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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 11, 1996

(SATURDAY SESSION)

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 11th day of May, A.D. 1996, between the hours 8:00 o'clock a.m. and 12:05 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

MAY 11, 1996

**MEMBERS PRESENT:**

Prof. Alexandra W. Albright
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Donald M. Hunt
Joseph Latting
Russell H. McMains
Anne McNamara
Anthony J. Sadberry
Luther H. Soules III
Paula Sweeney

**MEMBERS ABSENT:**

Alejandro Acosta, Jr.
Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Hon Ann Tyrrell Cochran
Michael T. Gallagher
Anne L. Gardner
Michael A. Hatchell
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
John J. Marks Jr.
Hon F. Scott McCown
Robert E. Meadows
Richard R. Orsinger
Hon David Peeples
David L. Perry
Stephen D. Susman
Stephen Yelenosky

**EX OFFICIO MEMBERS:**

Justice Nathan L. Hecht
Hon William Cornelius
O.C. Hamilton
Doris Lange
Michael Prince

**Also Present:**

Rosemarie Kanusky

MAY 11, 1996


| Rule | Page(s) |
|---|---|
| TRCP 4, 739, 744 | 4977-4985 |
| TRCP 742 & 742a | 4985-4992 |
| TRCP 747a | 4993-5002 |
| TRCP 749a | 5002-5006 |
| TRCP 749b | 5006-5018 |
| TRCP 749c | 5018-5019 |
| TRCP 751 | 5019-5020 |
| TRCP 292 | 5020-5044 |
| TRCP 232 | 5044-5075 |
| TRCP 40, 41, and 174 (New Rule 33 & 34) | 5075-5093; 5097-5098 |
| TRCP 43 (New Rule 35) | 5093; 5098 |
| TRCP 45 (New Rule 36) | 5093-5098 |
| TRCP 42(a) (New Rule 37) | 5099-5101 |
| TRCP 37, 60 & 61 (New Rule 38) | 5101-5124 |
| TRCP 150-159 (New Rule 39) | 5124-5127 |
| TRCP 162, 163, 165 (Unnumbered new rule: Voluntary Dismissals & Nonsuits) | 5127-5150 |

# INDEX OF VOTES

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


4983
4992
5001 (two votes)
5016
5018
5019
5020
5047
5071
5087
5097 (four votes)
5098 (two votes)
5100
5104
5131

CHAIRMAN SOULES: Good morning, everyone. It's about 8:00 o'clock, so we'll get started. We're going to start with Elaine Carlson's report, and she has got some materials I think that are being passed out, and if not, they are on the table behind the Chair here. So Elaine, let me give the floor to you, and you tell us, lead us where we need to go.

PROFESSOR CARLSON: All right. This is the subcommittee report on Rules 737 to 813. You should have as the first page a cover letter dated 11/6/95 from myself to Luke, which is the report of our subcommittee.

As you might know, those rules or that range of rules principally covers forcible entry and detainer, so most of the proposals we have deal with that area of law.

What you have in the packet before you in addition to the cover letter, which generally describes the subcommittee recommendations, there's an Attachment "A," which is a memorandum, a research memorandum from my research assistant pertaining to an issue we'll get to on the unauthorized practice of

law in forcible entry and detainer cases.

Attachment "B" is the red-lined version of the rule. Attachment "C" is a disposition chart that includes the current rule so you can sort of compare what the recommendations are. And Attachment "D" is a disposition chart without the current version of the rules.

I suggest you follow Attachment "C," the letter, and the red-lined version.

The first problem we're dealing with, as I set forth in this letter to Luke, is the application of Civil Rule 4 to Civil Rules 739 and 744. To try and translate that into plain English, Rule 739 provides for citation to be served in a forcible entry and detainer action, and the form of the citation is to inform the defendant tenant to appear at the time and place named in the citation, which is to be not more than 10 days nor less than six days from the date of service. And of course, the landlord typically is trying to, in an expedited fashion, get the tenant out based on a breach of a lease agreement or something like that.

Rule 744 allows the tenant to -- actually it allows any party to demand a jury upon the timely paying of the fee and the demand, and it provides it's timely if the fee and demand are paid on or before five days from the date the defendant is served with citation, so the scheme is pretty straightforward when you look at the rules.

You have five days to demand. The jury trial is not to begin until six days, six to ten days after service of citation, so the theory there was sound. The problem is when we apply the counting rule, Civil Rule 4, there ends up being a problematic area where the action can actually go to trial before the time to make the demand, and it's because of the way we count.

You will recall that Civil Rule 4 provides two distinctive methods of counting depending upon whether the time periods you're looking at are less than five days or not.

The general rule under Civil Rule 4 is that for time periods that are more than five days, we know you don't count the day of the event, the next day is day 1, and you do count

Saturdays, Sundays, legal holidays, and you count the last day, and if that's a Saturday, Sunday or legal holiday, you go to the next day that isn't.

Clearly that counting method is what you would use in figuring out the time you go to trial under Rule 739, so that if we had service of citation on a Thursday, for example, and assume Friday, Saturday, Sunday, and we have Monday as a legal holiday, you would count Friday as day 1. Then we would count Saturday, Sunday, right, legal holiday, two, three, four. That would get us to Monday, Tuesday, and Wednesday would be our day 6. So you can see how with that counting method you could be going to trial by the following Wednesday as day 6.

On the other hand, Rule 4 goes on to provide a distinctive counting method for time periods that are less, five days or less. And in those instances, you don't count Saturdays, Sundays and legal holidays in your computation, and so -- unless it's exempted out, because that's the third part of Rule 4, is the exception to the exception rule. And

so that second part of Rule 4 in counting would apply to the jury demand, that is, to Rule 744, so that if -- again, which is triggered by the date of service of citation.

Assume again that service of citation is on Thursday. That's day 1. Friday -- actually it wouldn't be day 1. Friday would be day 1. Saturday, Sunday, legal holiday on Monday we don't count. Tuesday would be day 2. Wednesday would be day 3. Thursday, day 4. Friday, day 5. We already went to trial, and it was nonjury.

We can see that the problem is you're not able to make necessarily the jury demand before you go to trial on the forcible entry and detainer, and so the solution to that is to exempt from 744 our five-day counting period, to exempt that from the five-day rule and put it under the usual counting rule where we count Saturdays, Sundays and legal holidays. And if we do that, then we will not have this problem.

In the materials that you have, it erroneously states that we also recommend exempting Rule 739 from Rule 4, and that's

just nonsense, because it already is not part of it, so I apologize to you, but when you look at Attachment "B," if you would, under "Rule 4, Computation of Time," the very last line, "for under Rules 739, 744," you need to cross out 739.

And this last part of Rule 4 is the exception to the exception which places the five day or less counting period back on the usual counting track.

Again, if you look at disposition chart C and D, under the first one it says Rule 739, and in the very right-hand column, it says Subcommittee Action, adopt or reject, it should read "Reject," because we reject that proposal by Judge Till, because where you do the fix, as I said a moment ago, is over in Rule 744, where we have "Adopt" the recommendation of Judge Lawrence.

And in fairness to Judge Till, who is not here, what we had for his letter is in the materials, but it's only one page and then it sort of ends. I'm sure there was more, but we did not have that. He may have gone on to explain as Judge Lawrence did in his letter.

If you look at Judge Lawrence's letter in your materials on Rule 910, in the last paragraph on that page, Rule 4, Judge Lawrence sets forth this problem. Judge Till echoes the problem in his letter, as much as we have it, on page -- just a second, 952 is Judge Lawrence's, and 970 is Judge Till's.

CHAIRMAN SOULES: Okay. Is this a different -- oh, this is on page 910, not Rule 910. Okay. It's still dealing with the same rule, Rule 744?

PROFESSOR CARLSON: Yes. The two together, 739, Luke, 744, and Rule 4.

CHAIRMAN SOULES: Okay.

PROFESSOR CARLSON: Does anyone have any questions or input on that?

CHAIRMAN SOULES: Your recommendation then is, what, encompassed by the red-lined rule suggested in your new materials?

PROFESSOR CARLSON: Yes, as I suggested.

CHAIRMAN SOULES: On Attachment "B"?

PROFESSOR CARLSON: Yes, except

you have to cross out "Rule 739" because that does not make sense. I apologize.

CHAIRMAN SOULES: And why is that again, Elaine?

PROFESSOR CARLSON: Rule 739 is a counting period that's greater than five days, so it already allows you to count Saturdays, Sundays and legal holidays, and you just need to parallel that for the jury demand on Rule 744.

CHAIRMAN SOULES: Okay. Any objection to adding 744 to the JP exceptions to eliminating Saturdays, Sundays and legal holidays and periods of time under five days, five days or under? No objection. Okay. That will be taken as unanimous consent to add 744 to Rule 4.

PROFESSOR CARLSON: All right. The second item that --

PROFESSOR ALBRIGHT: Can I ask one question?

PROFESSOR CARLSON: Yeah.

PROFESSOR ALBRIGHT: Are we exempting all FE&D time periods from Rule 4 now?

PROFESSOR CARLSON: I don't think we can say that, Alex, because some of the time periods, like 739, are greater than five days. And Rule 4 really starts out with the general rule for time periods less than five days, then counting if you have a five-day period or less and then an exception to the exception.

PROFESSOR ALBRIGHT: I was just wondering, I mean, this is not a proposal for right now, but one thing about Rule 4, it says this is the rule for every rule except for these specific rules. But if you look at most of these rules, they seem now to be forcible entry and detainer proceedings, and I think we might want to consider putting some words in there like "forcible entry and detainer" to catch people's attention that when you're filing forcible entries and detainers that's specifically where these exempt proceedings are. I think that's something that would have to be looked at carefully, but that's just one thought I had, because when you have numbers, people -- well, I glaze over numbers, but I like words better. I would have both.

PROFESSOR CARLSON: Okay.

CHAIRMAN SOULES: Moving right along. What's next?

PROFESSOR CARLSON: All right. The second note in the letter to Luke is a suggestion pertaining to service of citation and forcible entry and detainers. Currently Rules 742 and 742a, civil rules, provide for service of citation and forcible entry and detainer complaints and citations by an officer. They're silent as to the ability to have other authorized persons serve as allowed in other JP, district and county court civil proceedings, and by that I mean the JP proceedings under the 500 series of rules, the nonforcible rules. And our committee recommends to delete the word "officer" and include or substitute the words "sheriff, constable or other authorized person," and that would parallel the provisions in Rule 106 on who generally can accomplish service.

MR. LATTING: And that would be who?

PROFESSOR CARLSON: Joe, that could include anyone who the court authorizes

by an order. It could be an independent process server. It has to be someone who is independent, but the court has a great deal of discretion on who that might be.

MR. LATTING: I'm just a little concerned about starting the process to kick people out of their house unless we're sure that the person serving the citation is okay.

CHAIRMAN SOULES: You could take a billion-dollar default judgment.

MR. LATTING: That's right.

PROFESSOR CARLSON: That concern was raised, and we discussed it at the committee, because that was raised by Joe Bax of Houston, who -- we did not receive that letter directly, but we happened to receive it on another subcommittee that I sit on, so I know that it exists, and I can probably track it down in the 500 --

MR. LATTING: Well, I suppose if the court has to authorize the person who serves the process that there wouldn't be much room for abuse. And I suppose that private process servers are licensed, aren't they?

CHAIRMAN SOULES: No.

PROFESSOR CARLSON: No. And I understand that it's a practice that varies by county, and the rule that provides for other authorized persons does not state whether it requires the court on a case-by-case basis to approve an independent process server. And I understand that in many counties there's just a list, and these are the independent process servers that are authorized by court order.

MR. LATTING: But at least they've cleared some kind of a hurdle where it's not just the plaintiff who is taking care of all of this and then representing to the court that the process has been served?

PROFESSOR CARLSON: No, it's not a disinterested person without a court authorization.

HON. C. A. GUITTARD: Elaine, have you considered the question as to whether justices of the peace, which in some instances are not very learned in the law and may be subject to influences that an ordinary judge is not subject to, whether a justice of the peace can properly be relied upon to name a responsible process server?

PROFESSOR CARLSON: We debated that at some length, and I think that the views are very divergent, but we came out with the majority view that it seems to be working well in other courts. There, of course, are some other constitutional county court judges that need not be licensed lawyers either and they have that authority, so we just came out on the end of expediency, I suppose.

I do want to point out to you the letters, though, that we received or actually that we found. On page 728 and 729 Joe Bax writes a letter. He represents a great deal of landlords, and he expresses the concern that Joe Latting just suggested; that in this kind of a proceeding, because we're basically throwing someone out of their house and home eventually through the process that perhaps independent process servers are not appropriate.

MR. LATTING: Well, I'm not --

CHAIRMAN SOULES: Let me try to get it this way just to try to cut to the chase here so we can get on with it.

Rule 103 has safeguards in it that were

built into it when persons other than constables and sheriffs were authorized to serve process. We had to do that because I believe it was in Harris County that they quit. They wouldn't do it. The constables and the sheriffs wouldn't serve civil process. But 103 has some safeguards built into it, so why don't we say any -- the sheriff, constable or person authorized by Rule 103 receiving such citation shall execute it, so it's got to be a person that's authorized under 103.

MR. LATTING: And you feel like 103 would keep it relatively clean?

CHAIRMAN SOULES: Can't be a party, can't be an interested person, has to be approved by the judge. They may be on a general list, that's not been decided, but the judge has to give some form of --

MR. LATTING: Well, my perception has been that there is not a lot of trouble with this.

CHAIRMAN SOULES: Yes, sir, there has been.

MR. LATTING: So I'm not trying

to nit-pick. All right. Well, I'd be satisfied with that.

CHAIRMAN SOULES: And there's not a licensing, and the people that want the licensing most are the process servers so that they can close the circle of authorized persons.

MR. LATTING: It's okay with me.

CHAIRMAN SOULES: And so we've left it to the trial judges to say who can serve their processes.

HON. C. A. GUITTARD: I would like to ask whether we need a special rule for justices of the peace with respect to service of process, why the regular rules wouldn't apply, and why they shouldn't apply?

CHAIRMAN SOULES: Well, you've got these six-day rules and we don't have time to overhaul the JP rules. We're probably going to get a chance to look at that someday, but there are different times here, Judge.

HON. C. A. GUITTARD: Well, I'm not concerned about the time, I'm concerned simply about the service.

CHAIRMAN SOULES: Let's don't, please.

HON. C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Bypass --

MR. PRINCE: Luke, I don't think we ought to beat this to death, but do you -- is there any need -- I agree with the change that talks about who may serve under Rule 103, but Rule 103 goes on and talks about service by mail by the clerk, and I think the rest of the JP rule makes it clear about how, mechanically and physically how it's supposed to be done, so I don't particularly read that -- I mean, if you just incorporate the people authorized in Rule 103, I don't read that as a problem.

PROFESSOR CARLSON: And it's really a policy decision. Judge Till felt that he would not make the proposed change. He would leave it with the sheriff or constable. We received letters on both sides, and the committee just came out, the majority perspective was to allow authorized persons envisioning the constraints of Rule 103.

CHAIRMAN SOULES: Well, Mike, I

don't see how the clerk could possibly serve under 742, because it says it has to be -- you have to deliver a copy to the defendant or leave a copy with a person under 16.

MR. PRINCE: I understand. It just says -- your suggested change is "person authorized by Rule 103."

CHAIRMAN SOULES: Right.

MR. PRINCE: And you might argue that the clerk is a person authorized under Rule 103. I mean, I don't read it that way, and it doesn't make any sense.

CHAIRMAN SOULES: But the method the clerk would use under 103 cannot work under Rule 742.

PROFESSOR CARLSON: That's right.

MR. PRINCE: Okay.

CHAIRMAN SOULES: Okay. So sheriff, constable or person authorized by Rule 103 receiving such citation.

PROFESSOR CARLSON: I think that's acceptable.

CHAIRMAN SOULES: Any objection? Done by unanimous consent.

PROFESSOR CARLSON: The third problem we address is raised by a justice of the peace pertaining to what he perceives to be an unauthorized practice of law. Civil Rule 747a, and in the Property Code, Section 24.011, allow parties to an FE&D case to represent themselves and to "be represented by their authorized agent" "who need not be attorneys."

Judge Baker's letter on page 960A through D points out a problem in that paralegals were appearing on behalf of corporations or sometimes tenants to represent them in forcible entry and detainer cases, and he was concerned on whether this constitutes the unauthorized practice of law.

The memo on Attachment "A" is some discussion of our rules pertaining to the unauthorized practice of law trying to determine what the intent was. In enacting Civil Rule 747a we talked to a number of JPs pertaining to this, and the input we received led us to believe that the fix on this would be to clarify it by a comment to Rule 747a of what seems to be the intent of the rule; that

an authorized agent for purposes of an FE&D on behalf of the landlord should be construed to be the owner, the employee of an owner, the managing company hired by the owner or realtor retained by the owner. For purposes of the tenant, an authorized agent should be construed to mean the tenant, the employee of the tenant or occupant of the premises as defined in the lease.

And this would prevent a paralegal or someone who doesn't have the direct employee/agent relationship by virtue of the landlord or the tenant's business from appearing on their behalf.

HON. C. A. GUITTARD: Mr. Chairman.

CHAIRMAN SOULES: Judge Guittard.

HON. C. A. GUITTARD: It seems to me that since this comment restricts the scope of the rule or the possible scope of the rule that it should be included in the rule other rather than in a comment.

CHAIRMAN SOULES: When this rule was passed, the landlords were saying

that they couldn't -- that lawyers didn't want to do this work and that it was too expensive and it was really -- they were really talking about their employees. But at that time this Committee felt they didn't care who represented a landlord or a tenant in an FE&D case, and if that's what they wanted, that was okay. The Supreme Court had the ability to say who could do something in a court whether they were a lawyer or not. This was sort of -- and just it went through with sheer brute force and I guess neglect in a way. But do we care?

MR. LATTING: I don't.

CHAIRMAN SOULES: I mean, if a paralegal -- if somebody has formed a little FE&D shop and has got a couple of paralegals that can do a good job for a landlord or a tenant, what difference does it make? I mean, I'm asking a question. Do we care or do we want to change it or do we want to leave it as it is? Justice Duncan.

HON. SARAH DUNCAN: I care. And I'm in favor of at least leaving it as broad as it is, if not expanding it. I mean,

I would go just the opposite way of the committee. I think one of the reasons that litigation at any level costs so much is that we restrict representation to attorneys, and I'm not in favor of that monopoly.

CHAIRMAN SOULES: So no change? Does anybody want to change this?

PROFESSOR CARLSON: Can I just mention one thing, Luke?

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: On page 3 of this memo on Attachment "A," it's pointed out that the Government Code, Section 81.101, prohibits persons not admitted to the bar to proceed on behalf of a client in front of a judge, and then it lists those persons who can: Licensed attorneys, bona fide law students, unlicensed graduate students who have their bar card basically.

If "authorized agent" means anything other than attorneys, the attorney general believes that Rule 747a would necessarily have to yield to the statute, looking at the attorney general opinion. Therefore, the

question is not whether we care, but more or less do we care that we may have a rule that's in conflict with the statute.

Now, you might just come out on the end that the Supreme Court has the authority to regulate the practice of law. This is their rule, and that authority overrides the legislative suggestion to the contrary or the attorney general's opinion not directly addressing this problem but another problem on non-attorneys representing folks in court.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I don't think we can decide this kind of an issue. There are also cases around the country holding that it is unconstitutional for any governmental entity to prevent a party from representing itself at any stage in the litigation in civil cases.

CHAIRMAN SOULES: Including corporations?

HON. SARAH DUNCAN: Yes. I think there's -- well, I'm not going to try to say the state, but there are a couple of cases

around the country. And to decide this issue I think is beyond what we really can do. If it gets litigated and someone says there's a conflict between the statute and the rule, that may have to be decided, but I don't think at this point we can resolve that.

CHAIRMAN SOULES: Well, the only way we could resolve that is to repeal the rule.

HON. SARAH DUNCAN: Well, then we may resolve the conflict between the statute and the rule, but we may be creating a denial of equal protection depending on the constitutionality of the entire limitation of the practice of law, so all I'm saying is sort of whichever way you go in this area you're going to run into judicial questions.

HON. C. A. GUITTARD: But if the authorized agent is defined as proposed by the Committee, how would that trespass on any right of a person to represent himself?

JUSTICE CORNELIUS: They are representing themselves through an agent.

HON. C. A. GUITTARD: The only restriction would be to have some agent other

than themselves like a paralegal represent them. Is that contrary to the Constitution?

HON. SARAH DUNCAN: You got me.

CHAIRMAN SOULES: Well, a corporation has to act through its agents. It doesn't make any difference whether they're employees, directors, officers, outsiders, insiders, out-house, in-house. They're all still agents.

HON. C. A. GUITTARD: And that's what the comment would provide for.

JUSTICE CORNELIUS: Right.

CHAIRMAN SOULES: But in trying to pick up on what Justice Duncan has said, why can't a paralegal be the authorized agent of a corporation just like its president? There's no reason, no legal reason why not. The president only has the authorization given to it by the board. There's no magic to someone being an employee as opposed to an outsider, I wouldn't think.

HON. C. A. GUITTARD: Well, is that a corporation representing itself?

CHAIRMAN SOULES: If it elects to have an agent.

HON. C. A. GUITTARD: If it employs somebody, some outside person to represent it, it's not representing itself.

PROFESSOR CARLSON: It's not someone purporting to practice law, not holding themselves out to be practicing law.

CHAIRMAN SOULES: Well, they can't do that.

MR. PRINCE: All we're trying to do is just address that paralegal thing and make it as broad as possible. I think the Committee agrees with what you're saying, that we ought to make it as broad and give as many options as there are to people in FE&D cases as possible to appear on behalf of the parties; but within making it as broad as possible, try to address this unauthorized practice of law problem. So the question is, do you want to not address that possible unauthorized practice of law problem? That's why we carved out the -- that was the only purpose; there wasn't any real decision there.

CHAIRMAN SOULES: Why don't we leave it up to the Supreme Court to decide whether or not it has the power to let a

nonlawyer appear in JP court on FE&D cases.

HON. C. A. GUITTARD: Well, they would decide that if they approve the rule, you know.

CHAIRMAN SOULES: Well, they've already decided -- see, this rule is already on the books, Judge.

HON. C. A. GUITTARD: Well, I know, but if they approve the comment or approve incorporation of the comment into the rule, then they would be deciding, have the question before them, and would be in a position to decide it.

CHAIRMAN SOULES: That's the comment. They've already passed -- in 1982 they passed the rule that's above that.

HON. C. A. GUITTARD: Yes, I know. But if the comment goes or the comment gets put in the rule, then they would have that question to decide specifically.

CHAIRMAN SOULES: What I'm saying is let the Supreme Court decide whether its current rule is valid on the face of the AG's opinion that it may not be. Sooner or later the Court has got to decide that.

Anyway, the committee recommends the comment, right?

PROFESSOR CARLSON: Correct.

CHAIRMAN SOULES: Okay. That doesn't need a second. Those in favor show by hands. Five.

Those opposed. Three.

Five to three in favor of recommending the comment.

HON. C. A. GUITTARD: I move that the comment be incorporated into the rule.

JUSTICE CORNELIUS: Second.

CHAIRMAN SOULES: Moved and second to make it part of the rule. Those in favor show by hands. Eight.

Those opposed. One.

Eight to one to make it part of the rule, so write it and make it part of the rule, Elaine, and we'll go to what's next.

PROFESSOR CARLSON: All right. The fourth matter on page 2 of the November 6 letter to Luke is simply to correct an error. Reference was made in Rule 749a to a pauper's affidavit. It should read "contested by

appellee." It currently apparently says "appellant."

CHAIRMAN SOULES: Where is that? 749b?

PROFESSOR CARLSON: 749a.

CHAIRMAN SOULES: Okay.

PROFESSOR CARLSON: And if you look, it should be in the red-lined version, Luke.

HON. C. A. GUITTARD: In my book it says "appellee."

PROFESSOR CARLSON: You know, we had different rule books. Some had "appellant"; some had "appellee." I don't know what the official one says, but we did have conflicting rules book.

CHAIRMAN SOULES: Well, in years past West has seen it fit to correct some of the things that we sent out with errors, so they may have done it to some books.

Where does the word appear that we're fixing? I cannot find it.

PROFESSOR CARLSON: Okay. It says "Raised by Bill Willis" in his letter on

page 978.

HON. C. A. GUITTARD: It's the second to the last line in the first paragraph of 749a, is it not, Elaine?

CHAIRMAN SOULES: "When a pauper's affidavit is timely contested by the appellee," so we're going to -- I guess for purposes of sending this to the Supreme Court we ought to put in "appellant" and then --

PROFESSOR CARLSON: No. "Appellee" is correct, and as I said, some rule books had it, Luke, and some rule books didn't. I did not look at the official --

CHAIRMAN SOULES: But we've got to tell the Supreme Court what we're doing, so we'll insert "appellant" and strike it through and underscore "appellee."

MR. McMAINS: No, appellee, not appellant.

HON. C. A. GUITTARD: Right.

CHAIRMAN SOULES: You don't understand what I'm doing. I'm trying to tell the Supreme Court what we're doing. I'm going to insert before the word "appellee," "appellant," and then we're going to strike

it through. And then we're going to underscore "appellee." Okay? We've got to tell the Court what's up.

PROFESSOR CARLSON: Okay.

CHAIRMAN SOULES: Okay. Next.

HON. C. A. GUITTARD: Mr. Chairman, I notice the term "pauper's affidavit," and do we need to use that term here since we've eliminated it in the General Rules?

CHAIRMAN SOULES: Judge, no. And if you would like to rewrite it, help us. That means we're going to have to go through all these rules and rewrite affidavit of inability, and if the game is worth the candle, well, somebody can take it on.

HON. C. A. GUITTARD: Well, I don't think this Committee ought to sit down and do it, but perhaps it ought to be done.

And also the fact that the affidavit of inability does not incorporate the requirements of Rule 145, and the question is whether it should.

CHAIRMAN SOULES: There may be a second big chapter to all of this. The

justice courts want a new rule book to cover every rule focused especially for them and distinct from the rules of all other courts in Texas, so I don't know what they're going to come up with. So we probably shouldn't go beyond these inquiries today and just try to fix the things that people have complained about, if we agree they need fixing. What's next?

PROFESSOR CARLSON: All right. The next area deals with a proposal to modify Rule 749b. And I wish Steve Yelenosky was here, because it deals with the requirement of a tenant, who suffers an adverse forcible entry and detainer decision, who appeals by trial de novo, to pay rent pending that appeal by trial de novo.

If you recall, we looked at this I think back in 1990 and we made a modification that would not contingent the ability to -- the tenant could no longer be required to deposit up front the rent because we felt that that might have some open court implications, but that nevertheless the tenant had a duty to continue the rental payments as now provided,

I believe, in 749b.

The suggestion has been made to modify that rule to allow for payment of the fair market value of the rent by a tenant seeking to remain in possession while appealing the unsuccessful judgment. The proponent suggests that without that clarifying language some courts are allowing tenants who receive government assistance from government housing authorities to remain in possession pending appeal without having to tender the rent into the registry of the court, and the proponent also suggests the adoption of a presumption to incorporate into the rules that the rental amount as provided by a lease agreement is the fair market value of the rent for purposes of determining the appropriate rent deposit.

The committee looked at that suggestion by Lynn Sanders beginning on Page 971 of the materials and recommends that we adopt his suggestion; that is, we include at the second sentence at the end of 749b(2) that the rental amount as provided by a lease is the fair market value of the rent for purposes of determining the appropriate rent deposit.

If you look at the red-lined version of the rule on Page 3 you can see how that sentence would be added in under the proposal.

CHAIRMAN SOULES: What does this accomplish?

PROFESSOR CARLSON: According to Mr. or Ms. Sanders, I can't recall which it is, that there are some courts who are now -- some JP courts who are now totally waiving the requirement of paying rent by a tenant who is on government assisted housing because they say it's government assisted housing so you don't have to pay any rent.

PROFESSOR ALBRIGHT: So how does this solve -- I don't understand how this solves the problem.

PROFESSOR CARLSON: It gives -- the suggestion was to give the justice of the peace this presumption so that they could figure out what the fair market value of the rent would be.

PROFESSOR ALBRIGHT: Why is there no fair market value of the rent if they receive government assistance?

PROFESSOR CARLSON: Apparently

they're taking the view that since it's government assistance and the government pays part of it, they can't determine what the fair market value is. And apparently this is done, I don't know, it's what we're told, in private apartment situations or housing situations and then apparently there's some governmental ability to come in and basically pay a part of that.

PROFESSOR ALBRIGHT: It seems to make sense, because I would think if somebody wanted to make a big stink in any case they would start arguing about whether the rental agreement was really the fair market value, and it doesn't seem like you should have that stink going on or that controversy going on for the purposes of this.

CHAIRMAN SOULES: Where is the letter that this responds to?

PROFESSOR CARLSON: The Sanders letter I believe is page 971, is that right?

HON. C. A. GUITTARD: It seems like this provision would not create the controversy but would cure or avoid the controversy.

MR. HAMILTON: I don't understand. If there's no rental agreement, how can the fair market value be based on the agreement? If it's government housing, there isn't any lease agreement.

PROFESSOR CARLSON: If you look at -- it is Mr. Sanford's letter on page 976.

CHAIRMAN SOULES: Oh, I see what they're saying. Okay. Here is the deal. Some JP -- if a person is in possession of multifamily residential premises, their apartment, and they're getting rental assistance from the government, HUD, then some JPs are saying that those people can stay in possession of their residential premises if they continue to pay their part. And this guy wants us to throw them out, even if they pay their part, if the government doesn't pay its part. That's what this says.

PROFESSOR CARLSON: So assume the tenant breaches the lease in some way that would trigger a right for the forcible entry and detainer in a government housing situation, which is apparently what's happening. The government usually would pay

all or part of that rent, but now the tenant has breached the lease in some way that would support losing a forcible entry and detainer action. This just says now what happens. They are supposed to pay one month's rent into the registry of the court.

Apparently some courts are saying, well, since the government was paying it before but they're not anymore because you breached the terms of whatever HUD requires, you don't have to pay anything. And the question becomes is that the correct interpretation and should we address it by signaling to the court that here is a presumption of what fair market value would be that the government was paying before the lease terminated because of a failure to comply for some reason.

CHAIRMAN SOULES: The county court found that the tenant was only required to pay his portion into the registry of the court, which in this case was zero. And he wants this rental amount as provided in the lease agreement, which he says should be prima facie evidence, as evidence of the fair market value.

MR. HAMILTON: Where does fair market value come in? Why do we have to switch from rental amount to fair market value?

CHAIRMAN SOULES: He wants the rule to be changed to require the payment of the fair market value of the rent into the registry of the court, with the terms of the rental agreement being prima facie evidence of fair market value. So really there's no anchor to the concept of fair market value being the lease in the rule as written. He wants that to be written in too.

MR. HAMILTON: We would have to change paragraph 1, then, to provide the fair market value.

JUSTICE CORNELIUS: Well, that's a circuitous way of determining it. There's going to be a rental amount agreed upon somewhere. It's either going to be in an oral contract or a written contract, so what's -- we don't need fair market value in there. All we need is the amount of rent provided by the agreement. That way you can do away with prima facie and all of those

problems.

PROFESSOR CARLSON: And you could argue that 749b(2) does that already.

CHAIRMAN SOULES: That's what it looks to me like.

PROFESSOR CARLSON: That's just not the interpretation that apparently all the justices are utilizing, and whether -- this was just an isolated letter, so it's whether the committee feels that it's a sufficient enough problem to address or whether we should just rely upon the language of the current rule.

JUSTICE CORNELIUS: If you leave it the way it is, the rent might be conceivably way below the market value and then the fellow, in order to appeal, would have to pay the higher amount, which is not fair.

PROFESSOR CARLSON: You know, Luke, I just have to confess an ignorance on our committee, and that's why I was hoping Steve would be here, on how the HUD lease situation really is structured.

CHAIRMAN SOULES: Well, this

man says they're not a party to a lease but they make a contract to pay a portion of the rent to the landlord. And here the landlord said -- or the tenant said that the tenant was going to vacate, so HUD stopped the copayment, and then the tenant didn't vacate. The tenant stayed there, and they tried to get the tenant out, and the county court held that the tenant only had to pay his part, which was nothing, to keep the premises. That's what this letter says.

MR. HAMILTON: You could correct that by changing paragraph 1 to provide that they pay into the registry the amount due the landlord for one rental period. Then it wouldn't matter whether it was due from the tenant or from the government.

JUSTICE CORNELIUS: But in that case would he have to get the government to pay its share as well?

MR. HAMILTON: The tenant's share under the example is zero, so whatever is due the landlord, I guess the tenant would have to pay the whole thing.

JUSTICE CORNELIUS: Or you

could say whatever the tenant owes the landlord for his rent, and that would take care of the HUD situation as well.

MR. PRINCE: But that's the problem.

CHAIRMAN SOULES: Yeah. What Sanford is trying to get to is he's saying that if the tenant holds over after the government stops paying, the tenant ought to have to pay the full rent.

PROFESSOR ALBRIGHT: Do we have any evidence that this has happened more than once?

PROFESSOR CARLSON: No.

CHAIRMAN SOULES: No. And this was October 1990.

PROFESSOR ALBRIGHT: So nobody has brought this up again in six years?

PROFESSOR CARLSON: There's no other correspondence that I'm aware of.

HON. C. A. GUITTARD: I guess the question is whether or not the government can defeat his appeal by not paying its part.

CHAIRMAN SOULES: Well, he caused the government not to pay. He told the

government he was going to vacate, so the government stopped paying because they thought he was going to vacate, according to this letter, but the sentence itself -- it seems to me like it's almost self-evident, the sentence that the rental amount as provided by a lease agreement is the fair market value. The only problem I have with that is what if there's an exorbitant holdover rate? That would be a rental value provided in the lease, so somebody might contend that it was that huge amount that was the applicable rate instead of the primary term rate.

PROFESSOR CARLSON: If it was a presumption, it could be rebutted.

CHAIRMAN SOULES: Okay. What do we do with this, so we can move on?

PROFESSOR CARLSON: Luke, I don't think the committee has strong feelings, the subcommittee, so I would say just put it to the Committee whether we want to address the problem.

CHAIRMAN SOULES: Okay. In or out, the last sentence. Those who say in hold up your hand.

Out. It's a unanimous denial of the last sentence. No amendment.

PROFESSOR CARLSON: All right. The next proposed change is, again, just a cleaning up of the rules a bit.

Again, Rule 749b, subparagraph (3) ends with the words, "the court shall issue a writ of restitution." In the other places in the FE&D rules we have replaced that term with "writ of possession," so we would simply be changing the last word of paragraph (3) of 749(b) from "restitution" to "possession."

CHAIRMAN SOULES: A writ of possession to the appellee?

PROFESSOR CARLSON: I think the writ actually is served by the sheriff or constable or otherwise authorized person.

CHAIRMAN SOULES: Let's see, I'm just confused by the fact that we're using "possession" in two different ways. I guess "writ of possession" has its own -- we're talking about the tenant staying in possession and then we're going to issue a writ of possession?

PROFESSOR CARLSON: I know.

It's a term of art that's just been incorporated in the other FE&D rules.

CHAIRMAN SOULES: In favor of the appellee? Okay. It doesn't matter.

Those in favor of substituting "possession" for "restitution" show by hands.

Is anyone opposed?

Unanimous consent. Okay. Next.

PROFESSOR CARLSON: On paragraph 7 in this November 6th letter the suggestion was made that there be a clarifying comment included to Rule 749c that although a right of appeal from an unsuccessful forcible entry and detainer judgment out of a JP court de novo to the county court exists without the necessity of making a rent deposit into the registry of the court, the tenant has no right to remain in possession pending appeal without the appropriate tender of rent.

We recommended including that proposed comment.

CHAIRMAN SOULES: Any objection? Justice Duncan.

HON. SARAH DUNCAN: I don't have an objection. I do think -- I notice

that the subcommittee hasn't addressed Rule 749, and I do think there is a problem in these rules with confusing the appeal bond for purposes of appeal and a supersedeas bond for purposes of suspending enforcement of the judgment, and I wondered if the subcommittee had considered 749 in the context of 749c or not?

PROFESSOR CARLSON: No, we have not.

CHAIRMAN SOULES: Okay. Any objection to the comment on page 4 of Elaine's materials under 749c? No objection. It's unanimous consent. 751.

PROFESSOR CARLSON: Yes. There was a suggestion made to clarify the type of notice the clerk should give pursuant to Rule 751. Apparently some JP clerks are erroneously interpreting the notice to be the equivalent of service of process and are charging a service of process fee for the appeal de novo to the county court.

And so there was a suggestion made to modify Rule 751 by adding the sentence you see at the bottom of page 2 of this letter, which

is, notification is sufficient by first class mail and that no service of process fee shall be charged.

CHAIRMAN SOULES: That's talking about the county clerk, isn't it?

PROFESSOR CARLSON: You're right. The clerk is to immediately notify the appellant and the adverse party of the date of receipt of the transcript and the docket number. That notice is to advise the defendant of the necessity of filing a written answer in the county court when the defendant has plead orally in the justice court.

The suggestion was made that we make it clear to the county court clerk that notification is sufficient by first class mail and service is not required.

CHAIRMAN SOULES: Okay. Any objection?

PROFESSOR CARLSON: Or service of process fee.

CHAIRMAN SOULES: Okay. It's passed by unanimous consent.

PROFESSOR CARLSON: Finally the last suggestion, paragraph 9 on page 3 of this

letter, goes to the overall suggestion that was made by -- or the work led by Bill Dorsaneo on a recodification of the rules project. And I don't know if you want to bring this up at this point, Luke, or if you want to wait, but there are a number of miscellaneous rules at the end of our sections 814 through 822 that don't deal with forcible entry and detainer. They deal with miscellaneous general rule subjects.

Justice Guittard, I believe in your report, your appellate rule report, I believe you suggested that these would be renumbered as General Procedure Rules 13 through 20.

HON. C. A. GUITTARD: That depends upon the adoption of the General Procedure Rules. It looked like to me sort of like at the end of the legislative session that that's not going to get through; we're not going to have time for that, however meritorious it might be.

CHAIRMAN SOULES: Why don't we --

PROFESSOR CARLSON: -- table that?

CHAIRMAN SOULES: -- put that off and put it on the agenda for another day.

And I know that Paula wants some guidance from us on a couple of things, so why don't we spend not more than a half an hour on what she needs, if we can get it done in that length of time, and then get on with Bill's here, and we can pick up with where we left off with him.

You had something on Batson, and what was the other general area that you wanted us to address, Paula, with you today?

MS. SWEENEY: It was actually just Rule 292, and it's already been addressed and then commented on. Everybody just needs to see the final draft of it.

CHAIRMAN SOULES: On 292?

MS. SWEENEY: Yeah.

CHAIRMAN SOULES: Okay. Let's pass that out.

MS. SWEENEY: And Holly, you've got Batson there too.

CHAIRMAN SOULES: Okay. Let's get it done. Let's get it passed out there.

MS. SWEENEY: Okay. 292 is the situation that you get into when you start

with six or 12 jurors and you lose one or you lose two or whatever, and there were a couple of things that were done to the rule. One was just because it was a little confusing what happens if you end up with less than 12. But the other, if you remember, the discussion had to do with what happens vis-a-vis disability, and we had the case that sort of triggered the discussion, which was the lady juror who couldn't get to the courthouse because there was a flood and the judge excused her as disabled, and then the debate we had was is that a disability or should they have waited for the waters to recede.

Anyway, what is added -- can this has all been discussed, and this was the language that the Committee has instructed us to put together, and it has now been put together and it is here for your approval. What the rule provides now is that it makes it clear that if there's -- you've got to have the same 10 people who agree to everything. It includes replacements or alternatives, alternate jurors, which has never been clear before, and in fact there was a concern that

was raised by -- I think it was a letter from Kronzer a few years back. What happens if you lose some jurors and an alternate comes in?

The way the rule was written, you couldn't tell if that alternate was part of the same 10 that agreed to everything or if it had to be a core of 10 of the original and the alternate didn't really count, and this makes it clear that the alternate is equal, and that's basically it, so the subcommittee would move final approval of Rule 292.

And then the last sentence is the trial court can determine if a juror is disabled because of a severe illness of the juror or because of death or severe illness of a near relative of the juror, and that's the sort of codicil to what we were talking about in the flooding situation.

The old provision simply allowed that if the juror died or was disabled, he would be excused or she would be excused, but it didn't talk about family. And the discussion that we had here was it's unrealistic to expect a mother with a young child in the hospital or a sick husband or whatever, you know, your

husband has a heart attack but you're expected to be here on the jury and you can't be excused as disabled for that. It didn't make sense. That's not going to be effective jury service, so that was how the language came to be drafted. Alex.

PROFESSOR ALBRIGHT: When you have -- you're down to nine jurors. It says "those remaining may render and return a verdict." I assume that that verdict has to be unanimous?

MS. SWEENEY: It does.

PROFESSOR ALBRIGHT: Do we want to make that clearer, or is that clear enough?

MS. SWEENEY: We probably should. It says in the next sentence, "If fewer than 12 or six, it needs to be signed by each juror."

PROFESSOR ALBRIGHT: If you only have nine?

MS. SWEENEY: Yeah.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: What is the -- on the fourth line, "including any

alternate jurors sworn as replacements," am I supposed to be giving a new oath for alternates when they replace somebody?

MS. SWEENEY: You just swear them in.

HON. SCOTT A. BRISTER: Well, I've always just sworn everybody in. Has anybody seen anything different? I've got 13 there, 12 and an alternate, and I swear them all in.

HON. C. A. GUITTARD: Well, they would be sworn as replacements then.

MS. SWEENEY: So you're covered. This doesn't imply when they would be --

JUSTICE CORNELIUS: But under that interpretation all of the alternates would be replacements, and you don't want that.

HON. SCOTT A. BRISTER: Why not just say "any alternate jurors" and just drop "sworn as replacements"?

MS. SWEENEY: I don't see a problem with that.

Elaine, you sat through some of these

discussions. The rest of my subcommittee is tied up this morning, so --

HON. SCOTT A. BRISTER: Same thing in the next phrase, drop "sworn as replacements," and on the eighth line or ninth line.

MS. SWEENEY: I think the way this came out, and I'm trying to remember who initially drafted it, I think it was Anne Cochran, and I think the reason it was phrased that way was to make it clear that you're only talking about the alternates that are actually now sworn in to deliberate and not all of the alternates. I think that was the distinction she was trying to draw.

The suggestion has been made that we use the word "seated" instead.

CHAIRMAN SOULES: Doris Lange.

MS. LANGE: On that last line there, "illness of a near relative," I would suggest that it be "immediate family" to coincide with election laws and everything, which means your immediate family, because who is "near," your cousin or whatever? I think you would get into a problem of what is a near

relative, and saying "immediate family" would clarify it to be your household.

MS. SWEENEY: That was the vote of the Committee actually. That's what the Committee wanted. We just chose the term "near relative." But "immediate family" is actually a term of art somewhere in the Election Code?

MS. LANGE: Yes.

MS. SWEENEY: And it means?

MS. LANGE: Father, mother, spouse.

HON. SCOTT A. BRISTER: First degree.

MS. LANGE: First degree, sibling.

MS. SWEENEY: Okay. Then I would move that the Committee adopt a rule to include the three places where it says "sworn as replacement" replaced by the word "seated."

CHAIRMAN SOULES: Why?

MS. SWEENEY: And the words "near relative" replaced by "immediate family."

CHAIRMAN SOULES: Well, if

they're alternate jurors they have the capacity of a juror. Why do they have to be seated, sworn or whatever? That assumes all those things, doesn't it? I mean, why have any words other than "including any alternate jurors"?

MS. SWEENEY: I think the concept that Anne was shooting for was these are the ones who got used as opposed to the ones who sat through the trial but got dismissed because you still had enough folks to deliberate; in other words, distinguishing alternates who did get to deliberate from alternates who didn't get to deliberate. I think that was the concept. Do you think we get there without saying it by implication?

CHAIRMAN SOULES: Well, when are they seated? Are they seated when the evidence begins?

HON. SCOTT A. BRISTER: Well, you would be seated whenever you have less than 12 or six.

MS. SWEENEY: Right.

HON. SCOTT A. BRISTER: This says the first one is the same 10 members of a

jury of 12, including any alternates. Well, a jury of 12 would not include Alternate No. 13 when nobody has been disabled.

And the same thing in the second one. It's talking about only nine jurors remaining in a jury of 12 and including any alternates. That's not necessary because you've only got nine left.

MS. SWEENEY: Here's the problem that occurred that gave rise to this whole discussion. Apparently Kronzer was trying the case. They had 12 jurors and they had a couple of alternates. A juror or two died or got sick. Alternates came in. They didn't have a unanimous verdict. They had 10 of them signing, but that included some alternates. And the way the rule was written before, you had to have 10 members of an original jury and so the alternates couldn't -- so that's what we're trying to clear up, and I thought we had, but I'm willing to...

CHAIRMAN SOULES: I just don't know what "seated" means. That's why I'm worried. Why do we have that word? Is there

any new oath given to the jury? It's just that they're charged.

HON. SCOTT A. BRISTER: All the jurors and alternates stand up and take their oath before we start and sit down. The only distinction I'm aware of in practice is if somebody doesn't show up, is disabled or whatever, it's just who you send back. But they don't know -- normally they don't know who the alternates are. Some judges tell them, but normally they don't know who the alternates are until you say which 12 can go back to deliberate.

Now, there's actually a few judges that will let them all go back and deliberate with the alternates.

MS. SWEENEY: Yeah, on the basis that you have sat through this whole trial. Yeah, they have. And then you end up with a jury of 15.

HON. SCOTT A. BRISTER: Or 13.

CHAIRMAN SOULES: Just like in federal court, only there are no alternates in federal court anymore.

HON. SCOTT A. BRISTER: That's

right. There's a strange number of jurors.

CHAIRMAN SOULES: They've got the 12 and everybody that's left deliberates. Well, I don't know.

Don Hunt, I'm sorry.

MR. HUNT: Why don't we change the language to "an alternate juror who replaces an original juror."

MS. SWEENEY: That flows trippingly off the tongue. That may be the best way to do it. "Including any alternative jurors who replace original jurors," so in all three places you would do that?

MR. HUNT: Something like that.

JUSTICE CORNELIUS: Or you could just change "sworn" to "used," any alternate jurors used as replacements.

MS. SWEENEY: Any alternate jurors used as replacements. That works for me.

CHAIRMAN SOULES: Okay. How is it going to read?

MS. SWEENEY: "Any alternate jurors used as replacements" in all three places.

CHAIRMAN SOULES: Okay. Is that okay with you, Don?

MR. HUNT: My goodness, yes.

CHAIRMAN SOULES: Okay. And the last sentence is going to say "including the death or severe illness of" --

MS. SWEENEY: -- "an immediate family member of the juror."

PROFESSOR ALBRIGHT: Of the juror's immediate family?

MS. SWEENEY: No, we want it to be --

CHAIRMAN SOULES: -- a member of the juror's -- a member of the -- or severe illness of the juror's immediate family, right?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Okay. All in favor of 292 as now constructed after this debate? Rusty.

MR. McMAINS: Let's have some discussion. Go ahead.

MR. HAMILTON: Are we going to add as to the nine that the verdict must be unanimous?

CHAIRMAN SOULES: We lost that thought, Carl. Thanks for bringing that back up.

MR. HAMILTON: The fifth line where it says "may render and return a verdict," which is unanimous or whatever the wording should be.

MR. LATTING: If it's unanimous and it's less than the original 12, do they all still have to sign it?

MS. SWEENEY: Yes.

HON. C. A. GUITTARD: Suppose it's 11, does it have to be unanimous?

MR. McMAINS: It doesn't have to be unanimous, but they have to sign it.

MR. LATTING: What's the idea of making everybody sign it if you have 10 jurors left and it's unanimous? It seems to me the only time you want individual jurors signing a verdict is when it's not unanimous.

CHAIRMAN SOULES: It does simplify these instructions. If less than 12 reach a verdict, they don't need to sign it.

HON. SCOTT A. BRISTER: It

conflicts with 226a. In 226a the boilerplate instructions has the signature certificate for the presiding juror alone, if unanimous, and then blanks, 11 blanks to be signed by those rendering the verdict if not unanimous. So the 226a form contemplates an 11-member jury unanimous if only signed by the presiding juror.

CHAIRMAN SOULES: Bar none?

HON. SCOTT A. BRISTER: Bar none. It's unanimous only if the presiding juror signs it.

PROFESSOR ALBRIGHT: So it could say, instead of saying if fewer than 12 or six jurors render a verdict, it could say, "If the verdict is not unanimous, the verdict must be signed."

JUSTICE CORNELIUS: Yeah. That's what that means, not that it is a smaller jury, but --

MR. LATTING: Why don't we do that?

JUSTICE CORNELIUS: -- if it's not unanimous.

MS. SWEENEY: All I can say is

the most surprised person in the world is going to be Judge Peeples, because he handed me this and said, "Okay, that's what everybody agreed on at the last meeting."

Okay. So if I understand, so far what we're saying is the rule is going to read, "A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same 10 members of a jury of 12, including any alternate jurors used, or of the same five members of a jury of six, including any alternate jurors used. However, where as many as three jurors die or be disabled or disqualified from sitting and there are only nine jurors remaining of the jury of 12, including any alternate jurors used, those remaining may render a verdict which must be unanimous. If the verdict is not unanimous, it must be signed by each juror concurring therein. The trial court may determine that a juror is disabled because of the severe illness of the juror or the death or severe illness of the member of the juror's immediate family." Yes?

JUSTICE CORNELIUS: Paula,

don't you think we ought to put back in after "used," put back in "as replacements" to distinguish between their being used as alternates or being used as jurors?

MS. SWEENEY: Yes. And that's what my notes say, that's just not what I read. You're right.

PROFESSOR ALBRIGHT: And one other thing, Paula, instead of "if the verdict is not unanimous," let's say "if any verdict is not unanimous," because if you say "the verdict," it seems to refer to the unanimous verdict of the smaller jury.

MS. SWEENEY: All right.

HON. C. A. GUITTARD: My question is, would that language require an 11-member verdict be unanimous? We don't want to do that, and I was just wondering whether that was --

CHAIRMAN SOULES: Yeah. This thing has still got some problems, and that's one of them.

PROFESSOR ALBRIGHT: Because it's only if --

CHAIRMAN SOULES: Let's try to

track along here and see if basically -- we all I think have the concept, it's just the words that are a problem now. A verdict may be rendered in any cause by the concurrence as to each and all answers made by the same 10 or more members of the jury. It should be "10 or more," shouldn't it, of a jury of 12?

PROFESSOR ALBRIGHT: No. You only have to have 10.

CHAIRMAN SOULES: Including any alternate jurors used as replacements.

MS. SWEENEY: The only qualm I have about that, Luke, is you might have 10 that agree on the first issue, or 11 that agree on one issue, but then only 10 agree on the next. Would that raise the implication that once you've got 11 agreeing you've got to keep those same 11 on everything? Because it's the core of 10 you have to keep.

CHAIRMAN SOULES: The verdict has to concur as to each and all answers. That's what it says here.

PROFESSOR ALBRIGHT: Yeah. But you only have to have 10 as to all of those answers. And that's the same language that

we've used before and that's never created a problem.

CHAIRMAN SOULES: Okay.

HON. C. A. GUITTARD: There ought to be a separate sentence in there that says, "Any verdict rendered by less than 11 jurors must be unanimous."

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I almost hate to say this, but this rule has caused a lot of trouble when it says the same 10 members as to each and all answers made, because it probably should say the same 10 as to each and all answers made to the issues that are material to the judgment.

And I really think we should look at other jurisdictions and see how they cope with this problem, because we have a number of cases where it's not the same 10 as to everything but it's the same 10 as to, let's say, a finding that there was no injury suffered.

MR. LATTING: Why don't we do that? Why do we need to look at other

jurisdictions? Why don't we just do what we said, the same 10?

MR. McMAINS: The problem is, how do you sort that out? Unless you have a verdict form for each question, how would you ever -- how would you know that was the situation?

PROFESSOR DORSANEO: Well --

MR. McMAINS: Because if they say they're hung on three, that doesn't mean, you know, they've agreed on four and five and six.

PROFESSOR DORSANEO: Well, there are two cases that have come up on it. Rusty's point is a good one. It is difficult to know in cases where the jurors disclosed that we had 10 on this one but we don't have the same 10 on all of them, or we can't even answer all of them, we can only answer this one about, you know, the statute of limitations or some affirmative defense, so we can all agree that there was no injury or that there's some defense established, or 10 of us can agree, but we can't agree on anything else. And I think the "same 10" language is

literally a troublemaker because it requires, well, more than the same 10 on material issues.

And all I'm suggesting, Mr. Chairman, is that we finish up with this and that the committee look at it to see if someone has figured out a way to articulate the same 10 in a more sensible fashion than just to say the same 10 on everything going in, you know. It's material going in, but if you get answers to some, the other questions become immaterial.

CHAIRMAN SOULES: Wasn't that case Cotner?

PROFESSOR DORSANEO: Well, there's a recent case on it, and then there's McCauley vs. Consolidated Underwriters, which the Supreme Court granted a writ, heard the argument and all that, and then couldn't figure out what to do and ungranted the writ.

HON. SCOTT A. BRISTER: I mean, you know, it makes some sense. I think the judge looked at it in camera and said, "Well, let me see what you've got so far." I'm not sure why in camera matters. I'm not going to

let the attorneys see. The judge looked at it and decided, "Hey, we can get rid of some of this," and told them to sign what they had.

CHAIRMAN SOULES: That was the problem. He should have told them to sign what they had before he looked at it and then it would have been okay, according to the case. If he would have said, "Fill out what 10 of you can agree on and sign it and bring it in and return it and we'll either have a verdict or we won't," I mean, if it's a defense verdict, it's a defense verdict.

PROFESSOR DORSANEO: The argument that the ones where you had a different 10 were not material because of the answers to the material ones was rejected by the court of appeals, I think it was the Tyler court, I may be wrong, on the basis that it wouldn't have asked it if it wasn't material. And my reaction to that is, well, yeah --

CHAIRMAN SOULES: We do that all the time.

PROFESSOR DORSANEO: -- but it can become immaterial if you answer some other questions in a certain way. And maybe we

don't want to mess with it, just let it be, but I would suggest to the committee to try to figure out some way to clarify it.

MR. McMAINS: I mean, we've never had a -- I mean, you're really talking about an entire system of rendition on a partial verdict.

PROFESSOR DORSANEO: Yes.

MS. SWEENEY: We determined that it wasn't our purview to kick that dog.

PROFESSOR DORSANEO: Well, whose is it then? Nobody's?

MS. SWEENEY: Well, no problem was raised to us, we received no correspondence to that effect, nothing was brought before the Committee, and so we took it as our charge to address those problems raised in the -- to cure the obvious problems, but we didn't go looking for any.

CHAIRMAN SOULES: Write up what you've got and bring it back and we'll look at it.

MS. SWEENEY: All right. I'd be happy to do that.

MR. LATTING: I would just like

to say that I think this is a very important thing and this Committee ought to look at it.

CHAIRMAN SOULES: Well, write up a recommendation. We'll take a look at it and put it on our agenda. We've got a big agenda.

MR. LATTING: Well --

CHAIRMAN SOULES: So if somebody wants to take it on, they can take it on. But we just can't start debating out a whole new cloth with the work that we've got in front of us, so anybody who wants to put something in writing and bring it in here, get it in here and we'll take a look at it. It will go on the docket if it's submitted in writing.

Okay. On to Batson.

MS. SWEENEY: What you have, you will note, with a Howie & Sweeney letterhead dated September 13th, 1995, has been in front of you since that time. We had a couple of minutes at the end of that meeting, and we brought you a Batson proposal, and everybody was going to read it and send me comments. And my secretary has just been

inundated by opening letters and receiving urgent faxes about this -- we've heard nothing from anybody and don't know whether to take it as your consent.

You want it -- you told us, if you will recall, that it was the sense of the Committee that there should be a Batson proposal drafted, so we did that, and that's where we sit.

What we have done in drafting it is to try -- and Elaine is here and she's our resource guru on Batson because she's written a couple of papers and Law Review articles on it and knows all about it nationally. But the sense that we have gotten since this project was started, which has been a couple of years, is at the time Batson seemed to be real happening, civil Batson seemed to be a real happening kind of thing, and it appeared at that time that the U.S. Supreme Court and our Court both were going to embrace a lot of protected categories of jurors that you couldn't strike on the basis of race, you couldn't strike on the basis of ethnicity, gender, and then what else would be included.

And it seemed that it was going to be an expanding thing, and since then it has appeared that it is less likely to be an expanding thing, and in fact, I think some folks have realized that it could become an enormous quagmire.

It also has not developed into a very important part of the civil practice in Texas. Going purely from anecdotal experience and talking to folks and from what I've seen at the courthouse, there's not a lot of Batson hearings going on. None of the judges are reporting a big problem with it.

Then there has been some sentiment on the subcommittee, and I want to raise it to you, of do we even want the rule. Do we want to tell people, hey, by the way, this is what you should do, you know, think about this. You know, is creating a rule creating impetus for something that we don't currently have?

We were charged to draft a rule, so we drafted one, but that concern exists, and so that's sort of where we are.

CHAIRMAN SOULES: Discussion.

MS. SWEENEY: The first thing

we want to know is do you all still want a Batson rule.

CHAIRMAN SOULES: Those who want a Batson rule show by hands. Five.

Those who do not want a Batson rule show by hands.

Five to two, we want a Batson rule.

MS. SWEENEY: Okay.

HON. SCOTT A. BRISTER: Well, I think we ought to propose one to the Court. As I understand it, I mean, this is a pretty clear policy question that they can vote on, but we ought to do our best on a Batson rule and see if they want one or not.

CHAIRMAN SOULES: May I ask the subcommittee why we have -- let's see, oh, this is just 232. You're not changing 233?

PROFESSOR DORSANEO: Well, it covers the same territory as 233 in different language.

CHAIRMAN SOULES: Why are we doing that? It looks to me like -- I mean, we've had litigation slugged out in the appellate courts on the meaning of "side" and how to balance it between parties and so

forth. Why do we change anything other than just add some Batson rules? I ask this subcommittee why.

MS. SWEENEY: This came out of the task force.

CHAIRMAN SOULES: Okay. Other than changing the Batson, other than adding something for Batson to 232 and 233, does anyone see any reason to change any of the words in those two rules? Alex Albright.

PROFESSOR ALBRIGHT: Well, it seems to me that we're doing lots of consolidating throughout the rules, and why leave this out. I think part (1) of the subcommittee's proposal says the same thing that Rule 233 does.

MS. SWEENEY: In fact, this is your draft.

PROFESSOR ALBRIGHT: That's why it's so good, I'm sure. And as I recall, the same language is used. Some of the definitions are not in there, but the definitions are all part of case law now.

HON. C. A. GUITTARD: I'm confused by some of this language here. Some

places use "challenge" and some places use "strike," and then down at the bottom of that paragraph, "challenges to peremptory strikes," which uses "challenge" in a little different sense than it's used elsewhere, so perhaps that ought to be cleaned up a bit.

MS. SWEENEY: Do you want to obliterate the word "strike" and talk about challenges?

HON. C. A. GUITTARD: That would be one solution, I guess.

MS. SWEENEY: Okay.

HON. C. A. GUITTARD: Then you have -- but that leaves the question of challenges to challenges there, which I guess is all right.

HON. SCOTT A. BRISTER: I have a few questions, Luke.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: Halfway through the first paragraph, what does "related to the case" mean? I mean, if they tell me, "I didn't like their body language," that's not related to the case, but I think

it's been held to be a good enough ground.

PROFESSOR CARLSON: Paula, can I answer that?

MS. SWEENEY: If you can.

CHAIRMAN SOULES: Okay.

PROFESSOR CARLSON: Judge Brister, at the time this was drafted, that language was lifted out of a court of appeals decision, and I think you're absolutely right; that the United States Supreme Court decision of Parkett vs. Elem makes it clear that a reason can be given that is not related to the nature of the case, such as body language, rolling your eyes, et cetera, so that language is more protection than necessary under federal constitutional guarantees.

MR. LATTING: Luke.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: We've gone to great pains to give trial judges the right to correct their mistakes and have their errors pointed out to them, but it looks to me like here in the last sentence of section (3) that if it's determined, in fact, it says that if it's determined that a party strikes someone

peremptorily on an improper ground, then that party gets no chance to cure that mistake or no chance to profit by its own error and say, "Well, okay, if you object to that, I'll strike somebody else." I mean, you just lose your entire right for a peremptory challenge before you know whether or not it was improper, so I don't see the idea of that.

And I think if we're going to submit this rule to the Court, which I think is folly, at least we ought not to compound it by making it punitive.

CHAIRMAN SOULES: Well, this rule goes beyond what the case law does.

MR. LATTING: I know it does.

CHAIRMAN SOULES: For example, we've got "If a neutral explanation is established by the evidence," case law doesn't require evidence, it just requires a statement, a neutral statement of that's my reason.

HON. SCOTT A. BRISTER: Yeah. That's --

PROFESSOR CARLSON: Luke, there's case law in Texas, civil case law

going both ways on that.

HON. SCOTT A. BRISTER: Yeah. But I don't want to swear -- this is normally done when I've got the panel seated. I've got a courtroom full of people. The panel is sitting there. I've called the jurors up to the jury box. Somebody says, "I want to make a motion." If I've got to swear people in and take the witness stand, I mean, the way I normally -- just come up here, just like Luke says, what's your -- who do you say? What's your reason that you struck Jurors 2 and 12? And they just tell me.

And I really hate not just satellite litigation but swearing in opposing counsel and making them take the witness stand, cross-examination, "You know you're a bigot," you know, that kind of stuff.

I definitely -- there are two different sets of courts of appeals, and I strongly endorse the ones that just say this is a representation matter in argument rather than evidence.

CHAIRMAN SOULES: The most recent case I read on this out of Texas Court

of Appeals, the party claiming a violation of Batson demanded to see the attorney's notes and the notes from the attorney's client to the attorney relative to jury selection. The court of appeals held that was work product and attorney-client.

MR. LATTING: And that's a different issue from the one I raised, which is if it's determined, whether it's evidence or not, that you made an improper strike -- what, in a child custody case, for example, happens if a lawyer strikes a high number of women and the judge decides that these were all improperly based strikes? Does that mean that all -- that that lawyer, that that side gets no peremptory strikes? Suppose you strike six women and they say, "Well, they're all improper." He's left with none.

HON. SCOTT A. BRISTER: I think that's what every court has ever done.

MR. LATTING: Well, I suggest we don't want to do that.

HON. SCOTT A. BRISTER: You could bust the panel, but you could always do that. I think, correct me if I'm right, you

always seat the disputed juror and you don't get any extras. Nobody has ever suggested to the contrary.

MR. LATTING: Well, I'm suggesting to the contrary. And put it in the record.

CHAIRMAN SOULES: But you know, I didn't -- as I began to read that case, I had no idea where it was going, because the whole issue is what are the mental processes that caused this juror to be struck, and what's the evidence of those mental processes. I mean, that's exactly what you're going into.

HON. SCOTT A. BRISTER: That's one of the problems with Batson.

CHAIRMAN SOULES: So?

HON. SCOTT A. BRISTER: There's no way around that problem other than to keep it from getting too intrusive, which is to say just by asking for a statement, Counsel, as to why, or an explanation rather than evidence under oath. So I would propose we drop the requirement that it be evidentiary and that the statement is to be under oath and things

that make it look like formal satellite litigation.

MS. SWEENEY: So you want to say, "Party seeking to uphold the challenge must present a neutral explanation"?

HON. SCOTT A. BRISTER: Right.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, the problem with that is that I think the right to a hearing on this issue is the essence of what Batson was and is about. It is also what has been adopted by the Texas Supreme Court even before it was applied to civil cases. We applied it before the U.S. Supreme Court applied it in civil cases, the Texas Supreme Court did, and reversed cases based on that and indicated that they had a right to a hearing, and you have a right to a hearing.

I mean, the Supreme Court just recently, when they have talked about the hearing, have talked about it in terms of a plenary hearing, meaning evidence, not affidavits, but people on the stand. And that's what they're talking about. That's what they historically have been talking about.

And I do not think you can write a rule that suggests that the trial court does not have to have the hearing. That is absolutely inconsistent with what the Supreme Court cases say.

HON. SCOTT A. BRISTER: There is absolutely no hint in any Texas Supreme Court case that we have to have a plenary hearing for Batson. If that's your interpretation of what they mean every time they say "hearing," I think that's wrong too. That may be what they mean sometimes, but sometimes "hearing" means "Mail it in to me and I'll let you know what I did."

MR. McMAINS: In a Supreme Court opinion recently on a class action, when the Court said "hearing," and it's just talking about hearing, it said, When we use the term "hearing," we generally mean a plenary hearing, which includes evidence, and does not mean affidavits. It means stuff that is admissible in trial. That's what they're talking about.

HON. SCOTT A. BRISTER: In class actions I'll agree with you, but I think

they're concerned with different things in class actions.

MR. McMAINS: There are due process considerations in class actions. There are equal protection considerations in Batson. That is the essence of it. It is a constitutionally derived source.

CHAIRMAN SOULES: Well, apparently we've got a fairly broad range of what could be a Batson rule. It can be a rule that is not very intrusive and therefore somewhat informal. In tracking the cases where the party objecting says, "I object, they struck all the women, and that's gender motivated," the lawyer striking gets up and states what his race neutral reason was. That becomes the prima facie reason, if it's anything short of nonsense. And then after that the burden is on the objecting party to do something. I never have quite understood exactly what that last part is, but I do know what the first two parts are in some of the cases.

Okay. Then the other end of the sweep across, if I'm understanding what Elaine is

saying and reading what this rule says, is the objecting party has to put on evidence that there is an improper motivation, to use the words that are in here. Then the striking party has to come back with evidence that it was not improperly motivated. And I still don't know what the third piece of it is.

MR. LATTING: And what you have just said is why it's folly for this Committee to endorse this whole principle to the Supreme Court. We can't write a rule that makes any sense because the concept doesn't make any sense, because the whole notion of peremptory challenge is contra to the idea of putting people on the stand and making them explain why. You strike people peremptorily because you don't feel good about them as jurors, because when you ask them a question they look down or they look like they don't like your client or they don't like your point of view.

And any lawyer, as you said, who has any sense can always come up with some explanation like that. What is the movant, then, going to do, except to subpoena records or subpoena notes and say, "Well, let me look at his jury

list and see what he wrote down by these people." And the courts that have said that's an invasion of attorney-client privilege and work product, and so it doesn't make any sense for us to do this.

CHAIRMAN SOULES: Well, we voted five to two --

MS. SWEENEY: Joe, I hate Batson too.

CHAIRMAN SOULES: We voted five to two to have a rule.

MR. LATTING: I understand we did, but I'm speaking to the Court through the record, so --

CHAIRMAN SOULES: Please, we voted five to two to have a rule. Now, this rule can be placed anywhere in this range. That's what I'm trying to get at, is give the committee some guidance as to where -- give the subcommittee some guidance as to where this Committee feels the rule should be placed.

MR. LATTING: Let's place it as far over as we can from --

CHAIRMAN SOULES: -- more

intrusive? Less intrusive of the peremptory challenge practice? I think that's what we have to tell the subcommittee, because as they write a procedure they are either going to be following certain case or common law logic or different common law logic, so what do we do? Rusty.

HON. C. A. GUITTARD: Put it in a comment.

MR. McMAINS: Well, the reason that we voted to give them a rule is because the trial courts are totally in the dark about what to do. They know that they have to do something, but they don't know what to do. And we were trying to present something that made some sense in light of the cases to establish whatever the standard was, and that's why it was to be more specific and not less specific, because less specific doesn't help them any more than the cases do.

MS. SWEENEY: The very first original discussion two years ago was, you know, you come in and voir dire along, you do your strikes, and what happens? You know, let's say opposing counsel strikes every

woman. The way you find that out under current practice is the judge starts calling the list, you get 12 men in the box, you look at it, and you say, "Whoa, he struck all the women. Judge, we need to talk to you."

The jury goes out in the hall, and they come back in, and the judge has ruled that the strikes were improper. Four women get put in the box and four guys get taken out. And you know, you're sort of telling the jury there's something weird going on here, so that was the genesis of it.

We've got to create something to tell the court, well, don't do that. Do it -- you know, let the -- before you put the jury in the box, handle any Batson stuff that's going to come up. That was one part for why we needed a procedure.

Another part of why we needed a procedure was what Joe has brought up. You know, you don't want to get into a situation where you're cross-examining them about what did you and your client talk about.

So it -- you know, we need some guidance for the Court. We need to at least get

something to the Supreme Court, and they can decide if they want a procedure or they don't want a procedure or whatever. But what we need to know from you guys is what Luke said: Do you want us to write just a little sort of vague, you know, here is when you do it. Do you want this level of specificity or do you want more specificity?

Elaine drafted this because it was as close to the cases as we could get, but it left flexibility; such as, it says "race, ethnicity, gender or other unconstitutional basis," because those are the three that have been specifically upheld, but there could be more, as opposed to us trying to enumerate what they might be.

CHAIRMAN SOULES: Okay. Let's give this 10 more minutes and then we're going to shut it down and go to Bill Dorsaneo and pick this up another day. Justice Duncan.

HON. SARAH DUNCAN: Well, to me, once you decide you're going to have a rule, you've got to provide for a hearing. Once you're going to provide for a hearing, I disagree with what Judge Brister is saying.

When this has gone up on appeal, there is no harm analysis, so it is a very, very serious point of error in any civil or criminal appeal. How do you review a trial court's ruling on the exercise of peremptory challenges if there is no evidence before the trial court? I don't know how you can do it.

I mean, you can say, you know, there are some cases that say arguments of counsel as officers of the court is the equivalent of evidence. Whether you go with that line of cases or not, it's a clearly erroneous, analogous to an abuse of discretion standard. What trial court doesn't abuse their discretion if they make a ruling on a constitutional challenge with no evidence?

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I think what Scott was saying is that he doesn't want to have an evidentiary hearing at the race-neutral explanation stage; that is, when you're first saying, when you're first bringing it to the issue that you don't have a hearing. You just say, "Okay, what is your

race-neutral explanation?"

And then if there is one, and the other party wants to go further and have a hearing or present evidence, then I think you do have to have a hearing. It's just at this first time that the objection is made when you first get started, at that point he's saying, "I don't want to have to have evidence."

HON. SARAH DUNCAN: How do you make a prima facie case if you have no evidence? Before you even get to the race-neutral explanation stage of the proceeding, the party that's challenging the exercise of the peremptories has to put on proof from which a trial court can reasonably conclude that a prima facie case of discriminatory purpose has been made.

PROFESSOR ALBRIGHT: Well, you do that through --

CHAIRMAN SOULES: Well, we don't have -- our rule doesn't have to say that. Our rule can say they make an objection, and then it can say that the issue is joined whenever the striking party gets up and states his race-neutral reason. Then if

the objecting party wants to go on at that point, you've got to have evidence. But up to then you don't have to have any evidence, because all that's doing is getting the issue defined.

And if you ever have an evidentiary hearing, you're going to have due process. It doesn't make any difference at what stage. You're going to have to have it at number one, where the objecting party starts; or number two, where the striking party responds; or you have it at stage three. Judge Brister.

HON. SCOTT A. BRISTER: Well, almost all of the stuff that's involved in these hearings is judicial. It's quicker to take judicial notice, because it's obvious. I mean, think, now, you need to prove up what color the people are. Okay. Now, you can do that laboriously, or I can look out there and take judicial notice of who they are.

The cases that find somebody is not telling the truth on their race-neutral explanations are all, correct me if I'm wrong, Elaine, where they say, "Oh, well, I did it because she was old," but there's somebody

else old of an opposite race that you didn't strike. Again, those are quick judicial notice kinds of things.

Plenary hearings are much more cumbersome, slower, and from my review of the cases, it's just going to be a more cumbersome way of proving up things which are almost all the judge could take a look and see and take judicial notice of.

And the question is whether there's a record of it. Now, we can swear everybody in, which is what you would require us to do, and this is going to create a tremendous amount of gamesmanship, because not only can you slow down and muck up the process for the people that want to slow down and muck up what's going on in the trial, I mean, this is going to create a big expensive mess; plus just, you know, when I'm mad at opposing counsel, I'm going to try to suggest to the judge and maybe to some of the jurors, if they're coming in and -- you know, I mean, can I call the jurors and ask them more questions in this evidentiary hearing?

You know, this is going to be -- are we

going to start trying to prove opposing counsel is a bigot in front of the judge and perhaps the jury before we even start the trial? I mean, this is crazy.

HON. SARAH DUNCAN: Maybe we disagree on what evidence is. If the trial courts in the Batson cases that I've had had taken judicial notice of facts on the record, I consider that to be evidence. But they don't ever do that. It's more that they come up -- the defendant will come up on appeal and say, "Batson challenge. Here is my hearing," and we've got a trial court and it's all been real informal and real chatty and there's no judicial notice. There's no indication in the record of who was African-American, who was Hispanic, who was Anglo, who was male, who was female. And it's like, well, did the trial court come to a reasoned conclusion? You can't tell.

And it's a frightening thing to look at reversing a murder conviction because you can't tell what the trial judge did in a Batson hearing. It's a frightening thing.

HON. SCOTT A. BRISTER: You

just tell the trial judge you've got to have a record. I mean, on sanctions I know there's a handful of appellate courts that require plenary hearings, but the Texas Supreme Court doesn't, and almost no -- the vast majority of courts don't. They do require that the record reflect why we did what we did. This is what they did wrong; this is what I'm doing; and this is why that makes sense; this is my reasoning. That I can put quickly and easily into the record, and you can review that. And if the record doesn't have that and the rule requires there to be a record on this stuff, then you can reverse on that basis. But that's a whole different animal from a plenary evidentiary hearing which we don't require on sanctions.

CHAIRMAN SOULES: Chief Justice Cornelius.

JUSTICE CORNELIUS: We review an awful lot of these Batson matters, and invariably in the cases that we review there has not been a plenary hearing. But the attorney states to the court his neutral reasons, and the opposing attorney then

counters that with evidence of what the juror said on voir dire, information from the juror information cards, disparate treatment by the lawyer who is accused of doing that; in other words, they say, "Well, you say you struck this lady because she's old, but here is another lady that is just as old and of a different race and you did not strike her."

That's the evidence on which we determine whether or not there has been a Batson violation. But it is not a plenary hearing, and as far as I know there usually is not testimony taken, just statements and the use of what the juror said on voir dire, and of course, that is evidence; and the jury information cards.

CHAIRMAN SOULES: Okay. Three more minutes. Does anybody have anything else to say? I don't know whether we've given Paula much help to work on this.

MS. SWEENEY: Oh, I know exactly where to go now.

Judge Cornelius, you're saying you all are seeing a lot of civil Batson or criminal Batson?

JUSTICE CORNELIUS: Criminal.

CHAIRMAN SOULES: But the rules I think under Edmonson --

JUSTICE CORNELIUS: And we are talking about the civil cases here, aren't we?

CHAIRMAN SOULES: But under Edmonson it's the same. You have the same problem or issues.

MS. SWEENEY: Yeah.

MR. LATTING: Edmonson being?

CHAIRMAN SOULES: It's the Supreme Court case that applied Batson to civil cases. Batson only applied to the prosecutor in a criminal case. It was just the prosecutor in a criminal case. That's all Batson was about.

MS. SWEENEY: It also was originally aimed at protecting defendants' rights, not the jurors'.

Would the Committee be happy with this alternative, that we stop at the stage of saying to the Court that if there are Batson issues, if there is any Batson challenge raised properly, you know, if any party contests a peremptory challenge, the court

shall hold a hearing and shall do so prior to seating the jury, and stop there without getting into the specifics of the ping-pong match of who does what when and just leave that to develop, or is that too far on the light side? That's "Batson light." Is that too light?

CHAIRMAN SOULES: How many agree with that? Show your hands. Nobody.

MS. SWEENEY: How many disagree with that?

CHAIRMAN SOULES: How many disagree with that?

HON. SCOTT A. BRISTER: I need to know, is this a plenary hearing or not?

CHAIRMAN SOULES: No. I mean, there are all kinds of summary judgment hearings that are not plenary hearings. We've got hearings all over the rule book that are not plenary hearings.

HON. SCOTT A. BRISTER: This is a plenary hearing.

CHAIRMAN SOULES: What?

HON. SCOTT A. BRISTER: This committee draft is a plenary hearing.

CHAIRMAN SOULES: I know.

MR. McMAINS: But if you're making a determination that there is no right to a plenary hearing in a Batson challenge, you are flying in the face of precedent in my judgment.

CHAIRMAN SOULES: Not in mine, so I would respectfully disagree.

MR. McMAINS: I'm not saying that you have to have one every time, but there is a threshold at which you have to have evidence under the Constitution.

CHAIRMAN SOULES: The kind of evidence that Judge Cornelius is talking about qualifies as a plenary hearing, right?

MR. McMAINS: If you're saying, "I'm not going to let you examine the other side," if that -- then the question is on what basis do you say, "You're not entitled to put on evidence." What is your basis in the Constitution or in any of the cases for saying that I don't have the right to call the other side when he stands up and says, "I have this race-neutral reason," and you have no right to cross-examination? Show me how that can

possibly be supportable in a Batson challenge. And that's what the judge wants. The judge would not want to have to allow that to happen.

CHAIRMAN SOULES: Privilege, according to one case.

MS. SWEENEY: What did you say?

CHAIRMAN SOULES: Privilege, according to one case, limits the right to cross-examination.

MR. McMAINS: The most recent reversal by the Corpus Christi Court of Appeals in a Batson situation was in fact an examination on the stand of the lawyer. And the lawyer also testified on a race-neutral reason, on several race-neutral reasons. But then in response to the question "Was it a factor?" and the answer, "Yes," reversed. And that's the Supreme Court, Texas Supreme Court basis. Is a factor. And the issue was completely presented as to whether or not it had to be the dominant factor or sole factor. Our own precedent goes much further than the U.S. Supreme Court does or ever has. And it is one thing to say this is the main reason.

That does not meet any test at all in Texas. The question is, was race a factor.

MS. SWEENEY: Luke, we're happy to go back and work some more on this.

CHAIRMAN SOULES: Well, I don't think we've given you any help at all, but time is up, so just sit on it and we'll try to give you some help next time.

HON. C. A. GUITTARD: Maybe they can provide us the alternative, peremptory or not.

MS. SWEENEY: Let us talk and see if we can come up with some other suggestions. We're not happy either. I mean, you know, as a trial lawyer I don't like Batson at all, but we've got to do something.

HON. SCOTT A. BRISTER: Can I just add, I'm a little concerned about also adding "other unconstitutional basis," for instance, creed. The latest criminal court's was that ain't a ground for Batson. And does this mean in civil? Certainly creed is an unconstitutional basis for lots of things.

CHAIRMAN SOULES: That's got to come out, because this Committee has already

voted that the grounds are not going to be a part of the rule, and that's got grounds in it. We voted not to put the grounds in, just to put a procedure in, because we don't know what the grounds will be next month. We don't even know whether gender is going to be one next month. Probably race will always be.

MS. SWEENEY: So you want us to say something like an impermissible, just --

CHAIRMAN SOULES: "Constitutionally impermissible" is what it should read.

MS. SWEENEY: Okay.

MR. McMAINS: Well --

CHAIRMAN SOULES: Okay. Bill Dorsaneo, let's pick up where you left off.

MS. SWEENEY: Thank you.

CHAIRMAN SOULES: That closes that discussion for this day and time.

Okay. Let's take a 10-minute break.

(At this time there was a recess.).

CHAIRMAN SOULES: Where do we start, Bill?

PROFESSOR DORSANEO: 33(b).

CHAIRMAN SOULES: And that's on what page?

PROFESSOR DORSANEO: Page 5. Now, we've covered discussion-wise 33 and 34 which need to be considered together.

The main point, if you have a rule book, is to look at Rule 41 of our Texas Rules, which was based on Rule 21 of the Federal Rules. As I indicated last time, the subcommittee embraced the first sentence of Rule 41 and moved it into this proposed 33(b), "Misjoinder of parties is not grounds for dismissal of an action."

The subcommittee embraced but modified slightly the last sentence of 41(b), which says, "Any claim against a party may be severed and proceeded with separately," making that sentence say, "Any claim against a party who has not been properly joined may be severed," having matched the first sentence.

HON. C. A. GUITTARD: Has been improperly joined?

PROFESSOR DORSANEO: Yeah. All right. Who has been improperly joined.

Now, with respect to that sentence,

because I'm going to be working through Rule 41 to see if you want us to preserve any other piece of it, with respect to that sentence, and frankly, the last sentence of Rule 41 -- I'll give you a true/false test. Is this true or false? Any claim against a party may be severed and proceeded with separately. Whether that's true at the federal level, that's false at the state level. It's not a severable claim. And that's why the severance subsection or subparagraph or paragraph is added to Rule 34 based upon the Texas cases.

So in effect we've replaced the last sentence of current Rule 41 with the new sentence about parties improperly joined and a section on severance in the rule which is now Rule 173 concerning consolidation and separate trials.

Now, let's look at 41, the rest of it, if you have your rule books, and see if you agree with the subcommittee that the middle part should be dropped from the rule book in the sense that that language would be dropped. It says, "Parties may be dropped," okay, and we

deal with parties may be dropped in another place, okay, and our current rule book does, and frankly, as I indicated last time, this is probably an inconsistency in our rules, and it comes to a great surprise it me that non-joinder of parties means kind of like non-joindering parties, you know, by order of the court ordering them dropped. Do you follow me? It's kind of like unjoinder or dropping "nonjoinder" in the title. I always thought "nonjoinder" kind of meant not doing something, but this nonjoinder is a transitive --

MR. LATTING: A disjoinder.

PROFESSOR DORSANEO: -- verb in this draft of our rule book and copied from the federal book.

"Parties may be dropped or added." Well, the added part, that's dealt with in the other rules too, or is it? At least, the circumstances under which somebody may be added are dealt with in the permissive joinder and compulsory joinder rules, and whether you can -- and in the, you know, interpleader rule, and in the joinder of additional parties

part of 97(f), plus we have separate rules on when you can change your pleadings.

And part of what you can do when you amend your pleadings is to add parties, drop parties, right? So it seems to me that this "parties may be dropped" as well as parties may be added is unnecessary to be here.

Now, the rest of it, "or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties," is more problematic.

I wonder why did somebody in 1939 think the words "or suits filed separately may be consolidated" need to be put in here? My best guess, and it's just a guess, is that the consolidation rule is located far away from here. Okay. And somebody felt uncomfortable about it being either far away or perhaps nonexistent. So by treating consolidation in paragraph 34(a) of this draft, I think we make it unnecessary to say "suits filed separately may be consolidated," because consolidation is

dealt with more explicitly in the proposed Rule 34.

Where "actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties," now that, you say, well, we might could put that in there somewhere, but if it's the same parties, when are actions improperly joined if it's the same parties? Maybe only in that insurance company context that we talked about, actions in a series and sequence, and do we need to say that? See? I mean, it's very limited circumstances when actions are improperly joined.

And do we need to say about claims the same thing we said about any claim against a party who has been improperly joined? See what I'm saying? I mean, it just kind of seems an unnecessary thing to say, but I don't mind saying it. You could put it in 34(c).

And then the final thing that is missing that might be thought of as pertinent is the timing. All of this is before the time of submission to the jury, which seems

extraordinarily late to me, okay, or to the court if trial without a jury on such terms as are just, which seems extraordinarily meaningless to me.

So you know, my suggestion is that we don't need any of this stuff in the middle here because it's covered elsewhere better and more accurately. But some of it might could be preserved without doing any real harm. I would propose to put it in 34(c) when we're talking about the severance part or putting it in 34 somewhere else if you're concerned about consolidation, et cetera.

And we would really just ask for guidance on it. And I don't think that there is any question in my mind that it's an improvement to unify the subjects of consolidation, separate trials, misjoinder of parties in the same place in the rule book instead of having it separated by more than 100 rules and dealt with in two different places, and it cleans things up a lot to me. But I'm not sure that it couldn't be done better than this draft.

The last point on 34, one of the things that happens when you put the subjects of

consolidation and separate trials in the trial part of the rule book is that you don't talk about it the same way. You don't say, as you would likely say if you were earlier in the book, upon motion, okay, actions involving a common question of law or fact, you know, may be joined. It talks about it from the perspective of what the trial judge can do without indicating how that gets started. Okay? Because when you write it and you put it in the trial part of the book, you're thinking about the judge as being the one who is doing things. At least, that's the way these rule books are written.

Maybe we could improve this consolidation and separate trials thing by referencing a motion, but maybe that's just unnecessary, see, since you can ask for anything that's permissible by a motion.

So I just think I have presented 33(b) and 34 and ask for any input or guidance on the treatment of Rule 41.

CHAIRMAN SOULES: Okay. Let me ask the first question. Does anybody see anything after the first sentence and prior to

the last sentence of current Rule 41 that's not covered in Bill's new proposed rules? Justice Duncan.

HON. SARAH DUNCAN: It might be covered by omission, but it doesn't have a time limit on severance.

CHAIRMAN SOULES: Time limit on severance?

HON. SARAH DUNCAN: Yes.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: I gather, Justice Duncan, that you think we need to put a time limit on severance in this thing somewhere?

HON. SARAH DUNCAN: Well, I agree with your comment that before the time of submission to the jury seems like an awful late time in the proceeding at which to start rearranging lawsuits and parties, so yeah, I think maybe there is a point when we're going to have, as I understand it from the discovery rule discussions, there is going to be a point at which the pleadings are supposed to be finalized and people are supposed to be preparing for trial on the pleadings as they

exist at a particular point in time. And it seems to me that severance is an aspect of pleading finalization and preparing for trial.

CHAIRMAN SOULES: Well, I know we've got that husband/wife loss of consortium case out of the Supreme Court in the last couple of years, but there can be some circumstances where there can be a severance at the motion for new trial stage.

PROFESSOR DORSANEO: What does Rusty say?

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, that's what I was getting at too, though, is if you put severance in as being limited to some particular time, does that impair the ability of the court to sever after verdict?

PROFESSOR DORSANEO: The difficulty with our current rule book is that by being liberal it's tried not to screw up. It suggests that that's the proper time, which is often too late, but not always. I don't know whether it's good to talk about it. Just let it happen when it's appropriate.

CHAIRMAN SOULES: Okay. So

let's move, then, to your rule, because apparently we're not losing anything other than perhaps a time for severance that we may or may not want to assign.

Nobody else sees anything that's missing in the Dorsaneo rules, as I'll call them, that's presently between the first and the last sentence, is that correct? Okay. If you do, call it to our attention. Otherwise, Bill, let's go ahead and move to the new proposed rules and see if they do what you intend them to do.

PROFESSOR DORSANEO: Well, 34 again is 174, Consolidation, Separate Trials, with the addition of the sentence concerning separate trials that appears in the current rule book as 40(b), which is being replaced by 33, Permissive Joinder of Parties in this draft. So the only thing that's done in (a) and (b) is to move Consolidation and Separate Trials from the trial part of the rule book into the parties and claims part of the rule book where it was already talked about, and to take the two separate trial paragraphs and to put them together without changing their

wording at all, and you know, that's the first part of it.

The severance part is taken right from case law. Obviously there is more case law about severance than that, and it could be made longer if you think it needs to say more. But this at least says something accurate as distinguished from, you know, any claim may be severed; it says when severance is appropriate under our case law.

HON. C. A. GUITTARD: Bill.

CHAIRMAN SOULES: Judge Guittard.

HON. C. A. GUITTARD: In 34(c) we use the word "cause of action," which I understand the rules committees have been trying to get rid of since 1939 because of some uncertainty of its meaning. I can't offhand think of a good substitute for it, but have you considered that problem? The idea is to use the word "claims" and so forth rather than "cause of action."

PROFESSOR DORSANEO: I think the word "claim" could be used there, because the Committee did not. The way -- this was

taken first verbatim from the Cotner opinion, and then the introductory language was adjusted. But the words beginning with (1), without the numbers, "if the controversy involves more than one cause of action," was lifted right out of Supreme Court cases, and that's the reason why it says that. It could say "claim" without impairing the meaning, because the next part talks about claim and talks about a particular type of claim, one that would be the proper subject of a lawsuit if independently asserted, and that --

HON. C. A. GUITTARD: That would be consistent with --

PROFESSOR DORSANEO: That's sufficient.

CHAIRMAN SOULES: So is anybody opposed to using the word "claim" instead of "cause of action"? No opposition.

HON. SARAH DUNCAN: Bill, I don't know if we want to get into this in the rule, but there does seem to be an awful lot of litigation recently on what constitutes a claim.

MS. SWEENEY: What constitutes

a what?

HON. SARAH DUNCAN: What constitutes a claim.

PROFESSOR DORSANEO: I think not.

HON. SARAH DUNCAN: Fine with me.

MS. SWEENEY: Can I ask you a question too while we're asking questions?

CHAIRMAN SOULES: Paula.

MS. SWEENEY: Is there a rule about how a severance is to be accomplished? Because in the instances where I've been in a severance situation, you know, you get one, it gets pulled out and gets renumbered, and the clerk is supposed to know how to do this, and then certain parts of the file are supposed to go with it, and it almost invariably gets screwed up. Is that dealt with in here?

PROFESSOR DORSANEO: Bonnie Wolbrueck was going to be working on that in connection with the clerks part of the book, but I need to -- and she's on our subcommittee. Let me just make a note here to talk to her about that, because she was very

concerned about the mechanics of that and making those mechanics uniform across the state, if possible.

MS. SWEENEY: Because it almost always involves having to go down and look through the file yourself and finding the right pieces of paper and handing them to the clerk and say, "Here!" I mean, we need to do better than that.

HON. SARAH DUNCAN: And also providing notice to all of the parties through their attorneys that there had been a severance and what the new cause number is.

CHAIRMAN SOULES: Well, theoretically, at the time the case is severed, you would have to copy the entire district clerk's file and refile it in the new cause, because everything up to that point is in the common cause and everything from that point forward may divert, but each arm of the diversion relates back to what was in the process before.

Of course, the parties themselves could get together and agree that an abbreviated record would work on down one path or for each

path. But at the time of severance everything that's in the district clerk's file should be duplicated and put in the new cause.

MS. SWEENEY: It can be pretty hard to convince the clerk of that.

CHAIRMAN SOULES: You've just got to pay for it. It costs a lot of money.

MS. SWEENEY: Yeah.

PROFESSOR DORSANEO: Next?

CHAIRMAN SOULES: Okay. It does say in 41 that the severed cause shall be -- let's see what it says so I won't --

PROFESSOR DORSANEO: Docketed as a separate suit.

CHAIRMAN SOULES: Docketed as a separate suit.

HON. C. A. GUITTARD: Which is the severed cause? They're both severed, aren't they?

PROFESSOR DORSANEO: The last sentence I took from Hall vs. City of Austin, "A severance divides the lawsuit into two or more separate and independent causes" which is not such a happy of word, but --

HON. C. A. GUITTARD: Cases.

PROFESSOR DORSANEO: Cases, yeah. Let me change that to "cases."

Do we need to say "docketed as independent suits"? I don't think so, do you?

CHAIRMAN SOULES: That's just speaking to, I guess it was Sarah's question, what happens.

PROFESSOR DORSANEO: Yeah. I'll ask Bonnie about that too.

CHAIRMAN SOULES: One thing that does happen is -- I think that one thing that is clear is it has to be docketed as a separate suit. Whether it gets an "A" or a "B" or a new cause number or something, it goes to a new cause number or whatever you call it.

PROFESSOR DORSANEO: Let me coordinate this with Bonnie Wolbrueck and see if she wants -- feels the need to say "docketed as separate suits" or put it over there, because she's working on it.

MS. SWEENEY: It does really need to be specific, because every time -- I mean, it's happened a lot of times to me, and

every time, especially if you then have an appeal on top of it, it's just a nightmare to find the right file, even down to the question Sarah asked, which one is the severed one, you know, and which one -- I mean, it just -- you end up with partial records and you can't find stuff, and that is something the clerk rules really, really need to address.

MS. LANGE: Bonnie and I have worked together on those rules, and we are proposing to make it a separate number, because you're right, in some counties they've added an "A" or "B" or whatever and it's confusing, so we're trying to get it written where it will be uniform all over the state.

PROFESSOR DORSANEO: Great.

CHAIRMAN SOULES: Okay. Rusty.

MR. McMAINS: I just wanted to mention, the idea of putting it in a separate number or doing it as a separate number, the only problem with that is that the tendency would be for the clerk to put it as a separate number in terms of a new number, which means that you have lost your age on the case. I mean, immediately then, the way that they keep

everything, you now are a newly filed case, whereas it may have been pending for six years, which is why I frankly prefer the A and B situation. Something needs to be in there which basically said you would not lose your status on the docket simply because you have been divided into two.

PROFESSOR DORSANEO: I wish I could do that. Well, let me go on to another one.

Interpleader is the same as current Rule 43, which was taken from Federal Rule 22 with minor textual changes, so I don't guess we need to talk about that.

Class actions. Okay. There's a lot of stuff we could do with class actions. All the committeee decided to do was to make our rule more like Federal Rule 23 by eliminating a separate category of (b)(3) class actions which were retained in the class action rule as it was changed in 1975, coming out of the Court Rules Committee at the suggestion of some of the members of the committee, from the old class action rule, the so-called, you know, hybrid class actions where the object of

the action is the adjudication of claims which do or may affect specific property involved in the action.

The committee believed that the federal organization of (b)(1), (b)(2), (b)(3) actions covers that case without the need to specifically identify it separately.

And as an historical matter, my recollection, which might be impaired, was that that was retained because that was the only kind of class action that Texas courts thought to be appropriate other than derivative actions before the modern era.

And for us to have a (b)(3) class action that's different from the main (b)(3) class action kind of makes us out of sync, and it's frankly stupid.

MS. SWEENEY: What is a (b)(3) class action?

PROFESSOR DORSANEO: Pardon me?

MS. SWEENEY: What is a (b)(3) class action, I'm sorry?

PROFESSOR DORSANEO: Well, a (b)(3) class action in common parlance is the normal class action that you're thinking about

filing, the common question of law or fact.

MS. SWEENEY: You're saying you just eliminated it?

PROFESSOR DORSANEO: Well, in our rule book the (b)(3) class action is where the object of the action is the adjudication or claims affecting specific property, which could be a (b)(1), (b)(2) or (b)(3)

PROFESSOR CARLSON: Federal (b)(1) or (b)(2).

PROFESSOR DORSANEO: Federal (b)(1), (b)(2). You know, it's already covered, is what I'm saying.

CHAIRMAN SOULES: Texas (b)(3) is redundant in federal -- Texas has (b)(1), (2), (3), (4). Federals have (b)(1), (2), (3). Texas No. (3) is redundant. Texas No. (4) is the same as Federal No. (3), so if we take out Texas (3), we'll track the federal statute and won't be losing anything because Texas (3) is redundant anyway, which I think is what will Bill is saying.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: Yeah, I think that's right.

PROFESSOR DORSANEO: And then there are corresponding changes in the balance of the rule to make it talk about (b)(1), (b)(2), (b)(3), rather than (b)(1), (b)(2), (b)(3), (b)(4).

CHAIRMAN SOULES: And other than that, it's the Texas rule?

PROFESSOR DORSANEO: And there are two other things. The effective date provision in the current rule book, which says, "Effective Date, This rule shall be effective only with respect to actions commenced on or after September 1, 1977," we didn't think that was necessary to be retained.

And the derivative suit paragraph that was injected into the middle of Rule 42 by the Supreme Court has been moved to a separate rule, Rule 37. The reason for that is that it requires separate coverage in order to avoid confusion about whether the remainder of Rule 42 applies to derivative suits or are they controlled by this paragraph, and they are meant to be controlled by this paragraph which came out of this Committee years ago and

was recommended to the Supreme Court as a cure for the elimination of coverage of derivative suits when the original 42 was adopted based on Federal Rule 23.

HON. SARAH DUNCAN: So the other provisions, for instance, 42(e) -- not (e), 42(f) on discovery does not apply to a derivative suit, is not intended to apply to a derivative suit?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Okay. Any opposition to -- let me just start I guess where we started today first at --

PROFESSOR DORSANEO: -- 33(b).

CHAIRMAN SOULES: Okay. That's unanimous consent.

34(a). Same. Unanimous consent.

34(b). No objection. That's unanimous consent.

(c), severance, 34(c), any objection? Unanimous consent.

We're changing "cause of action" to "claim" in (b). We changed "not been properly" to "been improperly." Also in 34(c), we changed "causes" to "cases" in the

very last word.

Any objection to 35? There's none. That's unanimous consent.

36?

MS. SWEENEY: I'm sorry, I didn't -- on 35, we didn't really go over it in great detail. Are there any substantive changes?

PROFESSOR DORSANEO: There are no changes at all.

MS. SWEENEY: Okay. Thank you.

CHAIRMAN SOULES: So all in agreement on 35? Okay. We all agree.

36, class actions?

MS. SWEENEY: And you're representing that 36 really makes no substantive changes either, Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Unanimous consent to 36.

PROFESSOR DORSANEO: Paula, now that you mention 35, we're going to go back and take the gender out of it. There's a "he" in there, at least one.

MS. SWEENEY: Kill him off.

CHAIRMAN SOULES: All right. Now we get to 37. Any objection to 37?

PROFESSOR DORSANEO: I might add on 37 that Mike Prince is not here, but the Evidence Committee is -- and his firm is working on this to see if we need to do anything else on the derivative suit rule including whether we need to have a rule like Federal Rule 23.2, actions relating to incorporated associations, which we don't have. And so this isn't completely finished. The only thing being considered -- none of this is, but --

CHAIRMAN SOULES: Well, I don't understand what you mean by "none of this is."

PROFESSOR DORSANEO: Well --

CHAIRMAN SOULES: You're talking about 37?

PROFESSOR DORSANEO: I take that back. I'm talking about 37, yes.

CHAIRMAN SOULES: Okay. We're going to vote on 37, and if you all decide that you want to do something more or less or different, bring it back to us.

MR. LATTING: Well, can you

tell me what you just said about derivative suits and discovery on this? You mentioned something about --

CHAIRMAN SOULES: Well, 42(b) and 42(c) -- Texas Class Action Rule 42(f) says unnamed members of a class action are not to be considered as parties for purposes of discovery.

MR. LATTING: And what does that have to do with derivative suits?

CHAIRMAN SOULES: It doesn't have anything to do with derivative suits. It does not apply. That's what they've done.

Okay. Any objection to 37?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: I don't know. What have you done to it?

PROFESSOR DORSANEO: We've moved it.

MS. SWEENEY: That's it? No substantive change?

PROFESSOR DORSANEO: Right.

MS. SWEENEY: Okay by me.

CHAIRMAN SOULES: Unanimous

consent. No objection to 37.

Now we're to 38.

PROFESSOR DORSANEO: Rule 38 is very different from our rules. 38 is the federal rule modified by leaving some things out. Our rules don't say anything about when intervention is appropriate. Our rules also say you intervene subject to being stricken. We decided that it would be better to have the federal rule where you move to intervene, and you have a right to intervene when you have a right to intervene, and it's subject to the court's discretion where intervention is merely permissive.

MR. LATTING: What's the idea of a mandatory trip to the courthouse, when the way we do it now is that if you want to intervene you simply intervene and if someone doesn't like it then that party moves to strike you? Why are we abandoning that laudatory practice?

PROFESSOR DORSANEO: Well --

CHAIRMAN SOULES: Where is intervention now, what rule?

PROFESSOR DORSANEO: 60.

CHAIRMAN SOULES: 60.

PROFESSOR DORSANEO: And I could -- I mean, I don't think there's a particularly good answer to your question.

CHAIRMAN SOULES: That was the change that was made in 1990, to eliminate the need for a motion.

PROFESSOR DORSANEO: What?

MR. LATTING: Well, let's don't do it then.

PROFESSOR DORSANEO: We never had to have a motion for that.

MR. McMAINS: We've never had to.

PROFESSOR DORSANEO: Now, I could say, you know, there is -- which statute is it now, Rusty, that -- the venue statute operates on the basis that there is a motion, and so it's kind of --

MR. McMAINS: It operates on the basis that there's an order allowing it.

PROFESSOR DORSANEO: Which would suggest a motion. And we just -- you know, the committee just thought it was better to do it this way.

MR. LATTING: Well, the plaintiff, who decides who is going to be the original parties to the suit, doesn't have to file a motion or do anything. Just A sues B. And then if C says, "I need to be in this fight too," he just comes on in. And if somebody doesn't want them, then they can ask the judge to kick him out, but I think our practice is much better than the federal practice. If it saves going down to the courthouse, it saves money for the litigants.

PROFESSOR DORSANEO: Well, that would be one issue as to whether you want to leave it the same way or --

MR. LATTING: I would. It works just fine.

CHAIRMAN SOULES: Well, let's take a consensus on it. Motion or no motion? The issue can be joined every time, because you can't get in without a motion; or it could be joined sometime, and that's when people object; or you just walk in and nobody objects, you're there, no motion, no hearing.

MS. SWEENEY: Well, I agree with Joe, if you want for us to tell you what

we think.

CHAIRMAN SOULES: Okay. For intervention, should there be a predicate motion? Those who say there should be a predicate motion in order to intervene show by hands. Two.

Those opposed. Seven.

So there will be intervention without a motion. And "subject to being stricken," is not the right word, because it should be subject to being severed. Suppose you intervene on the last day of limitations and you're struck out. It's really -- so that's what you need to do. Fix it to say "subject to to being severed."

PROFESSOR DORSANEO: So the adjustments are easy to make. Take out in (a) "upon timely motion" right at the beginning. Take out in (b) "upon timely motion." And we'll leave the procedure to the procedure paragraph, paragraph (c).

Now, this is the second issue, which you may not want to do this either, but I'm more confident that you will, which is do we want to talk about when intervention is

appropriate, or do we just want to leave that to somebody to figure out that that's appropriate if you're a proper party or if -- and it's really appropriate if you need it for just adjudication.

And you know, the committee believes that intervention as a matter of right matches up to the Texas rule, current Rule 39 and that this works together; that intervention as a matter of right is when in effect, to use the old parlance, you know, a necessary party who might be regarded as indispensible.

The same parallel language that you just approved a minute ago without thinking about it is from Federal Rule 19, Texas Rule 39. Okay. Who knows why we didn't -- who knows why they didn't adopt Federal Rule 24 to begin with? Probably because of the point that we just fixed would be my guess, but the standards ought to be here.

But these are all the standards in the federal rule which match the other federal rules that were embraced by the Texas Supreme Court years ago or that have been changed to follow evolving changes at the federal level.

Permissive intervention is a slight bit trickier than mandatory intervention because of the way the thing could be interpreted. And maybe we need a sentence, and I haven't finished working on this, and Rusty said maybe we need a sentence about insurance companies not being permitted to intervene, if that's the case law; that an insurance company is not permitted to intervene, if it wanted to, to be a party in an action against its insured.

HON. C. A. GUITTARD: Do you have that taken care of in another rule?

PROFESSOR DORSANEO: Well --

CHAIRMAN SOULES: You've passed me up. I didn't get that.

PROFESSOR DORSANEO: One of the by-products of not talking about when intervention is appropriate in the rule book is it's just not talked about. And the general approach in the cases is that sometimes you have a right to intervene, and that's under the circumstances indicated in (a), and other times it's permissive. But the permissive stuff is, you know, really pretty unclear to me, beyond saying that it's when

you would be a proper party and the court can exercise discretion even if you're a proper party when the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

MR. LATTING: It doesn't seem to me that we ought to be addressing this in the intervention rule, because this is really a question of the properness of parties and it doesn't really have that much to do with intervention, does it?

CHAIRMAN SOULES: Yeah, it does.

MR. LATTING: Because the same question be would be faced if they were an original party.

CHAIRMAN SOULES: Well, except that you've got new issues here.

And I need to back up because I was getting -- have you got in your notes that you are going to write a procedure for severance if the intervention is denied?

PROFESSOR DORSANEO: No. What I'm going to do is take that paragraph, take Rule 60, and put it in there. Any party may

intervene by filing a pleading, period, and and then write the procedure and replace "stricken" with the severance concept.

CHAIRMAN SOULES: Whatever you do, you've got that in mind?

PROFESSOR DORSANEO: Yeah.

HON. C. A. GUITTARD: And that will apply to (b) as well as (a)?

CHAIRMAN SOULES: And in the last sentence of (b) you've got "In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." There you're talking about the discretion to sever at that point?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: And the reason --

PROFESSOR DORSANEO: That may need to be changed just a little bit too then.

CHAIRMAN SOULES: And the reason it's a new issue is, other than the original formation of the parties is you've got someone who has injected themselves into the lawsuit, and shouldn't we speak to that

circumstance?

MR. LATTING: Well, I don't know. I'm thinking about it. You may be right, but I just don't know.

CHAIRMAN SOULES: It seems to me there's a difference, but there may not be.

MR. LATTING: Well, then maybe not.

CHAIRMAN SOULES: It's certainly a change in the architecture of the lawsuit.

MR. LATTING: Yeah. But I don't know why you wouldn't be facing the same essential question, if those, say, three parties had been original parties and one of them says, "This party ought not to be in this place. It's adversely affecting my rights and the contravention of law."

CHAIRMAN SOULES: Well, let's see --

MR. LATTING: "And I want to sever it or have a separate trial."

CHAIRMAN SOULES: Well, let's look at the grounds for severance and see if there's anything there about undue delay. Is

this a new ground for severance that's particularized to intervention?

And then I'll get to you, Justice Duncan. I've just got this on my mind here and I want to try to look it up.

PROFESSOR CARLSON: Pages 5 and 6, Luke.

CHAIRMAN SOULES: Joe, the severance rule doesn't really speak to undue delay and prejudice of an intervention.

MR. McMAINS: It can't.

CHAIRMAN SOULES: It can't?

MR. McMAINS: If you filed it at the same time, then what are you delaying? It's all one thing. It started at the same time.

CHAIRMAN SOULES: It's probably an essential circumstance, and you'll need to address it.

MR. LATTING: The delay part?

CHAIRMAN SOULES: Right. Okay. Bill, so that when you --

MR. McMAINS: Luke.

CHAIRMAN SOULES: -- when you consider it -- Rusty.

MR. McMAINS: Does the intervention rule as we've currently proposed it, does it have a service requirement?

CHAIRMAN SOULES: We have other rules that require service and the service could be by certified mail.

MR. McMAINS: Well, but I just a lot of times -- I think historically we have treated interventions as being they show up and they don't actually serve it.

PROFESSOR DORSANEO: Yeah. And frankly, that's screwed up. The case law -- there's one case that says there needs to be service.

MR. McMAINS: Yes, I know. And that would be my impression, particularly if it's a new claim. But what I'm concerned about partly is that if we do not have specific provisions for service, then what we're saying is that what happens is that once you commence the lawsuit this way, all that happens, if somebody challenges you, is you get severed.

Basically, obviously, when the people have come in, they have appeared, so you no

longer need service. The people that are opposing you come in and say, "I object to his being here," and they say, "Fine," and you're in this other lawsuit and it's ongoing. You don't have to do anything else. It's there.

Now, that frankly is not the way our procedure works now necessarily, and -- because we -- I mean, we do have -- in fact, our rule currently says "subject to being striken" and we do have interventions that are stricken.

MS. SWEENEY: And I also have concerns along those lines. In the current rule you can intervene subject to being stricken, but the way you draft it in (a), the Intervention as a Matter of Right, that intervenor, the way that's drafted, if they have a statutory right, they could intervene a week before trial, screw up your whole setting, and this doesn't give the court any leeway to tell them, "Sorry, you're too late, you're in a separate lawsuit" or whatever.

Under existing law, since it says subject to being stricken, there's been some protection for the litigants to say, "Hey,

don't come in and screw up my lawsuit in the last week," and at least the court has some discretion to exercise there. This seems to tell the court you don't have any choice, you have to let them in, with no concern for timing and so on.

PROFESSOR DORSANEO: I think that's an excellent point. And I think that sentence about discretion, which also is in the last part of Rule 37, as Judge Brister pointed out, needs to be worked in. I think this needs more work.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: That was my structure point, is I think the first sentence of (a) and the last sentence of (b) need to be segregated out into the first section. And then after we talk about intervention generally, then we talk about it as a matter of right or permissive. But in fact, both are permissive in the sense that the court would have the discretion to strike them in appropriate circumstances.

PROFESSOR DORSANEO: I don't

like "as a matter of right" now. It's borrowed from the federal, but I think it's not really quite as a matter of right. It's kind of quasi-right.

CHAIRMAN SOULES: Alex Albright, and then I'll get to some of these others.

PROFESSOR ALBRIGHT: Once somebody has intervened and they become a party, then the party then has discretion to deal with the lawsuit as if they were a party to it originally and they can sever out or try things separately or whatever as justice may require. But we may want to make it clearer. I think Paula is right that this makes it sound like you've got to do this and it has to be together, and there's nothing to keep you from doing that.

PROFESSOR DORSANEO: Our rule is silent, the federal rule is not as good as it should be, and we need to work on it to make it better.

CHAIRMAN SOULES: And what about a Rule 21a method of service in an intervention?

MR. LATTING: Meaning?

CHAIRMAN SOULES: 21a.

MR. LATTING: Remind me. You have to have actual service or just --

CHAIRMAN SOULES: No.

MR. LATTING: Okay.

HON. C. A. GUITTARD: If we're rejecting this federal language in some cases, what do we gain by using any federal language rather than using our existing rule?

PROFESSOR DORSANEO: Well, we already have that federal language in our rules on compulsory joinder of parties. I mean, what I think we're rejecting is this concept that it's a right. Okay? But you know, maybe -- and I don't know whether we need -- when a statute confers an unconditional right to intervene, I don't know if there is any -- I guess there may be some workers' comp statutes or subrogation. There are some statutes -- I don't know of any such statute myself. I had no particular statute in mind when I copied this federal language. Okay? Maybe it's unnecessary to say that.

But this wording, Claims an interest

relating to the property or transaction, subject of the action, the so situated, disposition of the action may as a practical matter impair or impede ability to protect that interest, that is already our standard for when somebody is needed for just adjudication. I mean, that's the standard.

MR. McMAINS: But the difference is that this is the person who is needed which the parties don't want in. And you know, I sympathize with the notion that we don't want the lawsuit getting screwed up, and we want the parties to be able to control their lawsuit, but this is giving the right in a mandatory sense to the people who, if the parties were seriously attentive to the absent party's interests, somebody would have raised the issues. And those parties have due process rights with regards to whether or not they're going to be bound by this judgment insofar as a particular race or property is concerned. I mean, that's what the "persons needed for just adjudication" is all about.

So if somebody is taking a tract of land and they are essentially ignoring other people

who have some kind of contingent interest in it and those people want to be heard, I'm sorry that it screws up your lawsuit, but I think that they have a right.

PROFESSOR DORSANEO: Well, if they should be regarded as indispensible, they probably have a right, but I think this is maybe a lesser group than that. And I think I need to work on this some more.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: In response to your comment that you weren't thinking about a particular statute, the situation of an adoption comes to mind when the biological father intervenes. You know, "unreasonably delays" I think has to be taken in context. And what might be an unreasonable delay in a commercial litigation or two related contracts situation might not be at all unreasonable when you're talking about someone's parental rights.

CHAIRMAN SOULES: It doesn't say delay. Unreasonably delay.

HON. SARAH DUNCAN: Right.

CHAIRMAN SOULES: So it may be --

HON. SARAH DUNCAN: What I was going to suggest is that the first sentence be the first sentence, not a part of a subpart; the second sentence of (b) be the second sentence. Then we define "intervention" generally. And then all really (a) and (b) are are grounds for intervening. It's not that any one of them is as a matter of right. They're all permissive, but they're different grounds for intervening.

PROFESSOR DORSANEO: Now, there may be a right, but that really would be covered by our 39(b) when somebody is regarded as indispensible when they really have to be there; otherwise, they're -- Rusty.

MR. McMAINS: Luke, I have one other -- and you're talking about rewriting this, and I don't know whether there would be much disagreement with this notion on the committee, but with regards to the -- what the effect of an intervention that is then -- whether it is stricken or severed, let's just say that you want to deal with it in the

notion of severance. The problem I have is, okay, that's a separate lawsuit. It's now commenced. It's commenced theoretically, I suppose, against whomever it is that goes along in the severance. The parties who are dragged along there need to know exactly what happened. I mean, is this a new lawsuit that they now have a right to answer from a certain time as of the date of the severance? Do they have a right to make the venue challenges that they would ordinarily make as of the time of the severance?

I mean, these are -- you are screwing around in my judgment with some views of the legislature when they passed the venue changes, if you say that we're going to avoid the intervention problem which gives a right to interlocutory appeal by simply severing. Okay?

So they're over there and that's a new lawsuit. And the defendants are saying, "Wait a minute, I can't appeal this," because it's not really an intervention because it didn't happen or it happened and it went away. Now I've got to do something. Do I file a venue

plea initially? Do I have a right to file a venue plea initially? When do I have the right to do that? These are things that affect that legislation.

And my personal judgment is that if you file an intervention in a claim, if you're talking about the same race of the subject matter of the claim, they have an interest in there, that really is properly an intervention. And I'm not sure that -- you know, then the notice provisions don't bother me as much because everybody knows that subject is involved.

If it's somebody who is merely involved in the same transaction, that's a different deal. That's a new lawsuit, and there ought to be service a la an ordinary lawsuit service and an opportunity to answer, make venue claims and so on.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: We just had this come up in a modification of child support --

MS. SWEENEY: Speak up, please.

HON. SARAH DUNCAN: We just had this come up in a modification of child custody visitation order, and there was a biological mother who was being told by the trial court that she could not attack venue and get venue moved to the child's principal place of her residence, and it just got all screwed up, and it's not really covered anywhere what happens when someone intervenes and what their rights are relative to the other parties and the subject matter of the lawsuit.

MS. SWEENEY: Are you suggesting someone ought to be able to intervene in a lawsuit and then move it?

HON. SARAH DUNCAN: If it involves a child whose principal residence is somewhere other than the lawsuit, yes. That is by virtue of the Family Code.

MS. SWEENEY: Okay. Other than children, as a general rule?

HON. SARAH DUNCAN: I'm not trying to provide any answers. I'm just saying there are a lot of questions that arise when there has been an intervention.

CHAIRMAN SOULES: But isn't that a jurisdictional question? That's more than a venue issue. If the child has been someplace else for six months, then the original court doesn't have jurisdiction anymore.

HON. SARAH DUNCAN: They have continuing jurisdiction until jurisdiction is transferred elsewhere.

CHAIRMAN SOULES: But it's a mandatory transfer of jurisdiction.

HON. SARAH DUNCAN: It is a mandatory transfer.

CHAIRMAN SOULES: Of jurisdiction?

HON. SARAH DUNCAN: Of venue. I'm not trying to say what I think the answers are on any of this. I'm just saying that I think intervention is more complicated than the one-sentence Rule 60 currently suggests, and I think that we might could address some of those complications.

CHAIRMAN SOULES: Okay. Anything else for Bill as he moves to rewrite this?

The only other thought I have is should it say "when an applicant claims an interest relating to the property, transaction or occurrence"? I guess transaction and occurrence are two different things, but we use them all the time in different ways, and I guess there's a reason for that.

PROFESSOR DORSANEO: There's no reason.

HON. SARAH DUNCAN: But they are different.

PROFESSOR DORSANEO: Historically the word "transaction" -- you know, we think of transaction as being business and occurrence as being -- transaction as being contract and occurrence being kind of tort, but really the historical development is that the word "transaction" is the word and "occurrence" is kind of a species of transaction, so why anybody ever said transaction or occurrence probably has to do with them being lawyers.

CHAIRMAN SOULES: Or maybe on insurance policies.

MR. McMAINS: Transactions

aren't covered in insurance policies.

CHAIRMAN SOULES: All right. Well, bad idea.

Let's go to 39 now, then. We've kind of got our minds drained on this for Bill, and we can fill them up and drain them again next time.

PROFESSOR DORSANEO: This is tricky, but what this is, in our current rule book we have a series of rules copied without change, and perhaps thought, from the Revised Civil Statutes of 1925, beginning with Rule 150 and going through Rule 156, and these rules are covered in Rule 39 in one rule.

And just to go through it, 39(a) is Rule 150 plus more. 150 now says, "Where the cause of action is one that survives" -- it says "which survives," but I changed it to "that" -- "no suit shall abate because of the death of any party, but may continue as hereinafter provided." Okay. Now, that is all on 150.

HON. C. A. GUITTARD: Do you want to substitute "claim" for "cause of

action"?

PROFESSOR DORSANEO: Yes. "Where the claim is one that survives, no suit shall abate because of the death of any party." And Rule 150 says, "thereto before the verdict or the decision of the court is rendered." Why in the hell does it say that?

PROFESSOR CARLSON: It must be too late then.

PROFESSOR DORSANEO: But if it doesn't abate, it doesn't abate after the verdict or decision of the court is rendered.

MR. McMAINS: Well, we have another rule in our current rule book that deals with how you deal with that.

MS. GARDNER: It's the death.

CHAIRMAN SOULES: What's that, Anne?

MS. GARDNER: It's the timing of the death, not the timing of the abatement before verdict or decision.

PROFESSOR DORSANEO: Oh, yes. Okay. I need to put that back in there. Who took that out of there?

151, Death of Plaintiff; 152, Death of

Defendant -- I'm going to apologize to the Committee, I don't think I'm ready to present this 39. I need to work on this more.

CHAIRMAN SOULES: We'll revisit it.

MS. SWEENEY: May I make a suggestion when you do?

CHAIRMAN SOULES: Paula.

MS. SWEENEY: The rules talk about a "suggestion of death" as though that meant something. There is nothing out there that tells you what it is, how to do it, where to get one, what it looks like, what to file.

PROFESSOR DORSANEO: Look in the Litigation Guide.

MR. McMAINS: There's one in his Litigation Guide.

MS. SWEENEY: Yes, I know. I've been there. But it might be you could take a page from your Litigation Guide and make it part of the rule.

PROFESSOR DORSANEO: Well, I think these rules need more consideration, and I didn't realize I changed them so much in the task force draft that I'm not really ready to

present them. This is messy, and we'll try to make it make sense.

MR. LATTING: Could you think about maybe calling it a notification of death instead of a suggestion? It sounds like "drop dead" or something.

HON. C. A. GUITTARD: Or "I suggest that he die."

PROFESSOR DORSANEO: Well, let's go to this unnumbered rule, "Voluntary Dismissals and Nonsuits."

CHAIRMAN SOULES: Where is that now?

PROFESSOR DORSANEO: That's on page 12, the last rule. Now, this is based on Rules 162, 163 and 165.

All right. Now, 162 in the current rule book begins, "At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss the case or take a nonsuit, which shall be entered in the minutes."

The draft says, "At any time before the plaintiff has introduced all of the plaintiff's evidence other than rebuttal

evidence, the plaintiff may dismiss an entire case or dismiss the case as to one or more of several parties."

That adjustment in language is a partial embrace of Rule 163 which talks about under the circumstances when it's appropriate the plaintiff may dismiss the suit as to one or more of several parties, the idea being that we can say it all in one place that you can dismiss an entire case or dismiss the action as to one or more of several parties at any time before the plaintiff has introduced all of the plaintiff's evidence other than rebuttal evidence.

MS. SWEENEY: There is a distinction that I recall between a dismissal and a nonsuit and the effect of that. There is at least a case or cases out there that say dismissal is different from a nonsuit; and that a nonsuit is something that you absolutely have a right to do which results in no prejudicial effect and you just kind of quit; whereas dismissal can potential have some sort of prejudicial effect such as being considered a dismissal with prejudice, and

that by asking for a dismissal you give -- if I say, "Your Honor, I move for a dismissal," I give the court power at that moment to say, "Yes, but it's with prejudice." If I say, "Your Honor, I take a nonsuit," it's over.

Did the subcommittee intend to obliterate that distinction? Because the word "nonsuit" is gone from sentence 1.

PROFESSOR DORSANEO: Well, I don't like to use the word "nonsuit."

MS. SWEENEY: I do.

CHAIRMAN SOULES: I think plaintiffs do in general.

MR. LATTING: Yeah. If we're going to change it, though, we ought to debate it, because she's right. It's clear that you don't prejudice yourself by taking a nonsuit.

PROFESSOR DORSANEO: Well, you shouldn't prejudice yourself by taking a voluntary dismissal either. I mean, that would be --

MS. SWEENEY: But if you say that word you give the court, under -- there's a case out there that does that, because I've had it stuck in my ear before. Well, I'm

not -- you know, this is a giant change.

PROFESSOR DORSANEO: There shouldn't be such a case, I guess would be my reaction.

MR. LATTING: We have the right to correct that, and we ought to address that.

MS. SWEENEY: Okay.

PROFESSOR DORSANEO: I mean, we need to take the attitude that there are not good cases and bad cases, only cases, but I think that's a bad case.

MS. SWEENEY: Yes, it is.

HON. C. A. GUITTARD: How can you dismiss something and have an adjudication? That's the problem.

MS. SWEENEY: A dismissal with prejudice.

PROFESSOR DORSANEO: It sure would surprise me if I wanted to voluntarily dismiss something and the judge said, "Well, guess what, you've voluntarily dismissed it with prejudice." That can't be right.

MR. LATTING: Well, couldn't we add a comment to that? If there is a case sitting out there, it seems to me that we

ought to suggest to the Supreme Court that --

PROFESSOR DORSANEO: Well, I can use the word "nonsuit" in here, but you know...

CHAIRMAN SOULES: How many want the rule to include the word "nonsuit" show by hands? Seven.

How many opposed to that? No one opposes it, so we use the word "nonsuit."

PROFESSOR DORSANEO: Okay.

MR. McMAINS: The current rule uses both.

PROFESSOR DORSANEO: "May dismiss a case or take a nonsuit." I really think that if those are two different things, then that's unfortunate, especially if one of them is something you don't want.

MR. LATTING: Well, I would not be opposed to changing the rule if you would say in a comment that we don't think that they're two different things. It might make more sense in drafting to do it that way, but I don't think we ought to take the word "nonsuit" out and then not address what --

PROFESSOR DORSANEO: Well, you

can see I didn't exactly completely take it out. I just kind of don't like it.

HON. SARAH DUNCAN: It's a suggestion of deletion.

PROFESSOR DORSANEO: Well, let me get this one, at least this one important point that the committee needs guidance on, an innovation. Look at the second and the third sentence which should begin with a capital "N" of this (a). "Omission of a party from the pleadings does not result in a dismissal of the action as to the omitted party," with the next sentence indicating how the nonsuit is taken. "Notice of the voluntary dismissal of an entire case or as to one or more of the parties must be filed separately from the pleadings," and then the proviso comes from Rule 165, "provided that a party who abandons any part of a claim or defense contained in the pleadings may have that fact entered of record during a hearing or trial to show that the matter was not tried."

We're trying to help people from inadvertently blowing their brains out.

MR. LATTING: Yeah. That's a

great rule.

MS. SWEENEY: Yeah, that is a good rule. Bill, you say --

CHAIRMAN SOULES: Paula.

MS. SWEENEY: -- that the party who abandons the claim can enter it into the record to show that it wasn't tried. Is -- do you want any party to be able to do that, as opposed to just the abandoning party?

MR. McMAINS: No. A party can only abandon his own claim. You can't have somebody else abandon your own claim. Most defendants would like that --

MR. LATTING: Yeah, I'd like to do --

MR. McMAINS: But not under --

CHAIRMAN SOULES: The court reporter can't make a record of this. Let's speak one at a time, please.

MS. SWEENEY: I agree with Rusty that defendants cannot abandon my claims for me. But if I have abandoned one and we try the case, we didn't ever try the contract, breach of contract part of the case or the fraud part of the case, then at some point can

any party under -- since this is a new process, can any party say, "Well, I want it on the record that that was never done," or is this a specific abandonment procedure that you're creating that would only vest in the abandoner?

MR. McMAINS: Well, this is in the rules now. This is Rule 165.

MS. SWEENEY: It is?

MR. McMAINS: And all it is is a preservation. It is an ability to stand up at trial and say, "I don't want to go forward on my gross negligence pleading."

PROFESSOR DORSANEO: Yeah, rather than filing a notice of voluntary dismissal.

MR. McMAINS: Right, that's what it is.

MS. SWEENEY: Okay. Forget I said anything. Thank you.

PROFESSOR DORSANEO: Rule 165 now is -- it's kind of -- it's really unclear as to how that is integrated into this, so we're trying to make it clearer; that if you do it by notice or if you're at a hearing or

trial you can just do it.

JUSTICE CORNELIUS: Bill, that omission sentence is very awkward and difficult to understand. It ought to read something like "Dismissal is not effective as to a party omitted from the pleadings," or "as to a party not listed in the pleadings."

PROFESSOR DORSANEO: I'll try to write a better sentence.

CHAIRMAN SOULES: Amended pleadings?

PROFESSOR DORSANEO: Now, the rest of it, (b) and (c), is the second unnumbered paragraph of Rule 162, I believe, verbatim, but put in a different order.

CHAIRMAN SOULES: Well, before we go there Bill, I don't think a party enters. Do you see that place? You say a party who abandons -- oh, may have that fact entered of record. Okay. Go ahead and go to (b).

PROFESSOR DORSANEO: (b), Avoidance of Prejudice, that title is put in there, but that is taken right from the beginning of the second paragraph of 162.

"Any dismissal pursuant to this rule does not prejudice the right of another" -- well, it says "an adverse party" in Rule 162. I changed it to "another." (Continuing) -- "the right of another party to be" -- adverse party, another party -- "to be heard on a pending claim for affirmative relief, excuse the payment of costs taxed by the clerk," and then this last part, "or authorize a party to prosecute an action without the joinder of a principal obligor, except as provided by statute," comes from 163, which at the tag end of it says, "but no such dismissal shall in any case be allowed as to a principal obligor except in the cases provided for by statute."

PROFESSOR ALBRIGHT: Isn't that the rule that we just took out?

PROFESSOR DORSANEO: Well, yeah. I'm not through with that either, those other rules we -- we didn't take -- those other rules we talked about that I need to justify eliminating, if we're going to eliminate them, which will be part of the next discussion of this.

So it's an amalgamation of the first part

of 162 with an embrace of some of Rule 163 which has already been put in paragraph (a), the rest of it.

The Effect on Sanctions' Motions is verbatim. "A dismissal under this rule has no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal as determined by the court. Any dismissal pursuant to this rule which terminates the case authorizes the clerk to tax court costs against the dismissing party unless otherwise ordered by the court."

Okay. So that (c) is verbatim; (b) is I think essentially verbatim; (a) is an amalgamation of 162 and 163. And finally, unless somebody thinks it needs to be in there, the language in 162 that says "Notice of the dismissal or nonsuit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order" is deleted on the thesis that any paper needs to be served under 21a. It's not necessary to say that, but Mr. Chairman, if you want me to put that back in, I will.

CHAIRMAN SOULES: Let me check it first.

MR. LATTING: I've got another question to raise about the effect on sanctions. I'm not sure that this is consistent with the rule we just passed on sanctions having to do with the effect of a dismissal on sanctions orders.

And it seems to me that what we, what the Committee as a whole did was to pass a rule that said that sanctions orders do not survive a dismissal -- no, what am I thinking of -- that a court cannot institute a sanctions order after a dismissal, a voluntary dismissal or nonsuit by a party that was not pending at the time. I know we addressed that issue.

And it seems to me that under Transamerican that there's a question that a sanctions order can be carried out after dismissal if it doesn't have to do with something that would be pertinent to that litigation. That is, for example, if a court made a monetary order for failing to come up with evidence in a case, a monetary fine, if you will, and the party who was the offending

party dismissed the case and it was over with, I'm not sure that that sanction can any longer apply.

PROFESSOR DORSANEO: Well, we need to know --

MR. LATTING: I'm not sure that this would agree with that.

PROFESSOR DORSANEO: We need to know from your subcommittee and from what this Committee has already done about this subject whether this needs to be here to begin with and what it needs to say. And we do need to integrate that, and I just had forgotten that there was any coverage of this at all in your subcommittee.

MR. LATTING: We addressed it, and it may be under Rule 13 under the new Rule 13 that we wrote, but it's something we've already passed and sent to the Court.

CHAIRMAN SOULES: Would you get that to Bill, Joe?

MR. LATTING: Yeah.

CHAIRMAN SOULES: Joe will send it over to you.

PROFESSOR DORSANEO: We need to

get it, because it's been rumored that Rule 13 has been rejected.

MR. LATTING: That's okay with me.

CHAIRMAN SOULES: Is that right, Rule 13, they're not going to pass Rule 13? Are they going to change it or what?

MR. PARSLEY: I didn't start that rumor.

PROFESSOR ALBRIGHT: The chief justice was passing that around at a CLE meeting the other day.

CHAIRMAN SOULES: What are they going to do?

MR. PARSLEY: They're going to defer to the legislature, as opposed to pass a rule that arguably conflicted with the legislative enactments.

CHAIRMAN SOULES: So they're going to repeal our Rule 13?

MR. PARSLEY: There's nothing in the book --

MR. McMAINS: It says "Rule 13, see legislature."

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: So we may need to --

MR. LATTING: Okay. Well, I'll get in touch with you.

CHAIRMAN SOULES: Now, in responding to your question about 21a service, 21 requires notice for a pleading, plea, motion or application to the court for an order. So if a nonsuit is one of those things, then it's covered by 21a anyway. If it's not through 21 and if it's not one of those 21 things, then it's not covered by Rule 21a.

PROFESSOR DORSANEO: All right. I'll take it back and try not to be too innovative.

Now, since yesterday -- question?

HON. SARAH DUNCAN: No, I was just going to ask if you've considered -- with that Effect on Sanctions Motions, did you consider putting effect on summary judgments?

PROFESSOR DORSANEO: No. What should we -- I would be happy to consider it.

HON. SARAH DUNCAN: Well, the

Hyundai case is saying that a summary judgment is not vitiated by a nonsuit.

MR. McMAINS: Well, there is a case that makes that point.

CHAIRMAN SOULES: That's the Hyundai case. That's the one she's talking about. Plaintiff who suffered an adverse summary judgment who then nonsuits, the summary judgment becomes a dismissal with prejudice, defers to a dismissal with prejudice.

MR. McMAINS: But I'm not sure that -- I mean, that's a case in which the entire claim, you know, against that party gets determined by summary judgment. I mean, I'm not sure if, for instance, you get a partial summary judgment, what is the effect of that?

CHAIRMAN SOULES: If you leave some --

MR. McMAINS: I mean, I have difficulty figuring out exactly how you write that in the rule.

MS. SWEENEY: But he's right. If you have a partial summary judgment granted

and you nonsuit the whole lawsuit when you come back the next year --

MR. McMAINS: Well, you can take the position that "I got the summary judgment and therefore I win."

MS. SWEENEY: Yeah. But that's not covered in the existing rule either.

CHAIRMAN SOULES: That's right. That's not covered in the existing rule.

MS. SWEENEY: I do have a covered-in-the-existing-rule question, though, Bill. The rule now provides two things. One is that when the nonsuit notice is issued or if you take a nonsuit, it shall be entered in the minutes right then. That's it. Nothing else happens. And also that it occurs without the necessity of a court order. You don't have to have an order granting your nonsuit. You just utter it. And then this -- that's all been dropped, and it is substantively important in my view.

The first paragraph of 162 is where I'm at.

PROFESSOR DORSANEO: I

understand. It's just the "docketed" is -- "entered into the minutes" is in there. The other is just case law. Maybe it does need to be spelled out.

MS. SWEENEY: Well, "without necessity of court order" is also in there.

PROFESSOR DORSANEO: Oh, okay.

MS. SWEENEY: The last paragraph -- the last sentence, the last line of the first paragraph of existing Rule 162.

PROFESSOR DORSANEO: Yes. "Without the necessity of court order," that does need to be in there. Do you think "entered in the minutes" needs to be in there?

PROFESSOR ALBRIGHT: Don't you really mean, isn't what you want is that it's effective immediately? You don't care whether it's entered in the minutes really.

MS. SWEENEY: That's true. It needs -- I guess that's what I'm saying. Alex is right. The drafting needs to embody existing procedure in law, which is that the nonsuit is effective upon notice and no court order is required. Nothing else is required.

PROFESSOR DORSANEO: I've got to add "without necessity of court order," add "immediately effective," and try to spell that out. I apparently exhausted myself in trying to make this match Rule 41 as revised and didn't get it all finished.

CHAIRMAN SOULES: Also shouldn't we just go ahead and spell out that it can be done by a document served or orally in open court?

MS. SWEENEY: Yeah. That would be nice.

CHAIRMAN SOULES: Because the old rule really contemplates something being filed, and that's not what's required always.

MS. SWEENEY: That's true.

CHAIRMAN SOULES: If it's done in open court on the record. Don Hunt.

MR. HUNT: Isn't there a Supreme Court case, and I know there's a court of appeals case, that says that when one files a voluntary nonsuit that eliminates part of a claim and makes a prior judgment final, that for purposes of counting you have to have an order signed? Now, aren't we about to build

in some problems here by keeping this?

There ought to be another way to address the problem that Paula raises without messing with either the case law or the timetable. We ought to be able to provide for some kind of a procedure by which a party, presumably a plaintiff, who wishes to take a nonsuit to be able to voluntarily do that without prejudice, and somehow to make it effective immediately and to start the appellate clock that requires some notice and requires some opportunity to be heard if there is prejudice involved.

I don't know how you would put all those together, Bill, but I think there is a problem there with respect to the appellate timetables.

CHAIRMAN SOULES: Well, really, Don, that's two different things.

MR. HUNT: I know it.

CHAIRMAN SOULES: What's at play as to the effective moment of the nonsuit is, if you have to wait for an order, the defendant may have already put on some testimony at which time the plaintiff's right to a nonsuit is gone. So it's got to be --

and the appellate case only -- it's restricted to what happens after a nonsuit that starts the appellate timetable running. It has nothing to do with when the nonsuit is effective, so what we're working with here is at the time that the nonsuit becomes effective as a nonsuit.

MR. HUNT: Well, I understand that.

CHAIRMAN SOULES: And then do you think we ought to put something in there about a written order starts the appellate timetable?

MR. HUNT: No. As long as he's drafting it, let's try to cure the problem. Let's try to make it a uniform rule, and if there's some sort of a way to include both --

PROFESSOR DORSANEO: I'll try to deal with that. I need to reject that. Let me -- oh, Judge Guittard.

HON. C. A. GUITTARD: Suppose the court makes a venue transfer order and then there's a nonsuit. I understand the law to be that that would govern any subsequent suit, and perhaps that ought to be included

here as an exception too.

PROFESSOR DORSANEO: Maybe.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I was also going to suggest, you know, we've got that one final judgment really means a one final judgment rule now, and we might, in line with what Don was saying, we might want to clarify that while a nonsuit may be effective when made, there are going to be some other considerations as to when you've got a final judgment under Rule 300(b).

PROFESSOR DORSANEO: Okay. And I think that's just about as much guidance as I can absorb on this. Carl.

MR. HAMILTON: One other thing, if we're going to continue the nomenclature of voluntarily dismissals and nonsuits, if they're different, let's explain why they're different in the rule.

PROFESSOR DORSANEO: Paula, maybe you can help me find that case so I can castigate it, repudiate it.

MS. SWEENEY: The bad case, the

case that shouldn't be there?

PROFESSOR DORSANEO: Yeah. And let me go back to the beginning of this rule book. I thought -- and this involves some guidance that I need, and I wanted to ask Sarah Duncan about Rule 33. Should Rule 33 be added to the first rule in this package, paragraph (a), Real Party in Interest? It got left out because I didn't think it was necessary and the committee didn't either. "Suits by or against a county or incorporated city, town or village shall be in its corporate name."

HON. SARAH DUNCAN: Why are you asking me?

PROFESSOR DORSANEO: Well, because you --

HON. SARAH DUNCAN: I asked the question yesterday, was it the Committee's intent or purpose to delete all these other rules, and was the Committee satisfied that all these other rules weren't needed? I don't know.

PROFESSOR DORSANEO: Okay. Well, I thought in representing, you know, the

City of San Antonio, that that experience over time would have had some -- it never occurred to me you would sue a city, you know, like Alamo City -- you know, Bill Dorsaneo vs. Alamo City. It didn't occur to me that I would use its common business -- does San Antonio have an assumed name?

HON. SARAH DUNCAN: I don't know why it would matter. I mean, if you sue the City of San Antonio and you serve the City of San Antonio, what does it really matter what you call the City of San Antonio?

PROFESSOR DORSANEO: Well, that's what I'm asking. That sentence would fit nicely in the Real Party in Interest rule, which would just say if you're suing a county or city, you have to sue it in its name, its real name, not just some common name, not some assumed name, assuming they had one.

CHAIRMAN SOULES: Does anybody have anything else that they want to bring before this Committee?

Our next meeting is when, Holly? It's July 19th from 8:30 to 5:30 and July the 20th from 8:00 until noon. I'm told that's the --

or is it September that we have a problem?

Somebody told me we'll have a problem with hotels. September is the UT/Notre Dame weekend, the same weekend we have our meeting, so you need to try to get your lodging arranged early.

Thank you very much. We are adjourned.

(MEETING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- - - - - - - - - - - - - - - - - - - - - - - -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 11, 1996, Saturday Session, and the same were thereafter reduced to computer transcription by me.

Charges for preparation of original transcript: $1,008.75.

Charged to: Soules + Wallace.

Given under my hand and seal of office on this the 28th day of May, 1996.

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