that if people would have to write the standard, they might realize frequently that there is no point in writing it a second time.

CHAIRMAN SOULES: No point in --

PROFESSOR DORSANEO: Writing anything -- the rest of it.

HONORABLE SARAH DUNCAN: No point in putting that in final form because the standard is it.

CHAIRMAN SOULES: Right. Right. Don Hunt.

MR. HUNT: Let me respond to several things that have been said here and disagree a little bit and agree in some other ways. Judge, I would prefer, for example, on (b)(5) that we call this "Jurisdictional

Basis" and limit it to a very idiot simple statement of that statute that gives you jurisdiction and not count it against the page limit. Then we could do in the argument what I think arguments are supposed to do.

One of the most difficult things to do myself and to teach students is to try to get them to capture the sense of the importance of the argument in the first two or three paragraphs, and then if we went to a jurisdictional basis and then left some language that is now in (b)(7), commanding the advocate to try to tell the Court why this thing should be granted, why there should be additional briefing in the sense of the importance of the case to the Court, to the state, and why the Court should want to hear more briefing on this, why the Court should take it, that that's a better place for it than arguing that kind of thing in a jurisdictional statement.

And so I like very much what the Court has done here in that sense. It may be that if we change the label on (5), we come up with a straightforward that this Court has

jurisdiction under "blurb" and site a statute and quit.

One other comment, and I think Justice Duncan may have a good recommendation that would be worthy of consideration. One of the things I have liked in writing Federal briefs, at least some of the Federal briefs, require that when you state your issue you cite immediately underneath that issue in the parentheticals the standard of review.

Like the standard of review is de novo, and you cite a case, and that's what's there in parentheticals, not so much different from the parentheticals that we now include on our points of error; and if that's done right there with the issue as presented and it doesn't count against the page limit, then we have built in what the Court may be attempting to accomplish, a 15-page argument section where you really sell your case, what's right or wrong below; and if you can't do it in 15 pages, you probably can't do it, and that's the reason why this may work.

CHAIRMAN SOULES: Okay. Well, Don, don't you usually in -- at least in the

Fifth Circuit, you have the issue as presented and then a separate section on the standard of review. Each issue.

MR. HUNT: Right. I didn't say Fifth Circuit because it's just some circuits that do that, and one of the things that I think is helpful is the bankruptcy rules, when you are going to the district court it spells out that you put that standard of review in parentheses underneath the issue. That part of the Federal practice may be quite healthy here.

CHAIRMAN SOULES: On the question of jurisdiction, but we have got several things at play. We have got sections of the government code that give you, what, review of error of law and then limited review on interlocutory orders where you have to have conflict. I think Justice Hecht spoke to that, and then you have got the piece of the -- I don't know if it's part of the jurisdictional piece or not, whether the case is important to the jurisprudence of the state. Is that considered part of the jurisdictional decision today?

PROFESSOR DORSANEO: It is, but I think what the appellate lawyers are saying here is that -- is what Don Hunt said, is that if we are going to have this jurisdictional basis or statement of concern and jurisdiction, it ought to be, you know, very simple and formulary and all of the argument about whether jurisdiction should be exercised should be together in one place, whether that involves conflict, a discussion of conflict of decisions or whatever. That naturally leads.

That's the second part of the brief of the argument after the introduction. That works reasonably well. Maybe that's what this is meant to mean when it says "a concise statement of conflict," just identifying the cases; but I don't see any point in identifying other than the jurisdictional statute, frankly, because once you start identifying the cases that are in conflict then you are going to want to put parentheticals after the cases and you are going to want to just --

MR. YELENOSKY: And as long as the page limit doesn't apply, that's what

people will do unless you say specifically a one-sentence statement of the jurisdiction.

PROFESSOR DORSANEO: Leaving all of the argument about it to the argument. That will work, works fine.

CHAIRMAN SOULES: What seems to me that might be helpful, to address this to Justice Hecht, what if we said, "A statement concerning jurisdiction is not to exceed one page"? It's a free page, but that really focuses.

MR. YELENOSKY: One sentence.

PROFESSOR ALBRIGHT: One sentence.

CHAIRMAN SOULES: No. I'm talking about if you have got to say why it's important, if you have got to say what conflict, you can do all of that in any case in one page.

MR. YELENOSKY: But that's your argument, isn't it? Isn't that your 15 pages?

CHAIRMAN SOULES: Well, it depends.

PROFESSOR DORSANEO: I think it may spend two pages.

CHAIRMAN SOULES: Well, if you only had one, you might do it in one.

MR. KELTNER: Luke, I think that's a good concept, but perhaps we can look at it from a different viewpoint because that is going to encourage people to discuss at some length and get into some of the argument that we probably ought to avoid. I think what the Supreme Court really wants to hear in the argument section is, one, there is an error; two, it's terribly important, and it's important to the jurisprudence of the state, and you can't let this injustice go unsolved.

And if that's what we want to hear, let's put it all in the argument section and just refer to the portion of the government code for jurisdiction because all this Court wants to know is -- they still get, unfortunately, applications for writ on insufficient evidence grounds, and that's what they are trying -- I'm guessing is what they are trying to prevent here, and let's keep it, as Don said, just bonehead simple on that and let all of the discussion in the 15 pages go to why it's important and why it's narrow and why the

Court ought to exercise the jurisdiction, because I really think that's what they want. Unless I'm misreading you, your Honor.

JUSTICE HECHT: No. That's sort of what we want.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: So this is basically just a check the blank, check the box.

MR. KELTNER: Yes. Exactly, Steve.

MR. SUSMAN: I think that's a great idea.

MR. KELTNER: And it would be if it's one of those, check the box.

MR. SUSMAN: After that they can use their 15 pages however they want.

MR. KELTNER: Yes. And the other -- the only problem with what I think Luke was trying to do is always there is a problem when you have conflicts between court of appeals decisions because there is quite often a disagreement among the parties of how directly do we hold the conflict, but that ought to be part of the argument and not part

of the jurisdictional statement, and that's why I think we don't need to waste a page there.

MR. SUSMAN: Agreed.

CHAIRMAN SOULES: Okay. Judge Guittard.

HONORABLE C. A. GUITTARD: If we have said enough about that point, I would like to inquire as to the respondent's -- under (c)(5), "Respondent's arguments shall be confined to the issues or points presented in the petition and those asserted by the respondent in the respondent's statement of issues." Now, it's not quite clear to me just how broad the respondent may state his issues. May he state, for instance, an independent ground of affirmance there?

Apparently under subdivision (e) he must be able to, otherwise there would be no occasion for a reply to it. So I think that ought to be made explicit in (5) that he may assert independent grounds of affirmance.

Then the next question is, does it make any difference whether the court of appeals has decided that point or not, and it seems to

me that he ought to be able -- the respondent ought to be able to assert independent grounds of affirmance if they are briefed in the court of appeals, whether or not the court of appeals has decided that particular issue. If No. (5) is broad enough to cover those situations, well, that's fine. I would suggest simply that if it is that broad, it ought to be -- those matters should be expressly included.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: I am not sure about this, but I think there are some bases for Texas Supreme Court jurisdiction outside the government code.

PROFESSOR DORSANEO: It seems like there is.

PROFESSOR CARLSON: And I think there is some out of the Constitution, so we might just want to say, you know, "indicating the legal basis supporting jurisdiction" or something like that.

MR. KELTNER: Well, but one of the grounds under the government code is

anything else by statute or Constitution, is my recollection.

PROFESSOR CARLSON: Well, I'm sitting here looking at it trying to find it, but you may be right.

MR. KELTNER: I could be wrong about that, but I --

JUSTICE HECHT: But there might be some day, so why be too confining?

MR. YELENOSKY: Whatever we put -- we were just sort of joking about that someone from the Republic of Texas could have perhaps some reason for state court jurisdiction that we all have never heard of; so whatever we say, I still think we need to put some limit in there, if we can't limit it to the government code or otherwise, that it's a sentence, two sentences, whatever, because if it's not counted in the page limit, somebody is going to figure out some way of adding to their argument in this portion.

MR. SUSMAN: It seems to me that when you talk about the length of the thing, why don't you just say what's included within the 15 pages rather than what's

excluded, because you have got -- it's really kind of complicated to read it. As I understand it, the statement concerning jurisdiction and the argument are limited to 15 pages.

MR. YELENOSKY: Well, that's the question. Should they be if we are going to -- the alternative would be to limit it to the argument, the 15 pages only apply to the argument, but within the part that refers to statement of jurisdiction, it says "a one-sentence, two-sentence statement of the jurisdiction."

MR. SUSMAN: Right. And then within the part that says "statement of the case" we would say, "seldom exceed one-half page," but that's not mandatory?

MR. YELENOSKY: Well, maybe you want to make that mandatory.

MR. SUSMAN: Yeah. Because it would be long statements of the case if it's discretionary.

MR. KELTNER: Including the "l-y" words.

CHAIRMAN SOULES: Anyone else

have any comments?

MR. McMAINS: Did I understand that the Court is saying that you are going to abandon the requirement to have assignments in the motion for rehearing, in the court of appeals? On records to review?

(Justice Hecht nods affirmatively.)

MR. McMAINS: Are these points that mean then that just anything you think of after the court of appeals opinion you can put in without any kind of discretion whether you raised it below?

JUSTICE HECHT: No. You have still got to have preserved it in (b)(6), the last sentence of that, but the motion for rehearing --

MR. McMAINS: What is (b)(6)? I'm sorry. I don't have it.

JUSTICE HECHT: Yeah. "If the matter complained of originated in the trial court, it must have been preserved for appellate review in the trial court and assigned as error in the court of appeals."

Doing away with the motion for rehearing

is not intended to affect the requirement that all issues be presented in the lower courts at every level, whenever they come up. So if you had a problem in the court of appeals opinion that you hadn't had occasion to complain about before it appeared, you would have to raise that in a motion for rehearing in order to preserve it to complain in our Court; but if there was nothing new, you just wanted the court of appeals to rethink its opinion, then you could file a motion for rehearing or not. It would be up to you.

MR. McMAINS: Well, our current timetables, of course -- are you talking about redoing all of our rules then on the regs with regards to not running from the date of overruling the motion for rehearing?

JUSTICE HECHT: I think we did that. Yeah. I think we did. I don't remember exactly what it is exactly, but I think -- I'd have to look at that change, Rusty, but I think we did.

MR. McMAINS: I'm just wondering if we kept -- because the problem that we had that came up in those series of

Rose cases was what happens when somebody files a motion for rehearing and somebody doesn't, and somebody is going to the Supreme Court and somebody is not?

JUSTICE HECHT: Right.

MR. McMAINS: I mean, it took us a long time to work through that scenario already, and I am wondering if we created it again.

JUSTICE HECHT: We are hoping to make it all disappear, but I don't know. I mean, you need to look at that and see if we did it or not, but we are trying to get out of all of those traps.

MR. McMAINS: Yeah. But I think the way we did it before was basically the clerk didn't do anything. Previously, of course, the Court got the writ when it was sent by the court of appeals, and the clerk wasn't supposed to send anything until all the motions for rehearing were over with, and that's the way we fixed it, was just an arbitrary telling the clerk, "Don't give them anything. Do not send it out of the courthouse until all of the motions for

rehearing are acted on."

Now, if that's no longer required then -- and some of them may or may not file, well, I think we have resurrected that problem.

JUSTICE HECHT: Okay. We will have to look at that.

MR. HATCHELL: There is a problem in that regard because the petition is now filed directly in the Supreme Court. It doesn't go to the court of appeals, so if you have a situation where somebody who is really ahead of the game files a petition at 14 days and then somebody else files a motion for rehearing in the court of appeals, and so you have got the Rose problem I think all over again in addition to the fact that I have seen a draft of the rules that says that then if somebody files a motion for rehearing and you haven't, you get the right to file one. So you could have a motion for rehearing pending while you have a pending application as well. Heaven only knows where jurisdiction rests in that scenario.

MR. McMAINS: We have

historically -- and I guess because it derived from statute, historically we never started the next court until we finished in the last court, and you kind of assumed --

MR. KELTNER: We have been largely unsuccessful at that, but we have tried.

MR. McMAINS: We have been trying.

CHAIRMAN SOULES: That's been the scheme, although there are failures.

MR. McMAINS: That was the objective of the scheme.

CHAIRMAN SOULES: There are failures in the operations sometimes.

MR. KELTNER: But we could work it out under this and still get rid of the motion for rehearing as a jurisdictional prerequisite in the Supreme Court, and I would very much applaud that, but I think you're right. I mean, we sure could end up in both courts at the same time with the Rose problem, but I sure would like to see us get rid of the motion for rehearing as a jurisdictional prerequisite.

CHAIRMAN SOULES: Okay. Rusty. And then I will come up the table.

MR. McMAINS: What is the time for the response? I mean, is it the same for the defendant? Is it 15 days?

JUSTICE HECHT: 30 days after the petition is filed.

MR. McMAINS: So you get 30 and 30.

JUSTICE HECHT: Yeah. We have extended that to give you more time.

MR. McMAINS: Okay. That's good.

MR. SUSMAN: Do I understand that briefs on the merits, I mean, other than the petition for review and the response and the reply, nothing gets filed without the Court asking for it?

JUSTICE HECHT: Yes.

MR. SUSMAN: Before and after argument?

JUSTICE HECHT: No. Just up until --

MR. SUSMAN: Because that's not clear. I mean, to me I think you-all ought to

deal with post -- I mean, I think the postargument briefing is a real problem in the Court, I think, because it never ends. I mean, to have the Texas Supreme Court do what a typical trial court does in deciding a discovery motion, let either side talk. The last side that sits down, you know, you can just Ping-Pong back and forth, back and forth, back and forth. I think that ought to be stopped because I think it is an abuse, and it costs parties a lot of money. You know, maybe one shot after oral argument, but it ought to end at some point in time, I would think; but the rule is not clear whether these apply postargument or just pre-argument.

JUSTICE HECHT: That's a good point.

CHAIRMAN SOULES: Well, but, I mean, the Federal rules have 28(j). 28(j) is limited and should be, and we don't abuse it. I know some people do, but I seldom see it abused in the Federal courts. Okay. This is where you would write a letter, and you would call to the Court's attention an authority that's come to your attention after briefing.

It can be done before argument or after argument prior to the decision on the merits, and it says -- you do it by letter setting forth the citations, but the letter shall without argument state the reasons for the supplemental citations, and there is always a spin, but it's short, and things come up until the case has been decided.

MR. SUSMAN: I don't question that kind of rule.

CHAIRMAN SOULES: And so I think if you just had a 28(j) process after the reply, that it's going to be informative, but not -- I don't think it's that burdensome, and there has got to be a way into the courthouse with a new case. Of course, suppose you have got a --

MR. SUSMAN: I agree 100 percent. I'm sorry. I didn't mean to -- I just meant regurgitation and re-argument.

CHAIRMAN SOULES: This is Federal appellate procedure 28(j). Rusty.

MR. McMAINS: I have one other just kind of overall comment about the idea of trying to limit the party's briefing, is that

I fear -- and there is nothing that I saw addressed in the rules. I fear that instead of briefing by the parties what we will have is an onslaught of contemporaneously filed amicus briefs.

That's going on now, and this is only going to be encouraged. When you limit a party's ability to brief, then what's going to happen is the one who can afford it, the one who can pay all the lawyers or whoever it is, you know, pay other parties, coerce other parties or whatever, to file a bunch of amicus briefs to heighten how important the issue or how unimportant the issue, although, I think that's kind of a misnomer, trying to get a lot of people saying this is not important, although we are spending a lot of money on it.

But I think it really lends to a lot more uncontrollable abuse in the amicus process, and if you went to this system, I would virtually favor a system which says, "The Court will not receive or file amicus briefs on the petition."

JUSTICE HECHT: Even if they were limited.

MR. McMAINS: There is no way that you can stop that process if you -- you know, there are a number of people that can call to task 20 people to file five-page amicus briefs, therefore, giving the Court 100 pages of briefs.

MR. SUSMAN: On one side.

MR. McMAINS: On one side and almost simultaneously, and that I think is a distortion of the system.

CHAIRMAN SOULES: Steve. Then I will get to David Keltner.

MR. SUSMAN: I just want the record to reflect that I agree 100 percent with Rusty, and I hadn't had any thought about it. I think this is generally a good idea, but that amicus thing really would make it unfair unless -- I think amicus should not be allowed, you know, at that stage for some reason.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I take the opposite view, and I have suffered with amicus briefs as well, Steve, and trying to deal with

them, and there is no doubt that they can be abused by one party, your Honor. No doubt about that. I doubt that the Court, though, is going to take the step of saying interested citizens can't file something before the Supreme Court on an issue they believe important to their business, profession, whatever. I just don't think the Court will want to do that for a number of reasons.

Perhaps another way of looking at that is having some reply option set out in the rules by parties once an amicus brief is filed. I don't think you would cut them off successfully. I think they would get filed and sent to you by the same groups that now do it. I think you know when they are abused and can tell when they have been solicited by parties, but nonetheless, there may be a way to regulate them. I doubt that you will truly as a matter of public policy want to cut out the filing of amicus briefs, but it is a problem.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: That's interesting. That might solve part of the

problem. I mean, in other words, if the party who goes out and hustles the amicus briefs knows that every brief that's filed is going to give the petitioner an opportunity to file a reply equal in length, so if you get ten amicus briefs ten pages long, I get ten replies ten pages long.

MR. KELTNER: Yeah.

MR. SUSMAN: And the respondent doesn't get to say anything. It might discourage the respondent from going out and hustling the amicus briefs.

CHAIRMAN SOULES: I will hustle amicus briefs for the other side.

MR. KELTNER: Yeah. That's absolutely true.

MR. SUSMAN: No, I don't think you will.

MR. McMAINS: You hustle the bad amicus briefs.

MR. KELTNER: How many of us have been hurt by amicus briefs filed in our favor?

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: I want to be certain

I heard Justice Hecht correctly. Is the process going to be that if the court of appeals makes the error for the first time that you must file a motion for rehearing there?

JUSTICE HECHT: It's my understanding that's our intent, yes, that you have got to preserve all the errors all the way up.

HONORABLE SARAH DUNCAN: At the level at which it occurs.

JUSTICE HECHT: At the level that it occurs.

MR. HUNT: Okay. I want to make a plea if it's possible to at least think about letting that occur in the petition for review rather than at the court of appeals level because so many times all the review you get at the court of appeals is just a simple listing of the points. That's all I send in most of the time, and a simple listing of the points gets me two weeks, and I would rather put that issue in the petition for review and argue it to a new mind rather than have the same judge take my time and my party's money

for a cursory two-week extension.

I feel safe enough in asking the Court to look at a problem with an opinion of the court of appeals and what it does as I do getting the judge to rewrite it. Now, there may be some occasions where the court really blew it, but if the court really blew it, I would rather use that as a way to get in the Supreme Court rather than to get a paragraph rewritten.

The opposite view here, I guess.

HONORABLE SARAH DUNCAN: I'm going to sound like Judge Guittard.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I think that's a waste of the Supreme Court's time. If the court of appeals will fix an error that it has committed, I think it should be given the opportunity to do so.

CHAIRMAN SOULES: Well, you know, there is some risk in this process --

HONORABLE C. A. GUITTARD: Amen.

CHAIRMAN SOULES: -- that the

courts of appeals will become in an expanded way the courts of last resort in this process we are looking at. That's the reality of it, and there is discussion. I mean, that's not my idea. There is discussion in the appellate Bar that we hear already. Justice Hecht has probably heard some of that himself, and I don't know if it's germane to what Don's saying or not, but maybe.

HONORABLE SARAH DUNCAN: They already are in 90 percent of the cases. That's just life.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Don, forgive me. I have got to argue against your position as well for another reason. In multiple panel courts, and we have an increasing number of those, one of the most effective motions for rehearing you have is motion for rehearing en banc, generally because the opinion of this three judge panel may very well disagree with another, and that is a higher percentage motion for rehearing and is something that is uniquely set for that court to hear to set the

law in that jurisdiction.

So I'd still have, if you have a problem with the opinion is to -- and I think most of those come by opinions, quite frankly, once the opinion is out, is do that at the court of appeals level before you go to the Supreme Court. I think that's just a better way to do it.

CHAIRMAN SOULES: Okay.

MR. HAMILTON: It's not stated in paragraph (6), and it ought to be motion for rehearing for matters that originate in the court of appeals, and I think it ought to state that. (B)(6).

CHAIRMAN SOULES: (D)(6) on page 2?

MR. HAMILTON: Page one. (B)(6), page one, the last sentence.

CHAIRMAN SOULES: What is "the matter complained of"? Is it a holding? I never have been quite clear on this. I mean, we have a judgment in the court of appeals, and that's what's really complained of in the Supreme Court, is the judgment. Does this mean that if the court of appeals makes a

holding that's somehow not been addressed by the parties before, you have to take that holding back to the court? Something that's in its opinion. It's not in its judgment.

MR. KELTNER: Yes. And I think that's the issue. Generally what happens is the court will have written and accepted the arguements one or more of the parties have written independently, and one of the things they say is "another reason for reversal of the judgment," but what you really are attacking really is the language in the opinion, and that's always been difficult for us because what you're actually technically doing is attacking the judgment and attacking one of the grounds for the judgment.

So it's always been a close call on motions for rehearing if a critical issue in the opinion really affected or supported the judgment. It's always been an iffy deal, and quite frankly, generally the Supreme Court has let you without an assignment in the motion for rehearing, as long as you said they were wrong, attack the opinion in the Supreme Court. So we have that problem already.

CHAIRMAN SOULES: Anyone else have any discussion on this at this time?

Justice Hecht, what's your timetable on wanting to get -- is this just something you want to have discussion from us pretty fully today so that it can go back to the Court based on our record, or do you want us to submit this to subcommittee for edit?

JUSTICE HECHT: I think Judge Guittard's people have had a chance to look at this some already, but we would like to include this in the TRAP rules, which we hope to have finished by the first of July. So these comments are very helpful. It's exactly what we needed, but if others after thinking about it, particularly the appellate subcommittee, have additional comments, then we would like to hear those, too. I mean, if you just think of something, we would love to hear from you.

CHAIRMAN SOULES: Okay. How many pages? Are the pages adequate? I mean, I understand Justice Hecht said that's negotiable. No comment on that?

Okay. By way of timetables, Justice

Hecht, we had understood -- we tried to work through this processing of the appellate rules earlier this morning, and you weren't here, so maybe I ought to kind of revisit that with you. I guess what we were -- we understood that you-all wanted to try to get LawProse to have their completed work to you or to the Court by the end of June.

JUSTICE HECHT: Right.

CHAIRMAN SOULES: That work is then going to Bill and Mike, and Justice Duncan has volunteered and Elaine and Don Hunt, I think, to help them, and David Keltner. I may have overlooked somebody. I hope not.

PROFESSOR DORSANEO: Justice Cornelius.

CHAIRMAN SOULES: And Justice Cornelius. Okay. To review for accidents.

JUSTICE HECHT: Right.

CHAIRMAN SOULES: And they indicated, I think, that they thought they could get that reviewed -- if they got it by the first of July, get it reviewed by the end of July for accidents, and then sometime in

August we would have a draft of that distributed to our entire committee, cleaned up, freed of accidents, and, well, let's see. I guess it goes back to LawProse after you-all do it.

MR. HATCHELL: We have nothing to do with LawProse. That's the Court's deal.

CHAIRMAN SOULES: Right now it's going back to LawProse. So they get the accidents identified and recommendations done by the end of July. Then it goes back to LawProse, and they have some period of time in August to react to or respond to that review; and if they do that promptly, we should have -- and, of course, I guess it goes back to the Court. It may not go back to the Court after that. It may come straight here, but we would have it hopefully by the first of September to distribute to the membership of the committee as a whole so that there could be homework done on it prior to our September 20th meeting.

That schedule itself seems fairly ambitious, although it still takes us to almost the end of September before we are

completed, the process is completed, but all of these steps have to have time to form, and I'd like to have any suggestions or input that you have on that.

JUSTICE HECHT: Well, we would just like to move along as quickly as possible, realizing the realistic constraints on people's time. We have the first 24 rules back from Brian, so we can send those to your group now and have them again look at those.

CHAIRMAN SOULES: I think they have come.

JUSTICE HECHT: Okay. You have already got them?

CHAIRMAN SOULES: Well, the first installment of 1 through 10, and then 11 through 24 has just come out.

JUSTICE HECHT: Right. So we can -- they won't have to review the whole thing at once. Hopefully, when the last installment comes all they will have to do is look at the last installment, but I mean, subject to trying to move it up as fast as we can without cutting corners, something like that is what we anticipate. We don't

anticipate that when it goes back to Garner that he will have many comments. I mean, he may have a few, but that shouldn't be a lengthy process, and I don't anticipate that the Court will either. So it might be a little faster than that, but we will just have to kind of monitor it and see how it goes.

CHAIRMAN SOULES: Well, to get it -- if it's going to come back to our entire committee to get it here by the July meeting is going to be --

JUSTICE HECHT: I don't see how we can do that.

CHAIRMAN SOULES: So the September meeting is the next after that, unless we have a special meeting.

JUSTICE HECHT: We will just have to see how it goes, but if we were that close to finishing we might meet earlier in September or the end of August or something so that we can make the publication deadline for the Bar Journal. Publication deadline is about the middle of the month, so if we were done the first part of September as opposed to the last part, it makes a month's difference

in the rest of the process.

CHAIRMAN SOULES: Okay. Well, whatever guidance we get from you we will follow as our quest.

Okay. Anything else on -- does anyone else have any comments on the functioning of this petition for review process?

Mike Hatchell.

MR. HATCHELL: Well, Luke, I guess, just to be concrete about the concerns I expressed, I don't see -- and I think the Supreme Court of the United States also has this in its cert process, a limited eight-page general reply or something to the petition might be helpful, and I really do think that the Court ought to have the record. That may be -- I understand the problems that the Court has with just the space and what have you, but --

CHAIRMAN SOULES: A limited eight-page reply to what?

MR. HATCHELL: To the petition. To the response to the petition. I'm sorry.

PROFESSOR DORSANEO: Regardless of whether there are crosspoints.

MR. HATCHELL: Right now the reply is limited to alternative grounds asserted in the response and grounds asserting a less favorable judgment.

CHAIRMAN SOULES: In other words, this doesn't give the petitioner an opportunity to respond to --

MR. HATCHELL: Implicitly it denies it.

CHAIRMAN SOULES: -- a flat misstatement of what a case holds or a flat misstatement of what the record is in order to assist the Court that there has just been a flat misstatement that this Court shouldn't be misled by. Okay.

JUSTICE HECHT: Yeah.

HONORABLE SARAH DUNCAN: Luke?

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I also think in addition to what Mike is saying there has to be tremendous reliance, I think, unfortunately on what the representations of counsel are as to the facts and the law to some extent, and a higher one I think than

anybody would like, and I know that David Lopez sent out reprints of his article on sanctions and frivolous appeals, and I think that needs to be taken into consideration in this petition for review process.

And if people make misstatements of fact or of law to the Supreme Court and it's pointed out by opposing counsel or the Court catches it on its own, there need to be repercussions; and it may be that you can't file a petition in the Supreme Court for some period of time because you have not served the Court well; and I'm not talking about where we all disagree, where two people disagree on what the law is or what the statement of facts says. I'm talking about the flat out misrepresentations of the record and case holdings or using an ellipsis in a deceptive way.

CHAIRMAN SOULES: Now, is there a place somewhere in here where it says if the error is new in the court of appeals --

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: -- there has to be a motion for new trial -- motion for

rehearing filed?

JUSTICE HECHT: No. It just says it has to have been preserved in (b)(6).

No. Let's see. That's not right.

CHAIRMAN SOULES: I'm looking there. I'm not finding it.

MR. HATCHELL: You can read (b)(6) when it says "assigned in the court of appeals" meaning if necessary assigned in the motion for rehearing.

CHAIRMAN SOULES: Well, but the sentence starts, "If the matter complained of originated in the trial court." That's the predicate for all of that sentence, and we are saying this is not a matter that originated in the trial court, so where do you go for the direction that you have to do anything in the court of appeals?

Well, what's the consensus on that? There has been kind of a debate back and forth about whether a motion for rehearing in the court of appeals should be required as a predicate for a petition at all, and if so, in what circumstances. I guess it's if this holding occurs in the court of appeals out of

the blue. What's the consensus? Let's just take it.

HONORABLE SARAH DUNCAN: We have already voted on that.

CHAIRMAN SOULES: Huh? We have?

HONORABLE SARAH DUNCAN: Uh-huh. A couple of times.

CHAIRMAN SOULES: In this context?

HONORABLE SARAH DUNCAN: That's another one I lost. That's why I remember it.

CHAIRMAN SOULES: Well, I know, but this is --

HONORABLE SARAH DUNCAN: The consensus of the committee was to continue to require motion for rehearing.

CHAIRMAN SOULES: Always, but this is changing that. The Supreme Court says they are going to change that. They are going to at least eliminate it sometimes, so whatever we said has been changed. Given that change, do we want to make a different recommendation?

PROFESSOR DORSANEO: I would

say "never" rather than "seldom."

CHAIRMAN SOULES: Never require it, always permit it? What? Never required, but always permitted?

MR. KELTNER: I'd rather go that way rather than the other way.

CHAIRMAN SOULES: What?

MR. KELTNER: I'd sure rather go that way rather than the other way.

CHAIRMAN SOULES: Otherwise somebody pretty sophisticated in appellate review is going to have to decide whether this is new in the court of appeals or not, and the Supreme Court is going to be struggling with that, and we are going to be using the sum of 15 pages talking about what should have been done on motion for rehearing instead of "This is a case you ought to look at, here's why."

MR. KELTNER: Good point.

HONORABLE SARAH DUNCAN: I see what you mean now. I misunderstood you. I'm sorry. Whether to go further or stay at this point or go further.

CHAIRMAN SOULES: Right. It just -- does anybody have a recommendation on

that? Yours was what?

PROFESSOR DORSANEO: Well, my recommendation would be to leave this sentence alone in (b)(6), but to be clear that it does not require a motion for rehearing because the error originated in the court of appeals, and I would be thinking there would be a couple of situations. There would be a ruling that was made first in the court of appeals, although there would be few of those because we are not dealing with the record anymore, but that would be something if we had a ruling then, well, if we have a ruling, then they have already ruled. Follow me?

I guess, an order, an order in connection with the appeal itself, processing the appeal. I don't see any need to have a motion for rehearing on that because that was a considered thing, and then these problems about holdings and the relationship of holdings to arguments to judgments to -- that's just too complicated. So I would just do away with the motion for rehearing if that's what it's about.

HONORABLE SARAH DUNCAN: Do

away with the motion for rehearing as a preservation jurisdictional requirement. It wouldn't preclude one -- I mean, we get motions for hearing every day on orders, and you could still file them as to judgments if you had a panel that had a history of withdrawing opinions and correcting things or whatever.

CHAIRMAN SOULES: Well, motion for rehearing, a motion for rehearing en banc, whatever, would always be permitted, and it would always function to delay this. I don't know. You hear about a Rose problem. I don't know how that works when you have got multiple parties. I guess that casts us into a new problem, but what I'm inquiring about is the wisdom of putting in a sentence that says no motion for rehearing in the court of appeals would be required as a prerequisite to filing a petition for review. That's clear.

So moved?

HONORABLE SARAH DUNCAN: So moved. It's sort of like the Check vs. Mitchell thing. What's a change in a judgment?

PROFESSOR CARLSON: Yeah.

HONORABLE SARAH DUNCAN: And what's a change in an opinion, and what's a holding, and what's a misstatement of the record or a misstatement of the ruling below? And this is the reason -- and I don't think that very many judges on the courts of appeals from when, at least, I have been practicing, I haven't seen a lot of changes of judgments. I have seen a lot of playing with opinions. Not even a lot of that. I have seen a teeny bit of that, but I haven't seen that it ever really changed the essential holding of the court very often.

CHAIRMAN SOULES: Judgment of the court.

HONORABLE SARAH DUNCAN: Holding. And that's why I was in favor all along with just getting rid of them as a jurisdictional requirement.

CHAIRMAN SOULES: Those of you that agree show by hands, just so we can get a consensus on this.

MR. HAMILTON: Agree about what?

CHAIRMAN SOULES: Agree that the motion for rehearing in a court of appeals should never be a jurisdictional prerequisite to a petition for review.

Eleven. Those opposed to that? Three. Eleven to three to do away with motion for rehearing as a prerequisite to petition for review. Sir?

JUSTICE HECHT: The pro se's will love it.

CHAIRMAN SOULES: Well, except for pro se's. Let's make an exception.

HONORABLE SARAH DUNCAN: They are held to the same rules everybody else is.

JUSTICE HECHT: We would get rid of a whole lot of pro se's because of our orders.

MR. YELENOSKY: Sarah's more worried about Don Hunt.

CHAIRMAN SOULES: Okay. Is there much change then in the -- say somebody gets through the wickets on the petition for review and the Court asks for briefs, is that pretty much the same as what we had recommended and pretty close to what we have

today?

JUSTICE HECHT: Should be.

CHAIRMAN SOULES: 132.

Mike has a point that we haven't come to yet on 133. Mike feels like the record should come up with the petition for review; is that right, Mike?

MR. HATCHELL: I do feel that way.

CHAIRMAN SOULES: Let's discuss that one so that the Court can have our discussion. Judge Peeples.

HONORABLE DAVID PEEPLES: A lot of our discussion seems to have missed what I think is a point here, which is the Supreme Court is probably more interested in did the opinion of the court of appeals mess up the law. I mean, how is it important to the state, how is it important to the Supreme Court if the opinion is not messing up the law? And I don't think that has much to do with whether they got the record. You can tell that by reading the opinion. I'm just wondering if that's what you-all are really interested in.

HONORABLE SARAH DUNCAN: Huh-uh.

CHAIRMAN SOULES: As opposed to a just result between a party?

HONORABLE DAVID PEEPLES: Are you-all interested in the result between the parties or the law of the state?

JUSTICE HECHT: Well, you know, mostly we are looking at the law of the state, but if an egregious wrong has been done then we are -- I don't guess there is a judge alive who sees a terrible wrong and doesn't want to fix it if he can, but I think sometimes a misstatement on the record can affect the way it appears to the jurisprudence of the state, is part of the problem. The respondent can say this just -- you know, sure if it were like that, this case might be important, but that just didn't happen or that's not a fair reading of the record, and that does happen sometimes. You can make the case look more or less important and the court of appeals opinion look more or less wrong, depending on how you represent the record.

CHAIRMAN SOULES: Steve

Yelenosky.

MR. YELENOSKY: Well, Judge Hecht, does that eventuality -- and I don't know how frequently that occurs -- justify sending up the record in every instance, or can there be some kind of contingency? From what Mike was saying, the existence of a reply would at least help in saying, "No, that's wrong," and at that point presumably the only way to resolve it would be to look at the record, but does that justify sending up the record every time? And because in the normal instance where that isn't pointed out, where there isn't a dispute like that, presumably the Court is not going to look at the record, even when it's limited the briefs to 15 pages on a petition for review presumably it's not going to review the record.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: If we don't send the record up, I'm afraid what people are going to do is take advantage of the appendix, and we are going to attach in the reply huge sections of the statement of facts and the

transcript. This comes up I think, Steve, a lot in the preservation of error context, whether or not the error was preserved, and that's going to be a massive deal. I would be in favor of taking the record up, except for space and handling by the Supreme Court staff, which is a big consideration. Don't get me wrong, but except for that, I don't see any harm for having it up with the Court to look at it in cases it needs to.

CHAIRMAN SOULES: If the petition is denied or whatever the ruling is going to be, then does the record go back to the court of appeals for storage?

HONORABLE SARAH DUNCAN: Uh-huh.

JUSTICE HECHT: I guess so. I don't know.

MR. KELTNER: Yes.

CHAIRMAN SOULES: So it only stays there for its tenure before the Supreme Court.

MR. KELTNER: And then it is permanently stored by the court of appeals during the period of time the courts have to

hold it in those warehouses around the state, and then it's destroyed.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: With all due respect to Judge Keltner, I completely disagree. I was just walking through our front office the other day, and one of the people in the front office had probably one of you-all's records, and it was about 40 boxes, and we had just gotten it back from the Supreme Court, and with all due respect to the Supreme Court, we have gotten pieces of about six different cases in the same group of boxes that was all labeled to be the same case.

And I say that with all respect for the Supreme Court because I have begun to realize what an incredibly time-consuming thing it is to be sending records back and forth between the courts, particularly in light of the fact that while all of you-all file absolutely good as gold petitions for review, you are not representative, I don't think, of many of the people who will be filing petitions for review. And it seems to me that it is a waste

of the Court's time and money frequently and the litigants' money to be shipping records to the Supreme Court when there is not a chance on God's green earth that that petition is going to be granted.

And I would be in favor of giving the Court the discretion to order up the record, and when Mike Hatchell says in his reply, "I preserved this, and it's on page 569 of Volume 75 of the statement of facts," the Court has the discretion to call up that record and demonstrate the preservation; but in a large number of cases they don't need the record to determine whether the misstatements of fact, assuming everything is a misstatement of fact and law, is going to affect the grant of the petition.

CHAIRMAN SOULES: Well, the offending practice that I encounter is the -- and this is the work of some very highly regarded lawyers in this state. The offending practice that I see is the appeal on legal sufficiency in the Supreme Court where they give a statement of facts that says, "Look at this. This conclusively establishes

that the respondent can't win," but there is a lot more in that record.

Now, why highly regarded lawyers do that, I cannot explain; but that is a false representation of the record in the case, and I don't think even a lot of these highly regarded lawyers realize that that's a false representation of the record in the case, and without a record it's a swearing match, and it may be important to whether or not the Supreme Court reviews it. It may not be. Maybe that's not important anymore. I don't know.

And I just wanted to respond to one thing. To me the logistics of moving boxes back and forth pales in importance to having the parties fairly reviewed, parties' contentions fairly reviewed. That's my view of it.

JUSTICE HECHT: Except that there will be a vast number of cases, I mean, like more than a fourth and maybe more than a third and maybe even more than a half, where there is no disagreement between the parties about what the record says, and none of this has gone on, and so do we want to haul all of

that up there just to make sure we get the others? I mean, we clearly want to have a right to get the record, but there are going to be a huge number of cases where nobody is going to look at it.

CHAIRMAN SOULES: Well, let me ask this question. Could there -- this is just an off-the-cuff thought. Would the Court entertain a procedure by which either party could send the record if they chose to?

JUSTICE HECHT: They might. I don't know.

HONORABLE SARAH DUNCAN: What about a motion?

CHAIRMAN SOULES: I would guess that any place where the Court can do something by request that it's probably going to activate a motion, except I don't know how else you would get them to do it except to --

HONORABLE SARAH DUNCAN: I thought you were talking about doing it as a matter of right.

CHAIRMAN SOULES: That's what I am suggesting. Either party as a matter of right can send the record and say, "They are

off base on the record, and I want the Court to have a look at it" or --

MR. YELENOSKY: Wouldn't that be a matter of course then? Everybody would do that or face malpractice.

CHAIRMAN SOULES: Well, probably in the legal and factual sufficiency appeals, but a lot of times that's not what's really involved. Justice Duncan.

HONORABLE SARAH DUNCAN: Well, and that's -- Rose brought up this question, and that's part of my question, too. How many times now before the Court decides to grant an application is there a thorough review of the record done? I mean, to some -- well, you know, the Court has discretionary jurisdiction now, and that has to cause some changes in the practice; and, you know, I'm as familiar with the misstatements as to legal sufficiency as I guess anybody at the table; but I would doubt that it's going to be terribly important to the jurisprudence of the state if it's just a question of legal sufficiency in the abstract, and usually it's the legal sufficiency coupled with some aspect of substantive law and not

just a disagreement between two judges as to whether this is legally sufficient or this is, that would cause it to get into the Supreme Court in the first place.

JUSTICE HECHT: Well, the answer to the question is nobody is ever going to look at the record unless one party says you need to before the case is granted. I mean, if one party says "yes" and the other party says "no," then almost invariably I can't think of a case where they won't go dig it out of the record and figure out which way is it, one way or the other. But if the petitioner says "yes" and the respondent either doesn't say anything or says "we agree," then nobody is going to go look at the record. If the parties say, "The facts are correctly stated by the court of appeals," nobody is going to go read the statement of facts. Everybody is going to assume that whatever is in the court of appeals opinion is right.

HONORABLE SARAH DUNCAN: And at the point that there is a "yes" and there is a "no," it seems to me that is good reason to

cause the Court's personnel and the parties to take up the expense and the trouble of transferring the records.

JUSTICE HECHT: Now, before an opinion is written there is a more demanding standard because people may misstate the record. I mean, the record may get misstated for a whole lot of reasons, because responding counsel is sloppy or doesn't know or didn't look himself or who knows why. So, I mean, you go and look at it almost always before the opinion goes out, but not -- unless there is a controversy about it, you wouldn't look at it ahead of time. You don't hardly look at anything ahead of time unless there is a controversy about it.

If the petitioner says, "The court of appeals is wrong and they didn't get the facts right, they didn't get the law right, and this case has got to be reversed" and the respondent doesn't say, "We object" or "We don't think that's right," then the petitioner is about 80 percent of the way there.

CHAIRMAN SOULES: Well, why don't we just take a show of hands here, and

the proposition is this, that the record would never go to the Supreme Court unless the Supreme Court requested it, but that the parties could prompt consideration of a transfer of the record to the Supreme Court by a motion. Those in favor? Seven.

Those opposed? Four. Seven to four. The next question that I had was under (d). Seven to four that it would not go unless requested, which could be prompted by a motion.

The next thing I had is under Rule 130 on page 2, (d) at the bottom of the page, "To obtain a remand to the court of appeals for consideration of issues briefed," we don't have in that list where those points can be presented. We don't have in that list "in the petition," and is that because the Supreme Court will read the 15 pages, the 15 and 7, make a decision, and then if a party -- if the petitioner wants it to go back for consideration, that doesn't come up until the petitioner files a motion for rehearing? It could be in the petitioner's reply, but not in the petitioner's petition.

JUSTICE HECHT: Well, to obtain a remand on issues briefed but not decided -- well, I don't know why it shouldn't be in --

CHAIRMAN SOULES: They take a no evidence point to you, and the court of appeals has not decided factual sufficiency, and they want it to go back for factual sufficiency if you disagree.

PROFESSOR DORSANEO: Yeah. I think you're right.

CHAIRMAN SOULES: I think maybe you should be able to get that in the petitioner's petition.

PROFESSOR DORSANEO: Sharp eyes.

JUSTICE HECHT: I think that's right. Yeah. I'm not sure if the court of appeals -- I will have to map through it. I can't tell.

CHAIRMAN SOULES: It's been briefed in the court of appeals but the court of appeals doesn't touch the point.

HONORABLE C. A. GUITTARD: Luke, may I raise this question? If it's been

briefed in the court of appeals, and the court of appeals hasn't decided it, why should it be treated in the Supreme Court in any manner other than if the court of appeals had decided it? In other words --

CHAIRMAN SOULES: Jurisdiction.

HONORABLE C. A. GUITTARD: If it's been raised in the court of appeals and the court of appeals doesn't decide it and it's crucial to the appeal, why shouldn't the petitioner be able to raise it whether or not the court of appeals decides it?

CHAIRMAN SOULES: Factual sufficiency.

HONORABLE SARAH DUNCAN: That's jurisdictional. Take a question of law. Don't take something where there is no jurisdiction in the Supreme Court.

CHAIRMAN SOULES: Well, I can deal with those that I can fix in the Supreme Court, but what if they can't be fixed in the Supreme Court? What does the petitioner do?

JUSTICE HECHT: If they argue preemption of no evidence and the court of appeals grants on no evidence and says, "We

don't have to reach preemption and we think there is evidence," then they could ask in their petition for us to address preemption. That's right.

CHAIRMAN SOULES: Or they could ask if you don't want to do it, remand it to the court of appeals and let them do it. You can either decide what the court of appeals didn't decide, or you can send it back to them to decide. The Supreme Court has got that option.

MR. HATCHELL: Well, technically speaking, your Honor, I don't believe you can petition the Supreme Court on any matter about which you haven't been aggrieved. I suppose that you could address it -- raise it in your petition alternatively in the event you found error, but I don't understand why you would in that instance.

JUSTICE HECHT: Oh, yeah. I have got my parties turned around. You wouldn't be the petitioner then. You would be the -- is that right?

MR. HATCHELL: The petitioner is never aggrieved by --

CHAIRMAN SOULES: Aggrieved by the failure to consider.

MR. HATCHELL: Never aggrieved by a nonruling.

PROFESSOR DORSANEO: I don't know that there is a ruling. The ruling is your relief is denied.

MR. HATCHELL: Well, that's a ruling.

PROFESSOR DORSANEO: But not explaining --

MR. HATCHELL: Well, that's different.

PROFESSOR DORSANEO: I see it's different.

JUSTICE HECHT: I can't think it through sitting here.

HONORABLE SARAH DUNCAN: Can we go to something easier?

CHAIRMAN SOULES: Anybody got something easier? Justice Duncan.

HONORABLE C. A. GUITTARD: If the appellant -- go ahead.

HONORABLE SARAH DUNCAN: No.

CHAIRMAN SOULES: Justice

Guittard.

HONORABLE C. A. GUITTARD: If the appellant has raised the point in the court of appeals and the court of appeals hasn't decided it and has just written on some points that -- some other points and has overruled them, hasn't decided the point that the petitioner thinks should reverse it, then the petitioner ought to be able to present that in his petition for review.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: And ask for either a decision from the Supreme Court or a remand to the court of appeals for that court to decide.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. That's what I think may be right.

JUSTICE HECHT: I think you're right, without thinking it all the way through.

CHAIRMAN SOULES: Okay. Anybody else see anything else in 130 to 134, 135, that they want to talk to the Supreme

Court about?

Justice Duncan.

HONORABLE SARAH DUNCAN: If you-all did this when I went over to the Efficiency Commission, just tell me to be quiet. On page five, subsection (g), amendment, and there is also another amendment provision on page three, subsection (h). Is there a reason for choosing good cause rather than reasonable explanation? Is this a higher standard than reasonable explanation?

JUSTICE HECHT: No. I don't think so.

HONORABLE SARAH DUNCAN: Because we have gotten some case law as to what reasonable explanation means for purposes of extensions of time.

JUSTICE HECHT: The rule now provides "when justice requires."

HONORABLE SARAH DUNCAN: I sort of like that, but I'm just not sure what "good cause" means.

CHAIRMAN SOULES: Anything else?

Justice Guittard. Then I will get to

you, Mike.

HONORABLE C. A. GUITTARD: Subdivision 130(i) about requiring additional briefing that has to do with if the petition is not prepared in conformity and the same with respect to 132(h) about the briefs, we have recommended a standard, and I presume it's adopted, with respect to nonconformity of briefs in the court of appeals, which requires the court to send it back to the party, tell them what's wrong, and tell them when they should file their amended brief or when they should cure it; and why don't we adopt the same procedure and standard here as in the court of appeals?

JUSTICE HECHT: Because they have got a right to an appeal, but they don't have a right to talk to us, and I think, I mean, the committee may want to talk about this, but I think the view is if they can't draw a proper petition, then it's not --

HONORABLE C. A. GUITTARD: Well, maybe they can. They just inadvertently didn't do it.

JUSTICE HECHT: Well, that's

right.

HONORABLE C. A. GUITTARD: And if there is something wrong with the brief, why don't you tell them about it and let them correct it, like you would in the court of appeals?

JUSTICE HECHT: It says we may, and I think if there were any thought that it was inadvertent or there was some -- it didn't look like on the face of it that there was a problem, but, for example, just again to take another case, if it was a pro se petitioner, rather than getting into a Ping-Pong match with them to try to get them to draw a correct petition at some point you just want to dismiss it.

HONORABLE C. A. GUITTARD: Well, that's true in the court of appeals as well, of course.

JUSTICE HECHT: Yes. But you have to hear them, and we don't.

CHAIRMAN SOULES: Mike.

MR. PRINCE: I may be running against the tie, but just as a personal request I think the 15 pages is too short, and

I would urge that consideration be given to 25 or 20 for the petition.

CHAIRMAN SOULES: Okay. Any other discussion? Okay. Everybody, I'm sure you will have a chance to look at these again, and if you have suggestions, why don't you send them to me and Bill, and I will get them to him, and we will maybe talk about these again in July after you have had time to soak on them awhile. Judge Guittard.

HONORABLE C. A. GUITTARD: I think Mike has raised a legitimate question with respect to the settlement provision, 134 sub (7), is it?

CHAIRMAN SOULES: 134(c)?

HONORABLE C. A. GUITTARD: Yeah. The rule as now drafted says "if all parties join in a motion for settlement," and Mike raises the question that if some phase of the controversy is settled, all parties ought not to be required to join in the motion.

CHAIRMAN SOULES: We should say "all affected parties"?

HONORABLE C. A. GUITTARD: Well, Mike suggested "any party." Mike, would

you want to speak to that? Where is Mike?

MR. HATCHELL: Well, I think the point Judge Guittard makes is a good one, that sometimes on appeal a limited aspect of the case does settle, but the issue I was raising was that there are a number of ways that parties settle a case on appeal, and the agreements sometimes simply call for the execution of papers.

I think, Luke, you and I have even done this ourselves, or you and I entered into one that was very complicated; but frequently you just settle, and you have a release of judgment put on file and then you just say to the petitioner, you either dismiss your appeal or move to have it withdrawn as moot or something like that. I don't see why all parties need to join in that. The goal is to get the case -- a moot academic case out of the court as efficiently as possible.

JUSTICE HECHT: But that's to dismiss. This is to grant. If the agreement requires us to grant, then that's when this kicks in. If somebody just wants to give up, then --

MR. HATCHELL: But how do you under your jurisdictional powers grant a petition which is academic at this point? I mean, I thought --

JUSTICE HECHT: Well, we do it all the time.

MR. HATCHELL: Well, you know, I guess you are saying granted without reference to the merits.

JUSTICE HECHT: Vacate the judgment, send it back to do whatever they want to do.

CHAIRMAN SOULES: I think the theory on that, Mike, is that they grant in order to exercise jurisdiction to take some action; whereas, if they deny, they just are not going to exercise jurisdiction to take any action. That's what I have always thought.

JUSTICE HECHT: Well, for example, if there is a permanent injunction and the parties settle, and they don't want the injunction sitting out there anymore, the only way to get rid of it by the time it gets to us is to grant the writ, vacate the injunction, and then let them either agree to

something or then go from there.

The important part has always been the last clause, "Parties cannot agree to vacate the opinion of the court of appeals." It's still on the books, for whatever value it has. That writ has not been taken.

CHAIRMAN SOULES: Again, curious, vacate the opinion or vacate the judgment? Because they do vacate the judgment.

JUSTICE HECHT: Yeah. We frequently vacate the judgment, but we don't vacate the opinion.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I think this is a broader question than just the Supreme Court. As I'm sure some people have read, in San Antonio if you tell us a case is settled, we will vacate everything, whether you want it or not, and I think we need a separate rule by people who really settle cases having a lot of input into it as to what -- without regard to all of the technicalities of authority and jurisdiction,

I think we need to promote the policy of encouraging settlements, giving due regard to not vacating the court -- ordering the court of appeals opinion withdrawn, but give parties more options, less options to the court to screw around with people's settlements, and do it in one rule.

Because right now, I mean, I was reading the Dallas court's internal operating procedures the other day, and they have what -- a very understanding policy. Their internal operating procedures say, "People don't ask us -- don't tell us exactly what it is they want," and these are published. I am not talking about anything secret, but "People don't tell us what they want. They tell us they have settled, but they don't tell us if they want the appeal dismissed or if they want the cause dismissed," and the Dallas court errs on the side of caution and just dismisses the appeal apparently and not the cause, which is exactly the opposite of what our court does.

I think the whole business of settlement within the appeal context is something that

needs to be worked out in more detail than this rule or the court of appeals rule, and it probably needs to be in one rule that's easy to find and it's got it all spelled out.

JUSTICE HECHT: In response to that, Luke, the Supreme Court's view has been for the last ten years that the courts of appeals can do whatever they want to with their own opinions if there is a settlement before they lose jurisdiction over it. I mean, the opinion is handed down, and somebody files a motion for rehearing, and before it's ruled on the parties come in and say, "We want to settle this case, but we would like for you to withdraw your opinion as part of the settlement."

If the court of appeals wants to do that, we don't consider that to be any of our business; but once it's over with, if they come to us and say, "We have been thinking about this a long time, and we don't like the court of appeals opinion, and we have bought our piece, and now we want to get this out of the books," then our view has always been you should have brought that up in the court of

appeals.

HONORABLE SARAH DUNCAN: And I am not arguing for any change of the Court's current practice. I am just suggesting that --

JUSTICE HECHT: But courts of appeals do vary in how they look at it.

HONORABLE SARAH DUNCAN: I just think even settlement in the Supreme Court is maybe more complicated and more case by case without regard to whether the opinion of the court of appeals remains intact, just whether you're going to dismiss the application, grant the application, whatever it is. I'm just arguing in favor of a general settlement rule.

MR. HATCHELL: Judge Hecht, then as I understand what you're saying, this provision actually then is expanding the Court's power. It's not supplanting the dismissal route, but it's codifying what has sort of existed in miscellaneous orders and patterns you could follow for actually granting the application and sending it back to implement a settlement that needs implementing and not just perfunctorily gotten

out of the system.

JUSTICE HECHT: Right.

MR. HATCHELL: Okay. I think I understand, and that probably is very useful to the Court.

CHAIRMAN SOULES: Well, I suppose the Supreme Court, I mean, if you can -- does the Supreme Court in the face of settling parties sometimes remand to the court of appeals, or is it always all the way back to the trial court?

JUSTICE HECHT: Sometimes the court of appeals, whatever they want or need.

CHAIRMAN SOULES: I suppose if you remand it back to the court of appeals, then that court regains jurisdiction. It can do whatever it wants to with its opinion.

JUSTICE HECHT: Yeah.

CHAIRMAN SOULES: That court could withdraw its opinion at that stage.

JUSTICE HECHT: Yes. I suppose it could. I don't think we have ever done that, but I don't know that the Court would object to that.

CHAIRMAN SOULES: Curious,

curiosity anyway.

JUSTICE HECHT: We just don't want to do it because we don't want to be in the position of having the parties buy a court of appeals opinion out of the books and using us as an implement.

CHAIRMAN SOULES: I understand. Comity.

JUSTICE HECHT: Yes. Comity anyway.

HONORABLE SARAH DUNCAN: I'm sorry to be so picky, but I don't care about the opinion.

JUSTICE HECHT: Right.

HONORABLE SARAH DUNCAN: You are using the language to dismiss the case; and according to the courts precedent, at least as read by a fair number of people, that means you vacate everything as opposed to dismissing the application.

JUSTICE HECHT: Where is this now?

HONORABLE SARAH DUNCAN: In subsection (d), "without hearing argument dismiss the case," and at least -- and I am

not saying my understanding is necessarily correct, but there seems to be a fair amount -- I know that Justice Cornyn wrote an opinion recently, and I can't remember the name of it where he talks about -- and that was an actual -- a case in which things had become moot by reason of something other than a settlement; but there seems to have grown up this distinction between dismissing an appeal or an application and dismissing a case or a cause; and one vacates everything, which is frequently not at all what people want because their entire settlement agreement and the res judicata effect of it rests upon the trial court judgment remaining intact.

HONORABLE C. A. GUITTARD: But that's if the case is moot.

JUSTICE HECHT: I think if it's moot, doesn't it go to the -- it goes to the case as opposed to somebody that just doesn't want to appeal anymore, so they just give up. If the case is moot, they just want to dismiss the appeal.

HONORABLE SARAH DUNCAN: But if it's been settled, it's moot in one very

technical way of thinking. It's not moot because of events, but it is moot in terms of requiring court action.

CHAIRMAN SOULES: You're saying the case ought to be dismissed, Justice Duncan, or the appeal?

HONORABLE SARAH DUNCAN: No. No. All I'm saying is that I think this is more complicated than either these rules or the court of appeals rule addresses, and I think we need to make more of an effort to accommodate settlements, and that our current rules don't do that. And this, as I understand it, is pretty much a codification of what the Supreme Court is doing now, and I don't have any problem with what the Supreme Court is doing now; but the Supreme Court gets to react on a case by case basis as it feels best, and the courts of appeals are sitting there trying to interpret this, what the Supreme Court has done.

All I'm saying, I'm not advocating anything in particular other than a settlement rule in both the courts of appeals and the Supreme Court and that we give more

consideration to what the parties need, to what they want, and to finding that out or to doing the least amount of damage possible if we are not going to find it out.

CHAIRMAN SOULES: Okay. I think we need -- it would make sense that that project should be pursued, and you're on the appellate subcommittee. Why don't you-all try to do something about your collective thoughts on that whenever you-all have time and bring it to us?

HONORABLE SARAH DUNCAN: That's one of my questions. That's one of my questions, is, is it too late to amend the appellate rules? It seems like it's pretty late in the process.

CHAIRMAN SOULES: Well, to add a new rule that makes sense that doesn't change something we have already done? I don't think it's too late.

HONORABLE SARAH DUNCAN: Okay.

CHAIRMAN SOULES: But --

JUSTICE HECHT: They don't have a rule, and we did, so...

HONORABLE SARAH DUNCAN: We

have a rule.

JUSTICE HECHT: What's your rule? On mootness?

HONORABLE SARAH DUNCAN: No. Our rule is 48. I thought I knew what it meant until a little while ago.

HONORABLE C. A. GUITTARD: 59.

HONORABLE SARAH DUNCAN: Is that it?

CHAIRMAN SOULES: Okay. Does anyone have anything else you want to communicate to the Court by way of this record, communicate to the Supreme Court, on these proposed Rules 130 through 135 at this time?

All right. Well, continue to noodle on these rules, and I know the Court is aware that we got them shortly before the meeting and given our best effort here at identifying where there might be some reason for input.

There could be other matters that would come up that we would want to get to the Court, and I think we should be aware that the book is probably going to close on this in July because the Court is going to want to get

this into the appellate rules. So it's maybe largely closed before then, but if there is anything important, I'm sure the Court will listen to us; but beyond that, it's probably going to be the horse is out of the barn, and we will have to wait for another decade or so.

And, of course, we also have the issue that with these rules the Court of Criminal Appeals must, I guess, concur. So we have got that process to go through once it's -- or either concurrently as it goes through the Supreme Court or thereafter, however the courts work together on that.

Okay. What's next? I think we ought to go to Don's disposition, inquiry disposition chart. What time is it? 3:00 o'clock? Should we take a short break? Take a ten minute break at this point.

(At this time there was a recess, after which time the proceedings continued as follows:)

CHAIRMAN SOULES: We have an inquiry disposition chart, and we are back to our books, old books.

MR. HUNT: Mr. Chairman, the

good news is that these are short, noncontroversial, and for the most part have already been decided.

CHAIRMAN SOULES: All right. Let's take a walk through them then.

MR. HUNT: First, we have a recommendation by Judge Reiter and one by Justice Guittard that are similar. They deal with the Rules 296 through 299a, and the first suggestion is that we have something akin to a charge conference before findings are really made and before there is a judgment. Now, we considered at least Judge Guittard's recommendation that we do the findings before there is a judgment, and we rejected that in the January meeting. Implicit within that I think is probably the rejection of Judge Reiter's suggestion that you have this charge conference before you do the judgment or the judge has tried the case.

Mr. Chairman, I don't know that there is any further consideration of that that needs to be made, unless someone wants to revisit the issue of how we do findings.

CHAIRMAN SOULES: Oh, I see.

Judge Reiter says there ought to be a charge conference and the fact-finder, judge or jury, then and there would answer the questions.

PROFESSOR CARLSON: Sure. Uh-huh. Okay.

CHAIRMAN SOULES: Well -- and a draft put together. That's a fascinating idea, one I like very much.

MR. HUNT: We might ought to ask Judge Brister, would you prefer to be interrogated by counsel at the conclusion of a judge trial about what you believe the witness has testified to and what your immediate findings are?

HONORABLE SCOTT BRISTER: No. Broad form, that's what I'm -- I always thought I had to make details, but after our discussion two months ago, I am a strictly broad form judge on nonjury cases now.

PROFESSOR CARLSON: Broad form, big picture guy.

HONORABLE SCOTT BRISTER: Life's a lot easier. Save a lot of time in front of the word processer.

CHAIRMAN SOULES: Well, I'm

fearful, and I think probably -- Don, is it your concern if we did a rule like this, many of the trial judges might not want it?

MR. HUNT: That's correct. I don't mean to make light of the suggestion. It's not a bad suggestion if it worked, but I'm not sure trial judges would do it, and we have visited this process of how we go about doing request for findings and findings, and we have adopted these rules and rewritten them recently. So to try to go back and plug in something like a charge conference to force the lawyers and the judge to sit down together and the judge to decide it immediately is probably counterproductive.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Next.

CHAIRMAN SOULES: So the committee recommends no action in response to Judge Reiter's inquiry primarily on the basis that we don't -- well, we have addressed the process of findings of fact procedurally, and that to require the timing that Judge Reiter suggests is probably something that we would find as much resistance to as acceptance in

the trial bench. Leave it to the individual trial judges to deal with that question; is that right? Any opposition?

MR. HUNT: The trial judge could do that if the trial judge wanted to.

CHAIRMAN SOULES: Sure. Okay. So there will be no action.

MR. HUNT: And the second one on Justice Guittard's suggestion is we have taken an actual vote on that at the January meeting, so that has been handled I think.

CHAIRMAN SOULES: That was rejected?

HONORABLE C. A. GUITTARD: I'm glad that I am not included in this comment over here about the old dogs that can't learn new tricks. I'm not an old dog by that definition.

MR. HUNT: Correct, Judge.

HONORABLE SARAH DUNCAN: That's right.

CHAIRMAN SOULES: That's right.

MR. HUNT: I did that for you because --

HONORABLE C. A. GUITTARD:

Thank you.

MR. HUNT: -- that would describe those that wouldn't vote with you as old dogs.

CHAIRMAN SOULES: If anybody tries to confront you about that, this old dog will take up for you, Judge. 299a.

MR. HUNT: Lewis Kinard suggests there is an ambiguity in 299a. There is no recommended action because what we have done in rewriting 299 and 299a cure the ambiguity.

CHAIRMAN SOULES: Been cured. Okay.

MR. HUNT: The next two are the fastest we will have because they concern Rule 301 and the proposed 1990 amendment which never went into effect. That takes us to unknown's suggestion on Rule 306a, and the reason why that's unknown is because the letter I think came with some attachments, and you just sent me the attachment; but it does have a suggestion that anyone may send out notice of the judgment, and currently Rule 306a and the amended rule that we passed

today, 304(c)(3), says that the clerk gives notice of the judgment.

And the unknown was proposing that any party be permitted to give notice of the judgment in addition to the clerk. Of course, they can do that now if they want to, and that's a practice by some good attorneys. So it struck the committee that there was no need to formalize a practice which is now permitted.

CHAIRMAN SOULES: And 306a is still if you prove actual notice --

MR. HUNT: That's the only purpose of it.

CHAIRMAN SOULES: So a lawyer who wants to be sure they get things moving can send certified mail anyway.

MR. HUNT: True. No need in it.

CHAIRMAN SOULES: Not needed. Okay. Anyone object?

MR. HUNT: The last one on that page, Charles Spain makes his suggestion which we have considered in other context about the uniformity and spelling of "nonjury," and

that's been cured.

We go to the top of page two. Judge Max Osborn makes two suggestions. The first is with respect to Rule 324a. That was cured by the amendments to TRAP 52a. Then he makes a suggestion that we can consider. The committee didn't think we wanted to do it, but he thought too much time was being used on appeal and that we might want to look at the timeliness, and he pointed out some time limits that maybe could be shorter. The committee didn't believe so, or subcommittee didn't believe so, and no recommendation was made.

CHAIRMAN SOULES: Are these time limits that we have already addressed in the appellate rules?

MR. HUNT: Yes.

CHAIRMAN SOULES: So they have been addressed in other context?

MR. HUNT: Yes.

CHAIRMAN SOULES: Okay. Next?

MR. HUNT: We have the recommendations on 324 and 329b. The one on 324(a) is the same suggestion on Rule 307

that's been handled.

CHAIRMAN SOULES: 901. 901 has been cured already? 324(a) has been fixed? Is that what you are saying, Don?

MR. HUNT: Yes.

CHAIRMAN SOULES: To conform to this recommendation?

MR. HUNT: Yes.

CHAIRMAN SOULES: Okay.

MR. HUNT: And then we come to Martin Peterson's suggestion for Rule 329b. He's had the same problem that many of us have had when we talk about vacating the judgment. The subcommittee makes no recommendation on that because we hope we have cured that by eliminating motions to foreign number, and then in talking about the motion to modify, that includes anything you can do to a judgment, including vacating.

So maybe we have removed all the ambiguity and confusion in connection with vacating a judgment. So response, it doesn't make sua sponte or a response a judge makes to a motion to modify.

Unless there is some human cry here,

that's been cured.

CHAIRMAN SOULES: That's this Casebolt problem?

MR. HUNT: That's the next one. The next one is a Casebolt problem. The subcommittee talked about that and didn't view that as a problem, and in fact, with the amendment we made today to Rule 305 -- not amendment, but when we adopted Rule 305 third alternative and made the 105 days I think we have eliminated whatever distinctions that there could be when the Casebolt kind of a problem came up.

CHAIRMAN SOULES: Okay.

MR. HUNT: Next then is to Rule 320, Damon Ball requests an amendment requiring a motion for entry of a default judgment. Now, while no one on the subcommittee thought that was worthwhile, we might wish to talk about that for just a moment.

CHAIRMAN SOULES: Okay.

MR. HUNT: Does anyone believe that we need a motion to take a default? I'm not certain why you would want a motion to

take a default except that you would have to give notice. Bill.

PROFESSOR DORSANEO: Just in The Lawyers Creed there is a subparagraph that says if you know that someone is represented by counsel, that you should not take a default unless you contact them. To me that's probably good enough for it to be in The Lawyers Creed.

MR. HUNT: There is a Supreme Court case -- and remind me which one it is -- that says that when you're aware that the party is represented by counsel you have got to give them notice.

CHAIRMAN SOULES: Of a default?

MR. HUNT: Postanswer default. I'm sorry.

CHAIRMAN SOULES: Oh, yeah.

MR. HUNT: Postanswer default.

CHAIRMAN SOULES: I think Damon is talking about a no answer default here.

MR. HUNT: I don't see any need for it.

CHAIRMAN SOULES: Anyone disagree? Justice Duncan.

HONORABLE SARAH DUNCAN: I disagree.

CHAIRMAN SOULES: Anyone else? So the committee recommends no action? Those in favor of the committee's recommendation show by hands. 14.

Those opposed? 14 to 1.

MR. HUNT: Marvin Peterson resubmits his suggestion.

CHAIRMAN SOULES: In favor of the committee's action, recommendation for no action.

MR. HUNT: 329b, Martin Peterson resubmits his suggestion. He just sent it in again because he hadn't heard from us. So panel that.

CHAIRMAN SOULES: That's the same one we cured earlier?

MR. HUNT: Yeah. Then 329b, Charles Spain again suggests a new general rule on plenary power. We have answered him today.

The next one is Rule 330. Charles Spain suggests a broader rule is needed on the terms of court to take care of the problem of when

terms end and how that applies under Rule 330. We didn't believe the amendment was necessary or we necessarily needed to do anything about it.

CHAIRMAN SOULES: Okay. So you recommend no action?

MR. HUNT: No action.

CHAIRMAN SOULES: Anyone disagree? No disagreement.

MR. HUNT: The easiest one of all I think is at the top of page 3, the suggestion that we need new rules on control of visiting judges. Rule 330 doesn't address visiting judges, so we don't need to address it either.

Mr. Chairman, that completes the disposition inquiry. I'm grateful for the limited number of lawyers that wrote on the rules covered by this subcommittee.

HONORABLE C. A. GUITTARD: Grateful for all those lawyers that didn't.

CHAIRMAN SOULES: Okay. Don, I want to thank you for doing a splendid job over many, not just hours, but days, with this --

MR. HUNT: Thank you.

CHAIRMAN SOULES: -- series of rule from, what, 290's through the early 300's and for your endurance and for your wisdom in guiding us through this. I think you have done a great job. I think that completes your subcommittee's report. I also want to thank all the members of your subcommittee that have functioned and worked so well and so diligently to get this to us.

I think there were times when we thought this might never end, but it has, and I think the continuing effort to improve what we have began looking at, what, some at least six, eight months ago has -- I hope it will serve the Bar well. I think it will, thanks to you and your subcommittee.

MR. HUNT: I express my thanks for the subcommittee as well.

HONORABLE SARAH DUNCAN: And we express ours to you.

CHAIRMAN SOULES: All right. Next is, Bill, you have got some of Richard's report ready? Richard had a family law counsel meeting conflict, and the business of

that particular meeting this weekend was very important. He's an important piece of it. So he's deferred to Bill for some of his report.

We will go to that now. There is a handout up here dated May 8, 1996, if you want to get it and work along with Bill through the --

MS. SWEENEY: Could you hold up what it looks like?

PROFESSOR DORSANEO: It has an SMU logo on the front.

CHAIRMAN SOULES: SMU logo, actually it's Bill's memo dated May 8, 1996, subcommittee for Rules 15 to 165a. Begins "Here is a redraft" and so forth.

PROFESSOR DORSANEO: Let me introduce this by stating something about what's been done to the Rules of Civil Procedure proposalwise by this committee and its subcommittees over the last several years. If you look at the rule book as consisting primarily of the first 330 rules, what we did today disposes of Rules 271 through 330, replacing all of those rules with the fewer rules.

In addition, what was done in connection with the discovery and sanctions rules takes care in large measure of Rules 166 through 170, leaving a few stragglers, and then takes care of 186 through 215, leaving large holes in the numbering scheme 1 through 330. We have on the agenda the consideration of other parts of the rules concerning the trial that will be taken up in the near future, but basically what I'm saying is there has been a large scale revision of a substantial part of the Texas Rules of Civil Procedure, leaving about half of the job yet to be done of recodifying the entire shooting match from Rules 1 through 330.

The committee that has the largest number of rules to work on is Richard Orsinger's committee, Rules 15 through 165a, and what that committee decided to do was to work from the draft prepared by the recodification task force because of what I have just mentioned with respect to a number of the rules and for a couple of other reasons. One of the other reasons is that it had been decided, at least tentatively, to develop a section of the rule

book that deals with clerks and related matters, and a large number of the rules from 15 through 165a are concerned with clerks and, to a lesser extent, court reporters.

So when we take those out and put them in one place, it looks like Swiss cheese leading up to larger gaping holes that are already replaced by something else. So the long and the short of it is for a variety of reasons it was decided to take on the task of recodifying Rules 15 through 165a rather than just tinkering with them.

Now, where that stands at this point is from a committee's standpoint, an overall committee standpoint, a redrafted section on claims and parties which covers in our current rule book Rules 28 through 44, parties to suits. Some of the rules that are located in the pleadings section of the rule book that deal with claims, as well as the section on abatement and discontinuance of suit with the exception of dismissal for want of prosecution, Rules 150 through 165, leaving a smaller number of rules to deal with later.

The next major chunk of those smaller

number of rules would be the rules on pleadings and motions, which are in the process of being revised, and I anticipate by the July meeting we would have a very large piece of 15 through 165a redone because it wouldn't be just parties. It would be pleadings and motions, plus claims and parties. So it's maybe a scary thought, but we are very well along the way to a complete recodification of the first 330 rules, already more than halfway there, and with that, I will deal with the claims and parties section.

That was chosen to be done first at the subcommittee level because it was perceived that would be the easiest place to work, given the fact that it is most like the Federal rule book of any part of our rule book, although slightly different in some respect.

So with that let me just go to the claims and parties. Now, what this overall structure is in Section 4 is, it is the organization, the internal organization, of the joinder of parties section of the Federal rule book. It is organized internally exactly like the Federal rule book, and Elaine has a Federal

rule book. She can correct me if I'm wrong, but I think the internal organization of the section on claims and parties is based on the Federal rule book. Our rule book is based largely on the Federal rule book already, but not quite. It couldn't quite manage to just embrace the Federal scheme in 1939. From a policy standpoint what the subcommittee believed and I certainly believe is that we just should in order to complete the job.

Now, with that, let me go to specific issues, and I will tell you where there is a change and where there is not to the best of my ability to do so. This proposed Rule 30 -- and this could start with one; you know, it's just it happens to start with 30 because that's where the task force began this part of the rule book -- has as a new rule 30a, the real party in interest. The Federal rule book has a real party in interest rule. The Texas rule book does not have one. The Texas rule book in Rule 28 has a part of Federal Rule 17 in terms of the Texas rule book so-called suits in assumed name. Okay.

So (b), 30(b), is verbatim Texas Rule 28.

30(a) has no counterpart in the Texas rule book. Actually, there is one slight change in 30(b), but that's a sufficient introduction. Okay. Now, what the committee recommended is that we adopt a real party in interest rule substantially like the Federal rule, but a little different, and there are two changes. The Federal rule -- and I probably need to borrow the Federal rule book -- says in its second sentence more than the subcommittee believes should be said about who may sue in that person's own name without joining the real party in interest than we were willing to embrace.

The Federal rule says, "An executor, administrator, guardian, bailee, trustee of an express trust," and then it says "a party with whom or in whose name a contract has been made for the benefit of another," and we decided to leave that out, thinking that third party beneficiaries can sue as real parties in interest in their own name, and that's the way it should be done. "Or a party authorized by statute may sue in that person's own name without joining the party for whose benefit

the action is sought." I believe that to be a clear statement of what Texas law is already, and I would be pleased to stand corrected if I'm wrong.

The next sentence, which is not in the Federal rule, we decided to add, thinking it was probably the reason for this area, this problem area, is probably the reason why we don't have a 17(a) already in our real party in interest rule in our rule book already, but of course, that's speculation about why they did what they did way back when.

We added this sentence saying, "An assignee or subrogee may prosecute an action in the name of an assignor or subrogor, provided that the identity of the real party in interest and the basis for the interest is set forth in the party's pleadings," and that is an accommodation mainly to insurance companies that they can sue in the name of the insured but with this additional limitation requiring them to plead the identity of the real party in interest and the basis for the assignee or subrogee's interest in the party's pleadings, and you know, that's a specific

separate issue from whether we have a real party in interest rule to begin with.

So first issue is should we have such a rule or just let it be left to the case law, and if we have such a rule, should it include the assignee or subrogee sentence or something like that? And any of the subcommittee members, since I am just volunteering to present this, who want to say anything, please do.

MS. SWEENEY: May I ask you a question, Bill?

PROFESSOR DORSANEO: Paula Sweeney.

MS. SWEENEY: What's the current law about whether an insurance company can do this?

PROFESSOR DORSANEO: I think they can, and there is a statute in the property code that deals with this overall subject. Property code, Section 12.014. It, to me, is dealing with a more complex issue involving, you know, when assignments of choses in action can be done and when they are effective; but, you know, it is my

understanding of Texas law that an insurance company can sue in the name of the insured, period; and it is not completely clear under this statute or the case law as to whether there even needs to be any proof of the assignment or the disclosure at any particular point in the proceeding.

MS. SWEENEY: I guess that's my question, is, is there any provision that would tack onto this from case law -- and I am totally ignorant about this, so if it's a silly question, you can tell me -- to inform the insured that rights under his or her name are being litigated?

PROFESSOR DORSANEO: Well, we didn't even say we would inform the -- we are just informing the one who's being sued in the pleadings.

MS. SWEENEY: I think you kind of have to do that, but is there any provision either in existing law or contemplated to be put into the rule for that kind of notice to the insured?

PROFESSOR DORSANEO: We talked about that a little, but I think we concluded

that was a different subject from this.

MS. SWEENEY: Well, the reason I ask is the potential either estoppel effect or any other effect that might exist on the insured's cause of action giving rise to whatever the subrogation is for.

PROFESSOR DORSANEO: Tony.

MR. SADBERRY: I think the insurer by the time his right to sue was assigned, the subrogation was agreed. Now, I agree that perhaps a little more that obviously they have the right on some occasions, the insured, to exercise that right appropriately, and I don't think you require it. I think that as long as you have the contractual right to sue by contract --

CHAIRMAN SOULES: Speak up, Tony. I don't think the court reporter can hear.

MR. SADBERRY: As long as you have the contractual right, by contract the insured must have executed it, the law does not require notice now, is my understanding, to the insured.

PROFESSOR DORSANEO: Now,

Mr. Chairman, there are a couple of ways we can go through this. I can just present these, you know, for information, and then we could get additional input. We are going to have a lot of time that passes before we get to the end of this, or we can do more at this meeting. Probably, you know, we are more interested in input than we are in anything else.

CHAIRMAN SOULES: Okay. Is that a good stopping point for discussion, or do you want to finish this 30(a)?

PROFESSOR DORSANEO: That's a good stopping point. The simple concept that can be complicated is that the real party in interest is the one whose name should be in the pleadings unless the next two sentences give you something more explicit.

MS. SWEENEY: Here's the only concern that I raise with the question that I had, is, you know, someone has big medical bills. The carrier goes to assert their subrogation right. For some reason independent of any underlying lawsuit, they decide to do it themselves, and this does not

provide any notice to that insured person who may be waiting some time later than their two-year statute of limitations and they come in and they find out, oh, gee, the carrier already lost the case, and you are estopped. That seems like a problem that maybe there is a -- has the subcommittee talked about that or a way to address that?

PROFESSOR DORSANEO: No. And I think we would have large issues about whether somebody is estopped under those circumstances and, you know, whether they were a person that should have been regarded as indispensable who can come in and raise the absence of nonjoinder in the first instance under one of those rare indeed circumstances, and it's like any other case where somebody's interests are subject to being impaired or impeded by what somebody else does, and they don't get wind of it, you know.

HONORABLE SCOTT BRISTER: It seems like in that case they my be estopped to the extent of whatever that amount -- they can't recover that medical lien amount, but they don't need to recover it because the

intervenor paid for that. I can't imagine they would be estopped for pain and anguish or other things.

MS. SWEENEY: What about liability? There is a negative finding of liability on their same lawsuit.

HONORABLE SCOTT BRISTER: Again, the only thing the intervenor owns is the right to sue for medical damages. I don't see how -- I think that it would be collaterally estopped of the damages, from getting those damages, but they don't need them anyway because they had been paid for, so I can't imagine they would be estopped on your own lawsuit on liability.

MS. SWEENEY: I can.

HONORABLE SCOTT BRISTER: Not in my court.

MS. SWEENEY: Maybe it's, you know, just because you're not paranoid doesn't mean they are not out there. I mean, I would be concerned about a liability on a single incident, single occurrence. You have a liability finding because the carrier botched it, and then the claimant comes in and files

their lawsuit and they say, "Oh, hey. No. King's X. Liability has already been found against you. You just weren't here and didn't know about it."

CHAIRMAN SOULES: Well, collateral estoppel only applies when the party against whom its asserted had a full and fair opportunity to litigate the issue in the original suit. So you can't issue -- and there are so many statutes involved in worker's comp subrogation, but the issue of the right to a party to the personal injury damages where the insurance company has filed a property damage subrogation claim I don't think has been tried, and the insurance company could not have tried it because they didn't have it. Hey, I don't know. I mean, that's --

MS. SWEENEY: Well, we are not doing anything final about this today? As I understand it, we are just going through it the first time and talking about it?

Okay. Then I will go read a book about it.

CHAIRMAN SOULES: I wondered

about the same thing. If there were a cutoff of rights, where would you go? Anyone know the answer to that? Carl, in your practice?

MR. HAMILTON: I don't know the answer, but I think it's dangerous for the insured not to be notified if he's got a claim because he's going to be the named party in the lawsuit.

PROFESSOR ALBRIGHT: If you're an insurance company, you want to give notice. Paula, I mean, if you can't find a rule that requires notice and then your client gets it but hasn't talked to you yet, you're client will be estopped. So you may want to leave it alone. At least you would have the argument that your client didn't know about it.

MS. SWEENEY: Right.

MR. PRINCE: I think, Paula, just to let you know, we didn't go into detail about this particular aspect of Federal Rule 17, although I'm sure some case law -- like you say, we can look at it. The real purpose is -- Bill, you tell me if I am saying this wrong. This assumes that the assignment was valid or that the subrogation was valid.

That's a big assumption, number one, and that's a matter determined by other law, not by this rule.

MS. SWEENEY: Yeah.

MR. PRINCE: Then the second thing, then assuming that, the only purpose is if you are going to do that, the person who's being sued should be notified that this is the real claim and whose name it's being prosecuted in, and that person can take whatever action, contacting the insured, contacting whoever, the assignor; but at least they are on notice of what the basis for your claim is. You are just not some mixed-up claimant that is asserting a claim that you don't have any apparent interest in. We just felt like that ought to be disclosed, and other than that we didn't attempt to do anything.

CHAIRMAN SOULES: Okay. Well, I think the message is, what, that we need to understand the consequence to an insured of an insurer bringing an action for part of the damages to the insured arising in the same circumstances so that we know if that needs to

be fixed in a rule, it can be. If it doesn't need to be, we don't have to worry about it.

MS. SWEENEY: Thank you.

CHAIRMAN SOULES: It says, "The doctrine applies when the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the original suit." Well, the party, now the insured, did not have a full and fair opportunity to litigate anything in the case brought by a subrogee for property damage.

MS. SWEENEY: Would there be any argument of waiver there, though? You signed the agreement. You gave him his right.

CHAIRMAN SOULES: Well, you don't have the property damage right to claim -- well, I mean, I'm setting aside collateral source.

MS. SWEENEY: Right. Right.

CHAIRMAN SOULES: Because that's a whole other influence, but assuming collateral source is -- assuming the insurance company doesn't have to pay and then insured can collect again from the defendant and the collateral source with no right of

subrogation. Assume there is a subrogation right to property damage claim. See, that's where it stops.

MR. HAMILTON: But wouldn't that amount to splitting a cause of action on behalf of the named insured and making the defendant go through two trials?

MS. SWEENEY: That puts the burden on the defendant.

MR. HAMILTON: I think the insured has to bring his liability claim in the same suit.

PROFESSOR DORSANEO: Well, there is a lot of case law about all of the interstices of this, and I think there is support for what people are saying. All we are trying to say here, though, is that if you are an assignee or if you have gotten a claim because you paid a claim, that you can proceed in the name of the insured or the assignor, you know, and then we add a little, tiny bit more; but you have to say that that's the deal.

Beyond that, I don't think we can solve all of these questions about, you know,

whether that's barred by some doctrine against splitting causes of action or insurers and insureds and all the rest of that razzmatazz. I don't think there is a solution to that that could be written into this rule, and I frankly would think the same thing about notice to somebody whose rights are being obligated. Normally we allow defendants to raise the absence of somebody who has an interest by plea and abatement; and if you are worried about -- particularly about insurance companies colluding with wrongdoers who punish their insureds, I think probably the insureds have a little bit to worry about, but not any more than most people have to worry about things that generally could happen, too. I think it's unlikely.

CHAIRMAN SOULES: Two questions I see here that are germane to the rule. Number one, does the subrogee have to give the identity of the real party in interest in its pleadings? Number two, should the assignor or subrogor be notified? We can't change the fact that an assignee or a subrogee can sue on their rights because they have those rights,

and they can sue. Do they have to disclose their capacity, and should they be required to notify someone else who is affected? Those are the two things we can fix with the rule.

All right. Let's talk about the first one. Should the assignee or subrogee be required to identify the real party in interest in the pleadings? Anyone disagree with that? Nobody disagrees. Everybody agrees, right?

Okay. So that's done. Notifies to the -- I have a question of who the real party in interest is right here, because the real party in interest in a subrogation is the subrogee, isn't it?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Huh?

PROFESSOR DORSANEO: Uh-huh.

MR. HATCHELL: It's the insurance company.

CHAIRMAN SOULES: So the subrogee says -- oh, I see. So I'm suing in the name of Soules because I'm his insurer. Okay.

PROFESSOR DORSANEO: And we

could say instead of identity of the real party in interest, identity of the assignee or subrogee. Pretty clear.

CHAIRMAN SOULES: Okay. Whatever you decide on that is probably okay.

Okay. Now, passing that, notice to the assignor or subrogor. Discussion? Anyone have any suggestion on that? Don't do it, do it, does it make any difference?

MS. SWEENEY: Well, I think it potentially does make a difference.

CHAIRMAN SOULES: Mike.

MR. PRINCE: I'm not opposed to it. I mean, I think it's a matter probably governed by substantive law or case law. My only opposition, and it's not wrong, is I just don't think that kind of requirement would belong in this rule.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: And the subrogation context it seems may be simpler. The assignment, people take partial assignments and then do odd things with them that the original contract of the parties didn't expect. Why does the assignor even

need notice? Okay. No suggestions on this? Anybody comes up with one as we go along, let us know.

Okay. That gets us to the next sentence, "no action shall be," what's that one, Bill?

PROFESSOR DORSANEO: That's just borrowed from the Federal rule. "No action shall be dismissed that is not prosecuted in the name of the real party in interest until a reasonable time has been allowed," you know, to get that straightened out.

CHAIRMAN SOULES: Okay. Makes sense. Okay. So at this time at least nobody has any recommendations to change 30(a) from the way it's proposed?

Justice Duncan.

HONORABLE SARAH DUNCAN: I have a couple of questions. Does everybody else understand that the fact that the true identity is in the pleadings doesn't mean it gets to the jury?

PROFESSOR DORSANEO: Yes.

HONORABLE SARAH DUNCAN: Okay. And the other question that I had that I was

just asking Bill about, I don't have a stand to take on this. I just asked him if it was intentional that Rules 29 through 36 are dropped out, and it's on --

PROFESSOR DORSANEO: Well, there are some rules that have been dropped out. It may not be a good idea to drop them out, but this was our thinking, that when our parties and claims rules were taken largely from the Federal rules when the original rules were drafted, a lot of Texas rules that seemed to cover the same subjects, some of which are arguably contrary to the other rules that were embraced, were repromulgated. And my thought and I think our thought was that we don't need those rules that were dropped out -- maybe I'd be wrong -- because everything is already covered by these more generalized rules.

HONORABLE SARAH DUNCAN: Well, (a) covers, as I understand it, claimants. 29 through 36 discuss who you can sue individually or jointly and what name you sue them in, which is not covered by (a). Like if you're going to sue the sheriff.

PROFESSOR DORSANEO: Uh-huh.

HONORABLE SARAH DUNCAN: Or if you are going to sue a secondarily liable individual on a piece of commercial paper; and like I say, I don't have a dog in this fight. I don't care one way or another, but there might be some other people who know a whole lot more about this than I do and that it makes a -- I mean, whether you can sue someone who is secondarily liable on a note could make a big difference on secondary liability.

PROFESSOR DORSANEO: I think all of those specific situations are covered by the general rules.

CHAIRMAN SOULES: Which general rules?

PROFESSOR DORSANEO: Well, the ones that we are -- you know, mainly the general rules on joinder of persons needed for just adjudication and permissive joinder of parties.

So we may want to add some more of these specific rules in to these if they are not in conflict, but I don't think it's necessary. The Federal rule book doesn't have them, and if you look at them one by one -- and we can

look at them one by one, but it may be easier to look at them one by one after we cover the overall scheme. Suit on claim against dissolved corporation, Rule 29, that is, you know, incompatible with Business Corporation Act, Section 1712, which talks about how you handle dissolved corporations and how much time and who you sue and all of that, and that's just kind of in here and is probably bad for that reason.

You know, maybe someone would say we should rewrite it to make it compatible with 1712 or crossreference or do something else. Look at Rule 30, parties to suits. "Assignors, endorsers, and other parties not primarily liable may be jointly sued with their principal obligors or may be sued alone in the cases provided by statute." Well, why do we need to say that? Why doesn't permissive joinder of parties cover that, since it does cover it? And except as provided by statute, the statute covers it.

So, you know, surety not to be sued alone. "No surety shall be sued alone except in cases otherwise provided for in law or

these rules." Well, most of that is -- to say that surety can't be sued alone, that's mostly misleading because mostly a surety can be sued alone because of the law and, you know, the other statutes.

There are two parts to this, I guess. You know, what do we embrace that's in the Federal rule book making our rules like them or kind of like them, and what do we leave out because we don't need it and because it, perhaps, isn't helpful? My most distasteful one, which Judge Brister pointed out to me because he likes part of it, and I think I like that part, too, is this rule that's just Rule 37, additional parties. "Before a case is called for trial additional parties, necessary or proper parties may be brought in, either by the plaintiff or the defendant, upon such terms as the court may prescribe."

Now, if that means that the judge can do whatever the judge wants, then that's not compatible with the other rules; and if it only means go read the other rules, then I don't need it. That's the kind of thought process, you know, we went through; and I

don't think it should mean the judge can do whatever the judge wants without regard to the rules on permissive and compulsory joinder parties.

So then there is this last part, "But not at a time nor in a manner to unreasonably delay the trial of the case," and I think that's an important idea. Okay. That's an important concept, and maybe that piece ought to go in here somewhere. Huh? But this is our first presentation of this to the group, and, you know, we are kind of getting started on it.

Now, I wouldn't, frankly, mind writing a special rule for sureties because there is enough different about that maybe to, at least historically, at least to talk about it; but this business against the sheriff, I mean, do we really need to say whenever a sheriff has been sued for damages and taken an indemnifying bond that he may make the principal and surety on such bond parties defendant in such suit? Why isn't that covered by, you know, third party actions, you know, what is now currently our rule book 38?

Why do we need to say that?

CHAIRMAN SOULES: Direct action.

PROFESSOR DORSANEO: Well, this --

CHAIRMAN SOULES: Does direct action even apply to sureties?

PROFESSOR DORSANEO: I don't think it -- I mean, it's not a liability insurer, so it doesn't even apply. I mean, you are not going to make a direct action against somebody who owes you indemnity, two party insurance. Just like uninsured motorist, simple.

So the decision was made that some of this stuff that wasn't thrown out -- I felt like I was thinking about reviewing Bryan Garner's work. One of the things that you do when you go back and you revise things and you clean up everything is you notice you have some old stuff that's been kind of hanging around that you didn't even realize you had it, and it needs to be pitched. The fact they didn't do it in the late Thirties is no reason to at least consider doing it.

HONORABLE SARAH DUNCAN: Well, I don't mind pitching stuff that's no longer pertinent. I get a little concerned when we are pitching stuff when I don't know why it was in there to begin with or why we should be pitching it now or who it's going to affect if we pitch it, and that's my only -- I mean, like saying that Rule 29 is incompatible with Section 1712, well, you know, if you know that, you know that we should probably pitch Rule 29, but I didn't know that.

PROFESSOR DORSANEO: Right. But part of this is we decided to work from the task force draft rather than the current rule book, and we need to make special pains to do a disposition table and to discuss each rule that is proposed for deletion and not keep that a secret, and that wasn't our plan to keep it a secret.

And, in fact, some of these are very debatable as to whether it's useful detail, useful additional detail that could be added in the right place to the general rule for a situation that comes up and where, you know, we had a rule before, but this task force

draft is modeled very consciously on the exact rules that exist in the Federal rule book on the, I believe, accurate assumption that those rules are -- or constitute a system that cover all of the cases, okay, without perhaps the degree of specificity that rules could do, could have, and without the specificity that some of our older statutes that were recodified did have.

CHAIRMAN SOULES: A couple of ideas, though, for the subcommittee. The Federal rules by and large don't provide for substantive rights. A lot of our rules do, and they were rooted in old statutes, and as I'm hearing you, some part of 1712 or something of the Texas Business Corporation Act supersedes Rule 29. Well, if it does, it does. So we now have a statute. Probably when Rule 29 was taken from Article 1391 there wasn't any place else that had this substantive right to deal with the dissolved corporation.

PROFESSOR DORSANEO: Well, somebody took a piece out of 1391, which was miscellaneous corporation laws, and put it

over here in the rule book where it has been hiding.

CHAIRMAN SOULES: And then repealed 1391.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: So this may be the only place -- now I'm understanding that the Texas Business Corporation Act speaks to this and gives us what we need. Okay. The Federal law will work on that then because the substantive law of the state is going to be what they apply in diversity cases, but if we don't have this someplace else, this is the source of the Federal practice in this regard as well as the state practice.

PROFESSOR DORSANEO: That is a potential problem. If they did in the late Thirties what they should not have done, like we thought in the wrongful death area at our last subcommittee meeting that maybe the rule book was the only place that talked about survival of the death actions -- I since have convinced myself that that's not true. Okay. But it's possible that something was moved into the rule book that shouldn't have been

moved into the rule book, either because it was misunderstood or mischaracterized as procedural rather than substantive but that we don't want to discard because it's important.

You know, the committee needs your opinion on a lot of these things. We just give you our best shot at it and see what you think. It wouldn't be hard to write, you know, even just a miscellaneous parties rule that would have, you know, special circumstance rules to add this stuff in; but in some of these cases it's clearer to me than in other cases that this just isn't necessary.

CHAIRMAN SOULES: What I'm suggesting is that where we have other law that takes the place of these rules, then let's get rid of them. Where we don't, then we have got to either tell the legislature that we don't want them in the rules and they need to do this, which, you know, we could probably get -- not this committee, but the Supreme Court can probably say this belongs here or there and get something done, or it's just not necessary. I mean, maybe Rule 31 is just completely unnecessary in today's concept

of suing somebody or not suing somebody else, and that may be the answer to Rule 31, can't sue a surety without joinder. Why?

But when we get to the law of unintended consequences, such as they changed a bunch of words in the worker's comp statute, and now the insurance policies, worker's compensation insurance policies, don't provide coverage for the words that are in the statute. Everybody has sort of bridged that by saying, "Oh, they mean the same thing," but they are not the same words and in some contexts they may not mean the same thing. So you get these unintended consequences of doing something, so I think we do have to go through that.

PROFESSOR DORSANEO: We would plan to go through -- it just happens they are in the beginning there, go through 29, 30, 31, 32, 33, 34, 35, 36, 37, and, you know, make a case for eliminating it, unless said otherwise.

CHAIRMAN SOULES: That's good. That's done. And that's all we are asking. That's the whole message, isn't it?

Right. So message delivered, received.

Move on.

PROFESSOR DORSANEO: All right. Let's go to 30(b) then. The only change in 30(b) from Rule 28 of our rule book, which was taken from the Federal rule book, other than the little title "Capacity to Sue or be Sued in Assumed Name" is the addition of "other legal entity." Our current rule says, "Any partnership, unincorporated association, private corporation, or individual." It doesn't take into account that there may be a different type of legal entity not in existence at the time the rules were drafted originally, like limited liability companies and their ilk, and that's the only suggestion, to make it cover all legal and actual people.

CHAIRMAN SOULES: Any problem with that? Nobody sees a problem with that? Okay.

MR. HAMILTON: Is an individual a legal entity?

PROFESSOR DORSANEO: Yeah. But it's --

MR. HAMILTON: It doesn't list individual in there.

PROFESSOR DORSANEO: No, it does say. It says, "Any partnership, unincorporated association, private corporation, other legal entity," I don't know whether maybe an individual is considered to be not merely a legal entity but, you know, a real person, not just a fictional legal entity. We have got it "other legal entity" rather than name all of these additional legal entities that have been created lately.

HONORABLE SCOTT BRISTER: Same as saying "person or entity." That's all right.

PROFESSOR DORSANEO: Now, the next one is Rule 44. Now, if you look at Rule 44 in your rule book, and we didn't try to question the sense of the rule. It says a couple of things that -- and by the way, this is one of those ones. If you look at the source of Rule 44, it was taken from parts one and two of Article 1994. Parts three through whatever of former Article 1994 of the revised civil statutes of 1925 have been moved into Chapter 142 of the property code. So this is an example of taking something that existed in

the revised civil statutes of 1925, taking the procedural part, putting it in the rule book, leaving the other part over there, and then having that other part amended and changed and recodified in various ways over the years.

Okay. It begins, Rule 44 says, "Minors, lunatics, idiots, or persons non compos mentis." Now, in our other books we now talk -- including Chapter 142 of the property code, we talk about minors and incompetent persons. Okay. So that's the first change, is to use the word "incompetent person."

MS. SWEENEY: I'm sorry, but I really like the old language better.

PROFESSOR DORSANEO: Did you? Now, one of the things that I would point out to you is there is a definition of an incompetent person in Chapter 142 of the property code. We did not self-consciously embrace that definition here. We didn't say, "A minor or incompetent person is defined in Chapter 142 of the property code," you know, could do that, probably unnecessary. So that's the first change.

The next change deals with paragraph sub

(1) of Rule 44 in this odd numbering scheme that exists in Rule 44 which is embraced in slightly different language. "Such next friend" -- okay. The rule says, "Minors, incompetents," blah-blah-blah, "may sue and be represented by next friend under the following rules: Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof when required."

Now, that was largely embraced, although I frankly have a question about whether it all needs to be embraced, but that's in the first sentence, Rule 44(1) is in the first sentence of this 30(c)(1). The next part of Rule 44 says, "Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements, and compromises when approved by the court shall be forever binding and conclusive upon the party plaintiff in such suit."

Now, after reading that many times and reading the rest of the story, which is in Chapter 142 of the property code, it seemed to

us that what that was trying to say to the extent it's necessary to say anything is that a next friend may not dismiss or compromise an action brought on behalf of a minor incompetent person without court approval. I'd ask the judges to particularly see if that's what they think this is about.

HONORABLE SCOTT BRISTER: Compromise, yes. Dismiss, no.

MS. SWEENEY: Bingo.

HONORABLE SCOTT BRISTER: Now, there is some disagreement among judges, but it seems to me dismiss is something that neither plaintiffs nor defendants are going to want. Let me give you the two scenarios. My colleagues that believe dismissals require court approval had a case, not a very big case at all, minor, guardian appointed. They want to nonsuit it, everybody go home; and judge says, "No, no, no. You're staying here. You must settle this case."

That's when the defendants don't like it. A case wants to go away, plaintiff's attorney doesn't want to fool with it, next friend doesn't want to fool with it, defendant

attorney says, "No, it's going to disappear," and the judge says, "No. You have got to stay here and try or settle." Bad circumstance for the defendant, I think.

Plaintiff's bad situation would be a brain-damaged baby case, had one well known lawyer. Three days into the trial doesn't like the looks of the jury, doesn't like the way the case is going, wants to nonsuit and refile. I say, "No, no, no, no. Stay here and try it with this jury." I don't think plaintiff's attorney is going to like giving that right up. So I would say "yes" on compromise, but "no" on dismiss.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: Right now one of the safety valves that exists in our system -- and I have read to the back. I went ahead and skipped ahead to the nonsuit provisions, and this ducktails with that, is that at any time until a motion for affirmative relief has been filed against a plaintiff, a plaintiff can take a nonsuit, period, and it's effective on making the motion. That's it. It's a safety valve. It

allows people to quit. If you require court approval for quitting --

HONORABLE SCOTT BRISTER: Some courts are going to say "no."

MS. SWEENEY: Some courts are going to say "no." They are going to say, "Stay here and try it," and so, you know, I think that is one of the best provisions right now that exists in our statutes, and it's good for everybody, and it ain't broke, and it sure is important, and the thought of losing that --

PROFESSOR DORSANEO: Well, we could take out "dismiss." Frankly, that language was taken because I was looking at the class action rule when I was recasting this sentence.

HONORABLE SCOTT BRISTER: So drop "dismiss or."

PROFESSOR DORSANEO: Yeah. I don't think, yeah, we were thinking about it in as clear terms as people who actually do this.

MS. SWEENEY: Whose blood pressure just went dangerously high.

CHAIRMAN SOULES: I think that's right. Let me see if I can understand this sentence. "The next friend may not dismiss or compromise," we are going to take out "dismiss or."

"Shall not compromise an action brought in behalf of a minor or incompetent person without court approval." Now, that sentence as it remains with the words "dismiss or" deleted still covers the situation where the next friend and lawyer for the next friend dismiss for the purpose of making an out of court settlement.

MS. SWEENEY: Yes.

HONORABLE SCOTT BRISTER: I have got to approve that. I have got to have a minor settlement on --

CHAIRMAN SOULES: If they dismiss for purposes of making an out of court settlement, they are beyond their authority.

HONORABLE SCOTT BRISTER: Yes. If they settle, I have got to approve it.

MS. SWEENEY: Actually, right now the way the rule is written, we are doing this right now in a situation. The defense

does not want an ad litem. They just want to settle the case, no ad litem, and we look at each other and say, "Do we want one?" Well, yeah, probably in this climate we do, but under the present rule if the defense chooses not to request an ad litem, they can still settle the case, and the only thing to fear is Clause No. (2), since it hasn't been approved by the court it may or may not be forever binding and conclusive upon the party plaintiff.

That's the risk they take. If the defense doesn't get an ad litem under existing law, they take the risk on themselves that the minor plaintiff may come back when he's 20 years old, and say, "Hey, hey. You wait a minute. You didn't get an ad litem; therefore, no approval by the court, therefore, not forever binding on me," but it's still the defendant's choice if they want to take that risk under existing law. So this is a substantive change in that regard the way this is written.

HONORABLE SCOTT BRISTER: The current rule is next friend can settle.

MS. SWEENEY: I know, but this says right here, the new draft says the next friend cannot now compromise without court approval. Okay. That's what you have got. The existing law says nothing about that. You can compromise it with or without court approval, but if you don't have the guardian ad litem, you don't have forever protection for the defendant.

PROFESSOR DORSANEO: Well, that means the same thing to me. It means you can do it, but it doesn't count.

MS. SWEENEY: Well, it says to the defense you're losing this choice. If you have to now pay for an ad litem, you have to now have a minor prove up.

HONORABLE SCOTT BRISTER: No. I don't -- this just says the next -- court approval. This doesn't require an ad litem, and I have had them where the next friend comes in and I say, "No conflict between the next friend and the minor? Settlement approved," as long as I know what the terms are.

CHAIRMAN SOULES: Justice

Duncan.

HONORABLE SARAH DUNCAN: My question goes to a somewhat different level. I'm not sure that the sentence and the draft says the same thing as subsection (2). It says a next friend may not do it, but it doesn't say what the effect is if they do it with court approval or if they don't do it with court approval, which I think is what Paula was referring to.

PROFESSOR DORSANEO: Uh-huh. Well, it seemed to me that if it has court approval, then it's like anything else that has court approval. It's as binding as court approval can make it but no more binding than that, and the way the current rule talks about it, it says, "When approved by the court shall be forever binding and conclusive upon the party plaintiff in such suit." If that's meant to mean something extra special, more vital in this circumstance than others, it's pernicious.

MS. SWEENEY: Well, Judge Brister has I think persuaded me that I'm wrong. So...

PROFESSOR DORSANEO: It just struck us it's simpler to say, look, you can't compromise this without court approval if you are representing the interest of somebody who's not capable of representing their own interest; and to suggest to somebody that they can under some circumstances, although they might be at risk, they might have to pay later, or let them make an argument that the person is bound anyway because there was court approval, if there wasn't -- you know, things weren't done right, that's just not helpful, and it just promotes suggesting that people should get real close to the line and maybe over it if they outsmart themselves.

HONORABLE SARAH DUNCAN: I don't know the history of Rule 44, but it wouldn't surprise me if the reason that sentence is in there is because there were questions raised as to the binding effect of a settlement of a minor suit with approval of the court, and I agree with you. I don't think it should have any more res judicata or collateral estoppel effect than any other judgment or any less, but it does seem to me

that we may need to say it has the same binding effect or lack of effect as any other judgment, if you get court approval.

PROFESSOR DORSANEO: We could accept that. Same effect, binding effect. But you agree with me that this kind of goes overboard, "shall be forever binding"?

HONORABLE SARAH DUNCAN: Yes.

HONORABLE SCOTT BRISTER: You need to put something about the law of the Medes and the Persians in there.

HONORABLE SARAH DUNCAN: Yeah. It gives the impression that even if it would not be binding as a regular judgment, it might somehow be binding under this sentence, and I don't think that should be right.

PROFESSOR DORSANEO: Yeah. We could do that. That will improve it. The last sentence, "any money or property obtained" is simply to tell somebody to go read Chapter 142 of the property code, which is where the rules really are about what can be done with the loot. So, you know, take out "dismiss or" and modify that sentence to make it clear that this -- although I really end up

thinking it's pretty clear. I mean, to say that it can be done, one would think we would say can be done effectively, you know, not it can be done just for grins, but -- huh?

CHAIRMAN SOULES: Well, does the property code require management of the funds under 142?

MS. SWEENEY: I was going to go look that up, Mr. Chairman.

PROFESSOR DORSANEO: That's the way I read it.

MS. SWEENEY: Well, there are four possible things you can do, but I don't have 142 with me. I know you have got a 142 trust. I know you have got registry of the court.

PROFESSOR DORSANEO: I now also remember somebody mentioning it at our subcommittee meeting, and I didn't go look it up, but there may be a parallel provision in the trust code part of the property code.

MS. SWEENEY: I think there is. I don't think that you are only under that one section.

PROFESSOR DORSANEO: Paula, why

doesn't the committee ask you to help us on this?

CHAIRMAN SOULES: Yeah, it does. It either has to be managed under a court ordered trust or invested in securities that are provided in 142.004, one way or the other. So all the money has got to be managed under this.

PROFESSOR DORSANEO: But Paula is saying there may be another statute, another part of the property code, in fact, called the trust code.

MS. SWEENEY: There is something else because we just had it briefed, and I know there is four options, but anyway, I will work with you on that.

CHAIRMAN SOULES: Okay. Good.

PROFESSOR DORSANEO: Guardians ad litem, 173, let me look and see what -- kind of remember this.

HONORABLE SCOTT BRISTER: You dropped "lunatics" and "idiots" in it.

PROFESSOR DORSANEO: Yeah. I did that, and otherwise, something else was done, too. It's reworded, but I think it's in

substance the same. We dropped "minors, lunatics, idiots, non compos mentis." We dropped "lunatics, idiots, and non compos mentis" and replaced that with "incompetent," and I left out some words that just seemed unnecessary to me.

MS. SWEENEY: Well, you left out "plaintiff."

HONORABLE SCOTT BRISTER: Well, but it says "plaintiff, defendant, or intervenor." Why not throw in cross-defendant, cross-plaintiff, counter-plaintiff? It's just anybody with an adverse interest. I thought that, too, but looking at it --

MS. SWEENEY: But it says "an incompetent person who is a defendant."

CHAIRMAN SOULES: We have got "who is a defendant in there." Why is that in there?

HONORABLE C. A. GUITTARD: The next friend represents the plaintiff.

CHAIRMAN SOULES: Why do we have these words, "is a defendant and"? Why is that in there in the second line? Should

it be "a person who has no guardian"?

MR. PRINCE: That's out of the old rule, Luke.

PROFESSOR DORSANEO: I think you don't really -- I think it could say that. I think you take out "is a defendant."

CHAIRMAN SOULES: Well, it says "or where" -- the old rule goes on, "or where such person is a party to a suit either as a plaintiff, defendant, intervenor" and so forth. So it kind of covers the waterfront, but here we are just talking about a court must appoint a guardian ad litem to represent a minor or incompetent person.

PROFESSOR DORSANEO: It would be better if it said, "A court must appoint a guardian ad litem to represent a minor or incompetent person who, one, has no guardian or, two, who was represented by a guardian or next friend who appears to the court to have an interest adverse to the minor or incompetent person." All of these capacities doesn't seem to make any difference, in whatever capacity.

CHAIRMAN SOULES: That's right.

Right.

MR. PRINCE: It should be "has no guardian or next friend."

MS. SWEENEY: That's true. Well, can you be a defendant as next friend?

MR. PRINCE: According to the first part of this you can, but that's the old 44.

MS. SWEENEY: Yeah. I have never heard of a next friend defendant. Could I name you as next friend of Joe Blow and sue you instead of him?

MR. PRINCE: I don't know, but the old Rule 44 says if all of those people have no legal guardian --

PROFESSOR DORSANEO: That's why I left it.

CHAIRMAN SOULES: 173 contemplates the defense by a next friend.

PROFESSOR DORSANEO: Does it?

CHAIRMAN SOULES: Yes. It says so. "Or where such person is a party to a suit either as a defendant and is represented by a next friend."

PROFESSOR DORSANEO: That's

just dumb, isn't it?

HONORABLE SCOTT BRISTER: Technically correct.

CHAIRMAN SOULES: That's what it says.

PROFESSOR DORSANEO: Well, you will find some other interesting things in here.

HONORABLE SCOTT BRISTER: I have never seen one, but technically he's correct.

PROFESSOR DORSANEO: Now, I wasn't reading it that way because I have seen it just the way Paula is thinking, is that next friends are for plaintiffs and guardians are for defendants, and that's probably why I left in "who is a defendant and has no guardian" because that was what was in my brain.

CHAIRMAN SOULES: Why cut it down? Maybe a parent can go in and be a next friend for a minor who's getting sued, got no conflict. It says so now. Why not?

PROFESSOR DORSANEO: Well, I will change it around, and then, you know, see

if there is not more people here next time, but I am going to change it for drafting purposes to say, "The court must appoint a guardian ad litem to represent a minor or incompetent person who has no guardian or next friend or who was represented by a guardian or next friend who appears to the court to have an interest adverse to the minor or incompetent person." Will that --

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: Can I ask a real basic question?

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Why do we have next friends instead of just guardians?

MS. SWEENEY: Oh, God.

PROFESSOR DORSANEO: Because it's cheap and easy, and we have statutes of limitation and all of that.

MS. SWEENEY: It's a really good reason.

HONORABLE SCOTT BRISTER: When we split homes, parents, you know.

PROFESSOR ALBRIGHT: Okay. So

you don't have to litigate the guardian issue?

MS. SWEENEY: Right. Next friend you just say -- I can be your next friend. Anyone can be a next friend, subject to being removed as having adverse interest.

PROFESSOR DORSANEO: Okay. That's helpful. Let me go into 31.

CHAIRMAN SOULES: Anything else on (c)?

MR. HAMILTON: I don't know whether we covered this somewhere else or not, but we have a real problem in our county with the courts appointing a guardian ad litem when it's not necessary and then paying them big fees. Is that covered anywhere, where the party objects, there has to be a hearing and so forth and evidence taken and make appeals?

HONORABLE SCOTT BRISTER: There is a task force report on that.

MR. HAMILTON: I beg your pardon?

HONORABLE SCOTT BRISTER: There is a task force report on that. Is that coming in here anywhere?

CHAIRMAN SOULES: Don't know.

MS. SWEENEY: I have a ducktailing suggestion to that, though, and I don't know if it helps or not, but I do think it relates; but where it says that it appears to the court that there -- and this is the existing rule, but it's a question I raise that has been troublesome for awhile. Where it appears to the court that the next friend or whoever has an interest adverse to the minor or incompetent person, I have always thought that should say "potentially has such an interest" or "has an appearance of a conflict" or "a possible conflict," so you are not having the court actually make a finding that there is a conflict, which the current rule does seem to imply.

And I don't think that's what courts do when they appoint ad litems. I think they appoint ad litems because there is a minor, and they think it's a good idea, and they want to be sure there is no conflict; but any time you have a parent bringing a suit on their behalf and on behalf of the child you have a potential conflict because they are going to have to divvy up a pot; and therefore, there

is a potential for conflict there over who's going to get what share.

Just because the court appoints an ad litem does not mean that the court has found a conflict in all cases, but the court may have found a potential conflict, and I bring that to your drafting attention. I think it may be something that we ought to incorporate for the court to be able to find, yes, I think there might be a conflict here, and I want an ad litem to advise me on it.

PROFESSOR DORSANEO: Well, with the rest of this we would ask you to provide us with your specific and, you know, well-experienced suggestions on how we could improve this.

HONORABLE C. A. GUITTARD: That could be done by simply inserting the word "potentially" after "interest."

"An interest potentially adverse" and so forth.

JUSTICE CORNELIUS: You already have the word "appears" in there, which indicates that it would not be a definite finding but just an appearance of the

conflict.

PROFESSOR DORSANEO: Well, for now I am going to add in the word "potentially" after "interest" and before "adverse" and then we can work on it more as time passes.

MS. SWEENEY: Yeah. Thank you.

PROFESSOR DORSANEO: Now, the next one, which I kind of want to get to, is moved from, in our rule book, the pleading rules into the place where it appears in the Federal organization. Okay. This is Rule 51, joinder of claims. Now, 51 was taken from Federal Rule 18, and we put it back in the organizational scheme where the Federal drafters have put it and kept it. That's the first point.

Second point is that in 1946 the Federal rule was revised. The Texas rule has never been revised. We have the 1937 version of Federal Rule 18 in our rule book. The reason why the Federal rule was revised is that it was perceived in 1946, and maybe a little later than that as well, that the 1937 version was flawed, and I can talk about it in two

different ways, one, operationally and the other texturally.

Let me talk about it texturally first. Our Rule 51 says what this says in essential terms. Then it has two additional sentences. "There may be a like joinder of claims when there are multiple parties," leaving the general rule to be thought of as applicable only in A versus B cases. "If the requirements of Rules 39, 40, and 43 are satisfied." Those Rules 39 and 40 deal with joinder of parties, and Rule 43 deals with joinder of parties because it's interplead, right? There might be a like joinder of cross-claims or third party claims if the requirements of 37 and 97 respectively are satisfied.

So in our current rule there are crossreferences in the joinder of claims rule to the joinder of parties rules. You may say, well, what difference does that make, these crossreferences? Well, here's the difference that it makes. If you have a case -- and this is the celebrated Christianson case. If you have a case where there are three persons who

have signed a promissory note and they are all jointly and severally liable on that obligation, our joinder of claims and parties rules, whatever version, mean that you can sue all of them together if you want to because there is --

HONORABLE SCOTT BRISTER: One of them is writ and --

PROFESSOR DORSANEO: -- a same transaction occurrence, common question of law or fact. Okay. Now, the harder question is suppose you have two of them or one of them on a separate note involving a completely separate deal. Okay. Do you look at the joinder of parties rules first or the joinder of claims rules, or do you read them together? The Christianson case reputed at the Federal level by rule change said that you couldn't join the claim on the different note against the parties who were already properly joined because that note wasn't related to the first note. Got that?

If you read our parties rules first and say, okay, are A, B, and C properly joined and then complete the parties analysis and read

the first sentence of our claims rules next, along with the other sentences that follow it, or the Federal people thought it was unclear as to what the answer was. The answer under this proposal is that once you get the parties in there, then you can enjoin additional claims against them; and if there is a problem with that, that will be handled by rules involving severance and separate trial. In other words, that there only needs to be one claim linking the defendants together, one common claim, and other claims against individual defendants can be added subject to separate trial and severance principles of normal application.

And, you know, it could have gone either way at the Federal level I suppose, but we decided to go with the Federal thing, thinking it's probably not a big deal one way or the other anyway.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Bill, isn't the next step is that even under our rules where there could be misjoinder you

still don't dismiss? The rules provide --

PROFESSOR DORSANEO: Right.

PROFESSOR ALBRIGHT: -- that you take care of it by severance or separate -- I mean, severance.

PROFESSOR DORSANEO: Yeah. Right. That actually is a very good point, what Professor Albright says, is that even if there would be a misjoinder under our rules once you read all of this through, the remedy would be the same remedy that the trial judges authorize to implement. The slight distinction would be that it wouldn't be mandatory in some mystical sense because one wouldn't know whether this is reversible or whatever.

We decided to go with the 1946 version of the Federal rules, cleaning up an original Federal rule, rather than the rejected potential interpretation coming out of one Federal district court roundly criticized by the Federal commentators, including Professor Wright, as the wrong view.

HONORABLE SARAH DUNCAN: What are the commentators discussions of? It seems

to me that it's sort of unfair, given your hypothetical, that Defendant 1 and Defendant 2 -- let's say they are really simple promissory note claims, and then Defendant 3 comes in and raises an incredibly complicated usury defense to that note that was not part of the Defendant 1/2 transaction.

In our courts, state courts, Defendants 1 and 2's ability to get that severed out is going to be close to unreviewable the way the courts of appeals apply the abuse of discretion test in the severance context. That just seems sort of unfair to me that Defendants 1 and 2 have to sit through the trial of Defendant 3's usury claim when it doesn't have anything to do with them.

PROFESSOR DORSANEO: That's the point. That joins the issue. Are we going to leave it to the trial judge's discretion, or are we going to have a rule that is -- and maybe we can even make it clear, not just susceptible, but says the trial judge does not have discretion requiring the courts of appeals to apply the mandamus rules strictly.

I mean, do you want that job, or is the

trial judges good enough to not really abuse somebody? You know, do you want to be the policeman because they need the police? Do we need the cops, or are the trial judges good enough to deal with it?

CHAIRMAN SOULES: I think there are examples on the other side of Justice Duncan's hypothetical there, or maybe it's a real case, where the trial of another promissory note claim is really not very burdensome to do to this same jury while we're at it; and it may even be a second lien that some party has and another one doesn't have, and basically the facts are going to be very intertwined with very little different, very little more to try; and it seems to me like those are -- when you have got a range of possibilities like that we ought to leave it to the trial judge to determine the prejudice to the other parties of the plaintiff's effort to convolute, complicate, maybe unnecessary, maybe not deliberately; but the fact that the plaintiff adds a claim or joins a claim that's unnecessarily complicated for the others, separate them out.

HONORABLE SARAH DUNCAN: But that's a different question if they are related and all arise out of the same initial transaction. The hypothetical or the case that Bill was talking about is where it's wholly unrelated to the claims against Defendants 1 and 2.

PROFESSOR DORSANEO: Yeah. That's the best case for your argument, but Luke is right. Many, if not most, of these cases involve difficult questions about the transaction or relationship of the one note to the other note. Christianson, you know, was a close case on that, and maybe this is not worth trying to sort this out for the one time being mandamusable and another time not being mandamusable.

CHAIRMAN SOULES: I don't think it's mandamusable.

HONORABLE SCOTT BRISTER: Boy, that would be a complicated rule to try to write to cover when I have to do what. I mean, you would almost have to imagine every circumstance that comes up on it.

PROFESSOR DORSANEO: Yeah. We

were influenced by the fact that this has not -- although, it hasn't caused us any trouble in state practice, it's not likely to cause us any trouble in state practice if we get uniform with the Federal approach either. It's almost a question of just -- it's not that big of a deal. I am just trying to get in step.

CHAIRMAN SOULES: It seems like it's two things to deal with all the time. It's the burdensomeness of additional trial days, and it's 403. Does it somehow cause prejudice to the other issues to be resolved to have this one joined, typical things the trial judges make rulings on frequently?

But whatever somebody else wants to say. Carl.

MR. HAMILTON: It seems to me that it does not help our situation of trying to cut down costs. If you have one, two, and three on one note and three on the other note, three has got to put in the time and effort on that case anyway with his lawyer, but why drag one and two along with that separate claim. It adds more expense and time to their lawsuit

rather than having them separate.

CHAIRMAN SOULES: I think the answer to that is it depends on how much burden because we have also got a judge and a jury in the box that can try this maybe in one more day; and if we don't do it in this one day in this trial, we are going to go through a different jury trial where a lot of resources are going to be used, so just somehow you have got to balance those problems.

HONORABLE SCOTT BRISTER: It depends.

CHAIRMAN SOULES: It depends.

MS. McNAMARA: You know, Luke, I don't know the answer but --

CHAIRMAN SOULES: Anne Gardner.

MS. McNAMARA: McNamara.

CHAIRMAN SOULES: I mean, McNamara. I'm sorry. Pardon me. I'm sorry.

MS. McNAMARA: We ought to think about this in the context of the discovery cutoff concept because, you know, all of the sudden we are going to have limits on depositions, and I am not sure how all of

this fits in; but if plaintiff has got a whole bunch of different defendants with a bunch of different kind of -- you know, sues on a whole bunch of different notes or different causes of action and he is only going to be deposed for whatever the time period is, that gets awfully murky, although I don't exactly remember what the discovery rules say.

CHAIRMAN SOULES: We are going to have to get back to a lot of these rules once we know where the Court is going to go on the discovery window, and that's what they haven't yet decided one way or the other. I agree with you, Anne.

Okay. So what's the answer? How do we want the committee to proceed? Do we want them to proceed so that it's a matter of discretion with the trial court to join an unrelated claim by a plaintiff against one defendant or whether it's, in effect, foreclosed by a rule?

PROFESSOR DORSANEO: And this is somebody who is already there. This is somebody who is already there, you know.

CHAIRMAN SOULES: Not a new

party, it's just a new claim.

PROFESSOR DORSANEO: Yeah. Against the party that's properly joined, a new claim against a party who was properly joined; and the argument is, well, these other people who were also properly joined are not properly joined with respect to that new claim. Well, that's chicken and egg, chicken and egg, chasing yourself around the block.

CHAIRMAN SOULES: Let me get a show of hands. Those that feel it should be discretionary with the trial judge hold your hands up. Eleven.

Those who feel it should be foreclosed by a rule? One. Eleven to one to be discretionary with the trial judge.

PROFESSOR DORSANEO: Now, the joinder of contingent claims section has an interesting --

HONORABLE C. A. GUITTARD: Excuse me. Before we go on, in (a) is the words "legal or equitable," is that obsolete? Do we really need that?

PROFESSOR DORSANEO: It probably is obsolete, Judge, but it's in the

Federal rule, and we actually added it into the -- and I think you did it, that proposal on the -- that we voted on earlier on the state the relief, either legal or equitable. I don't think it hurts anything to say "legal or equitable."

HONORABLE C. A. GUITTARD: Legal is the opposite of illegal as well as the converse of equitable, and it would be nice to get rid of it, legal or equitable.

PROFESSOR DORSANEO: Well, I don't mind taking it out, but it's in there because it's in the Federal rule, and it's probably not exhaustive, although when it was written it probably was thought of as exhausting all of the claims.

HONORABLE C. A. GUITTARD: And the Feds have more of a difference between legal and equitable procedure than we have ever had, and so although it might be relevant in the Federal context, it really isn't relevant in our practice.

CHAIRMAN SOULES: Okay. Are you moving that we delete "legal or equitable"?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Second?

MR. HUNT: Second.

CHAIRMAN SOULES: Those in favor? Nine.

Those opposed? Nine to one. It's deleted.

PROFESSOR DORSANEO: That's probably good. I can do monkey see, monkey do, too. Rule 51(b), which is in this thing as 31(b) was taken from the Federal rule which is a paragraph entitled "Joinder of Remedies," and the Federal rule -- I hate to do it like this, but I don't know any other way to do it.

The Federal rule is entitled "Joinder of Remedies, Fraudulent Conveyance," and it begins like our Texas rule begins, "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion." Now, we immediately found the reference to things heretofore cognizable to be distasteful and thought that it could be worded better, and Richard Orsinger said this really isn't joinder of remedies. This is joinder of contingent claims, and why don't we

just say if a claim is contingent on the determination of other claims, the claims may be joined in the same action, which seems to be what this "heretofore cognizable" thing is saying.

Now, the "heretofore cognizable" sentence goes on and says this remarkable thing, "but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties," which struck us as unnecessary to say because what other relief -- on what other basis would you do it? Okay.

The Federal rule then goes on and talks about fraudulent conveyances. "In particular a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money." In order to try to indicate what in the world this general sentence is about, in 1939, as reflected on page 3 of this draft, the original committee said, "We don't need that."

"The reference to the right of plaintiff

to join an action upon a claim for money and an action to set aside a fraudulent conveyance is omitted as unnecessary in view of the decision of this state." So we know why that was left out in 1939, and the end of the story is at the time our new rules were adopted the insurance company lobby got a sentence added in, which we likely want to retain, in slightly revised form, "This rule does not permit the joinder of a liability or indemnity insurance company unless such company is by statute or contract directly liable to the claimant," and we mean for that to mean exactly what the current law is.

The current wording we think is better because the rule now talks about in tort cases, and we wondered whether that's really necessary to say as opposed to, you know, is this really a tort case anyway when it's on the contract? It's really a contract case, and that's what we did with joinder of remedies, left it essentially the same, a little different.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: And I assume the reason you left off the -- I just want to put this on the record. I assume the reason you left off the "unless" clause at the end is because all you're saying is this rule doesn't permit the joinder. There may well -- joinder may be permitted by statute or by contract.

PROFESSOR DORSANEO: In fact, we have the "unless" thing in there.

HONORABLE SARAH DUNCAN: Oh, I'm sorry. I didn't turn the page.

PROFESSOR DORSANEO: "Unless such company is by statute or contract directly liable." It's on the next page.

HONORABLE SARAH DUNCAN: I'm sorry.

CHAIRMAN SOULES: Okay. Carl.

MR. HAMILTON: If (a) permits the joinder of all claims, why do you need the first sentence in (b)?

PROFESSOR DORSANEO: Well, that's a good question. We probably don't, but it's a specific treatment of a contingent claim problem that has historically been a

problem.

CHAIRMAN SOULES: Could it be a question of rightness that this answers?

PROFESSOR DORSANEO: We probably don't need it, but you know, it's probably wise to keep it. That cuts against what I have said, you know, about some of the other rules.

HONORABLE SCOTT BRISTER: I think you should encourage all on the fraudulent conveyance, on --

CHAIRMAN SOULES: Judge Brister. She can't hear you with this noise behind us.

HONORABLE SCOTT BRISTER: On fraudulent conveyance, on turnover cases, you ought to do those all at once. I think it's good to have it or encourage your -- you know, let's not try the case, take it up on appeal, and then have a turnover statute case sever things. Let's do it all at once. It encourages doing them altogether.

PROFESSOR DORSANEO: Judge Brister, if you want to think up an in particular sentence, like the one in the

Federal rule book to put in here, that probably wouldn't be a bad suggestion, one that you have exactly in mind that comes up all the time that ought to be done together.

CHAIRMAN SOULES: Put it in the rule?

PROFESSOR DORSANEO: Uh-huh. I mean the Federal rule book says, you know, after saying in that odd language what we tried to say better, "In particular a plaintiff may," you know, join this with that.

HONORABLE SCOTT BRISTER: Of course, most of them are not very common, with the exception of insurance breach of contract, good faith, fair dealing, in which case I have never seen them not brought together.

PROFESSOR DORSANEO: Or any claim for indemnity.

CHAIRMAN SOULES: Wouldn't (b) cover any kind of contractual indemnity, insurance or otherwise? There are a lot of claims for indemnity in commercial cases arising in the party's private contracts.

HONORABLE SCOTT BRISTER: But the insurance, big insurance companies a lot

of times file those as separate causes of action because they may not like -- the way I see it is they may not like the form chosen by the plaintiff's attorney for the hurt oil and gas worker, so they file their express negligence contractual indemnity case somewhere else where they will be a little more confident in something.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Does the last sentence in (b) apply to the whole rule or just to (b)? If that speaks to the entire rule, we might want to make it a separate paragraph (c).

PROFESSOR DORSANEO: Let us think about that. It might.

HONORABLE SCOTT BRISTER: That's really a joinder of a party rather than a claim, isn't it?

PROFESSOR DORSANEO: Yeah. I mean, it actually really is, but you could think of it either way.

HONORABLE SCOTT BRISTER: I mean, if it's in the Federal rule that way --

PROFESSOR DORSANEO: It's not. That was one that was added onto our rule in order to make that special point that you can't sue me in this case if I'm a liability insurer. Maybe it's in a separate paragraph, maybe in a separate place.

MS. SWEENEY: Is there any sentiment here for deleting it?

HONORABLE DAVID PEEPLES: All of those folks left earlier in the day.

MS. SWEENEY: I know. We could take a real quick vote on it.

CHAIRMAN SOULES: What it really should say is, "This rule does not permit the joinder of the claims against the liability or indemnity."

PROFESSOR DORSANEO: You know, frankly, the sentence has probably always been in the wrong place. It probably should be in 40, which is going to change to 33.

CHAIRMAN SOULES: Or both, with putting claims here. I mean, this sentence limits the kind of contingent claims you can file. That's what its intent is, but it's written about parties instead of claims.

PROFESSOR DORSANEO: Well, we will reconsider placement. I mean, that's probably like that "conclusively binding" sentence that somebody put in 44.

CHAIRMAN SOULES: But what I'm saying is placement, it's probably not redundant to have it in both places.

HONORABLE C. A. GUITTARD: I agree with Luke, but it seems to me --

CHAIRMAN SOULES: It says "claims against" here because it's claims, and parties in the other place.

HONORABLE C. A. GUITTARD: Or it should say "a claim on a liability or insurance policy," rather than "against a liability or insurance company."

HONORABLE SCOTT BRISTER: But as I understood Bill explaining the scenario, was that you look first to the party rule, and then once you have got all the right parties there, then you address which claims you can have among those parties. If that was the deal, you just put it in the party rule and then if you can't have them as a party, you can't have them as a claim.

PROFESSOR DORSANEO: Well, but I guess there could be a situation where somebody was -- an insurance company is properly joined and is directly liable on some basis, but not on all claims against it. So maybe it should go in both places and be cleaned up. I hate to be doing the devil's work here. I will do that.

CHAIRMAN SOULES: Okay. Anything else on 31? Paula.

MS. SWEENEY: The new statute that was just passed by the legislature that allows defendants to bring in -- what do they call it?

PROFESSOR DORSANEO: Responsible third parties.

MS. SWEENEY: Responsible third parties. Have you-all figured out where that fits with this scheme yet, if anywhere?

PROFESSOR DORSANEO: Well, we have it on the list.

MS. SWEENEY: Ahh. Thank you.

PROFESSOR DORSANEO: Since we are planning on moving third party practice into the pleading rules, we haven't really

gotten to a specific consideration of the relationship of Rule 38 or what that will become to the new statute.

CHAIRMAN SOULES: Okay. Moving right along to 32.

PROFESSOR DORSANEO: All right. Now, 32 is going to be easy because the only change in 32 is to change -- and the history of it is our Rule 39, which is in this package as Rule 32, was taken with slight textural change from Federal Rule 19. Federal Rule 19 was amended in 1987 to fix gender problems that it had, and all this does is to do that. So this is 19, only it takes out "his" and says "the person." So it's the same now as the Federal rule has become in 1987 when they did what we are doing.

Yes, your Honor.

HONORABLE SCOTT BRISTER: Yeah. I pointed out the last phrase in 37 about "not to be at a time nor in a manner to unreasonably delay the trial of the case." It seems to me that needs to be in somewhere. That is a big problem and if --

PROFESSOR DORSANEO: I would

say put it in at the end of paragraph (a), you know, or maybe a separate paragraph; but it seems that that -- I would personally be amenable to adding that thought. I think it's not incompatible or inconsistent at all, and it could be done simply by taking the end language after the semicolon in Rule 37, I think, and just adding it at the end, maybe not at the end altogether but in the next to last sentence of (a). "If the person" -- no. Well, somewhere in here. Okay. I would try to put that thought in.

HONORABLE SCOTT BRISTER: Wherever it fits.

PROFESSOR DORSANEO: Does everybody understand what we are talking about? Rule 37 which we talked about a little bit earlier has at its end a different thought that is not expressed in either Rule 32 or 33. Maybe it should go in 33 and not merely in 32 or instead, but not -- saying that joinder of additional parties necessary or proper not be at a time or in a manner to unreasonably delay the trial of the cause. Now, what's unreasonable probably depends on the nature of

your interest. Huh?

HONORABLE SCOTT BRISTER: Yeah.

PROFESSOR DORSANEO: But we ought to try to put that thought in here somewhere.

HONORABLE SCOTT BRISTER: 33 would probably make more sense.

PROFESSOR DORSANEO: But in terms of our current rule book, and that is identical to our Rule 39, other than the reference to class actions at the end where we change the number from 42 to 36 because of this draft.

Now, I want to get, before we finish today, people to think about it. I want to get to 33, if I can go a little bit ahead, and particularly 33(b). There are a couple of complex thoughts here that I want you-all to be thinking about, and I'm going to go back to Dallas tonight and fly back in the morning, so I want Mike Prince to think about this, too, because he is going to do the first hour of this in the morning. No?

MR. PRINCE: I will talk to you about that later.

PROFESSOR DORSANEO: Maybe not. There are a couple of odd things in our rule book and in the Federal rule book. If you look at Rule 40 in our rule book, which is permissive joinder of parties, the same as this Rule 33, first of all, the first paragraph is identical. So I don't even want to talk about that now. It's just the same.

(B) in our Texas rule book is entitled "Separate Trials." We have in our Texas rule book in Rule 174 separate coverage of separate trials, several sentences about separate trials, two different parts of the rule book. Okay. Instead of talking about separate trials at all here in this Rule 40 the committee decided to talk about separate trials altogether in the next rule under the heading "Separate Trials," putting all of that information together. Okay.

So first thought is take separate trials out of 33 and put it in a separate rule entitled "Consolidation, Separate Trials and Severance," which is built largely on Texas Rule of Civil Procedure 174, with the addition of the little piece of it that's over here in

40(b) and put it in one place.

Now, the next and more interesting thing involves misjoinder of parties, and here our Texas rule is Rule 41. Now, I apologize to you if you don't have a rule book to look at, but if you do, follow along. Rule 41 says, "Misjoinder of parties is not grounds for dismissal of an action." We have embraced that sentence, okay, and put it in one of the parties rules. Okay. I think it's probably okay if it's just in permissive joinder of parties.

Then it goes on and says a lot of other stuff in the middle, and I will come back and talk about that in a minute. It says at the end, "Any claim against the party may be severed and proceeded with separately." We embraced the first and the last sentence of Rule 41. We, on purpose, did not embrace the middle. Now, as we read the middle, one of the things we noticed when we read it carefully is that it is inconsistent in part with the rules that Paul was talking about earlier on volunteer nonsuits. If you read it, it says, "Parties may be dropped or added,

or suits filed separately may be consolidated or actions which may have been improperly joined may be severed, and each ground of recovery improperly joined may be docketed as a separate suit."

All of those things that can happen are by order of the court on motion of any party, all of them. That did not become clear to us until we looked at the Federal rule, which doesn't cover as much territory. So what I believe is that we have failed to notice that this middle part of Rule 41 requires a court order to drop a party and failed to notice an inconsistency between this middle sentence and Rules 162, 163, and 165. What we planned to do was to resolve that inconsistency in favor of the approach taken in Rules 162, 163, et cetera, which is the unnumbered rule on page 12, the unnumbered rule on page 12 called "Voluntary Dismissals of Nonsuits." Okay.

The last thing I am going to say about it is that this goo-gosh added into the middle of Rule 41, the Federal version, which reads simply, "Parties may be dropped or added by order of the court on motion of any party,"

does nothing more than obscure the literal meaning of when a court order is required or not; and it just adds extra stuff talking about consolidation of suits filed separately, consolidation is dealt with separately, actions improperly joined being severed, and each ground of recovery improperly joined docketed as a separate suit.

It just seemed like a bad thing to do and in sense is unnecessary. Now, that may require some additional thought. There is some more of that you may want to say, okay, but our thought process is some of it is inconsistent with some of the rest of our rule book; that is to say, parties may be dropped by court order, which is the Federal practice, by the way, but not our practice. Okay. And the other stuff is not necessary because our other rules cover consolidation, et cetera. Now, some of it might still be saved, if you wanted to, but maybe not here. Maybe in Rule 34, "Consolidation, Separate Trials and Severance."

The last thing I'm going to say on 34 to kind of finish this up, the severance language

in 34 is taken more or less straight from case law. It's not otherwise articulated in the rule book, and we thought since Texas courts seem to be really concerned about the difference between separate trials and severance it's important to put it in there, and I'd like to bring that to a close for today so I can catch the airplane and be back at 9:00. Yes, ma'am.

MS. SWEENEY: Can I ask a question in deference to your flight? Did you intend to change the second sentence in part (b) of what you have numbered Rule 33? The Rule 41 sentence that you purport to say says, "Any claim against a party may be severed and proceeded with separately."

PROFESSOR DORSANEO: No. That may be something we want to put in here somewhere. I didn't think it was necessary to say that because we have --

HONORABLE SCOTT BRISTER: Separate trial rule.

PROFESSOR DORSANEO: -- severance. "The court may order a severance if the controversy involves more

than one cause of action, the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." I mean, that seems to be a more accurate way of saying when severance is appropriate than to say, and misleadingly, that severance is always appropriate.

MS. SWEENEY: That's not really what I was asking you, Bill. In the paragraph that you-all have labeled "Misjoinder of Parties," you went through and traced Rule 41 and said, "We kept the first sentence and the last sentence." You didn't keep the last sentence. You changed it, and I am wondering if you did it on purpose. The existing last sentence says, "Any claim against a party may be severed and proceeded with separately." What you-all wrote says, "Any claim against a party who has not been properly joined may be severed and proceeded with separately."

PROFESSOR DORSANEO: Ahh. Think about it.

MS. SWEENEY: I didn't know if

you meant that or not.

PROFESSOR DORSANEO: I think we meant it, but that's certainly something that I should have said.

CHAIRMAN SOULES: Well, in the context of (b) --

HONORABLE SCOTT BRISTER: That's what it's talking about.

CHAIRMAN SOULES: -- that's what it's talking about. 34(c) is a much broader rule that covers everything else.

MS. SWEENEY: But does this mean a claim against an improperly -- I mean, are we talking about severing the party or just a claim and leaving the rest of the improperly joined --

CHAIRMAN SOULES: Okay.

MS. SWEENEY: It seems to be a dangling modifier or one of those things.

CHAIRMAN SOULES: You would say, "A party who has not been properly joined" rather than "a claim against a party who has not been properly joined"?

HONORABLE SCOTT BRISTER: Or "claims against a party."

MS. SWEENEY: Something like that.

HONORABLE SCOTT BRISTER: The way it's written, it makes -- well, some of them you sever out. They are improperly joined, but you sever some of them out and not others.

CHAIRMAN SOULES: Actually, it's claims.

HONORABLE SCOTT BRISTER: Yeah.

CHAIRMAN SOULES: Well, any claim, all claims, or just claims, and that probably all means the same thing because what you sever is the cause of action. You don't sever the party.

HONORABLE SCOTT BRISTER: You might sever the party. You know, if you have -- what was the El Paso case about the two employees that got fired? It has improper joinder. What, do you sever one employee's case of wrongful termination out from the other employee's wrongful termination and make them two separate suits?

CHAIRMAN SOULES: But you sever the causes of action, not the parties.

HONORABLE C. A. GUITTARD: Does "who has not been properly joined" include an individual who has not been joined at all? He hasn't been properly joined. He hasn't been joined at all.

So what you really mean is a claim against a party who has been improperly joined.

PROFESSOR DORSANEO: Yes. That's true. But you have, you know, the main contours of this now. The other rules are some little changes here and there, but not that many. Now, I can either -- I am not going to get here until 9:30 tomorrow. You can either do something else and we can take this up later. It won't take but an hour at the most to finish the package up, as a tentative discussion, you know, thing.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Or Mike can do it, whatever is his pleasure.

MR. PRINCE: That's fine.

CHAIRMAN SOULES: Elaine has got -- you're ready on a report that probably won't take more than an hour.

PROFESSOR CARLSON: Won't take more than an hour. I would be surprised if it was a half hour.

MR. PRINCE: Luke, I don't mind doing it as long as I don't have to answer questions about what the hell the task force did when he was running it because I have no knowledge of that.

CHAIRMAN SOULES: And, Tony, your report is probably not -- is it very long?

MR. SADBERRY: Luke, did you get Judge Till's letter? I don't know what you plan to do on that. He asked that he be deferred. He had broken a leg or ankle or something. He had asked that you defer any discussion on the report until he could be here in July. I don't know what your plans are on that.

CHAIRMAN SOULES: Well, I will talk to Mike and see what he chooses to do, but Elaine hasn't been up to bat yet, and we probably ought to get your rules on the table, too.

HONORABLE SARAH DUNCAN: Do we

have Tony's report?

CHAIRMAN SOULES: Pardon?

HONORABLE SARAH DUNCAN: Do we have Tony's report?

CHAIRMAN SOULES: I think so. Okay. We will start with Elaine. If we have time we will do Tony and then we will get back to this, unless Mike wants to push on with that, Bill, which if he does, that's okay, too. But we will need everything here tomorrow to try to make progress.

See you tomorrow at 8:00 o'clock. 8:00 o'clock 'til noon.

(Proceedings adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 10, 1996, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,214.50.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 28th day of May, 1996.

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