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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 19TH, 1996

(AFTERNOON 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 19th day of July, A.D. 1996, between the hours 1:00 o'clock p.m. and 5:30 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

JULY 19, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
David E. Keltner
Joseph Latting
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Ann T. Cochran
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
John H. Marks, Jr.
Hon. F. Scott McCown
Hon. David Peeples
David L. Perry
Anthony J. Sadberry

EX OFFICIO MEMBERS:

Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
O.C. Hamilton
David B. Jackson
Michael Prince
Mark Sales
Hon. Paul Heath Till
Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Hon. Nathan L. Hecht
W. Kenneth Law
Doris Lange

JULY 19, 1996
Afternoon Session

INDEX OF VOTES

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

CHAIRMAN SOULES: Richard, you're next on the agenda with Rules 15 to 165a. Why don't you orient us as to where you want us to be and then we'll get started. You can take the floor and we'll begin.

MR. ORSINGER: Okay. What we're going to discuss today, I believe, is the changes that the subcommittee has made to "Pleadings and Motions" and "Claims and Parties."

We also have some work in process on the rules that relate to the government officials like the clerks of the court and the parties who effect service of process and whatnot. That's in process right now, and I think what I'd like to do with the part I'm talking about, the issuance of citation and the service of citation and whatnot, Bonnie has been consolidating and rewriting those rules, and I'd like for her to speak maybe just two minutes about what we're doing.

And while I put a stack of those out over there, I think it's premature for you to look at them, unless you just have a burning desire to let your input be had. And if you do, then

we're happy to have it, but we're not going to discuss it today and it's just a preliminary thing, so let's take it up first.

Bonnie, can you for about two minutes just scope out what we're doing in terms of consolidating and moving those rules.

MS. WOLBRUECK: Basically what we have done is we have identified about 65 rules that have to do with duties and requirements of the clerk of the court, and these have to do with filing, the keeping of the record, the issuance of anything from citations to writs, notice requirements, requirements in transfers, change of venues, disposition of exhibits. We have added into this also rules regarding fax filing and electronic filing. So we're trying to combine all of these rules into a section called the Duties of the Clerk, so basically a review of all of these rules is being done.

We still have about 20 rules in regards to some of the issuance to continue to review, but that's basically what's being done, so that there will be a complete section on everything regarding a duty of the clerk or a

requirement by the clerk of the court.

MR. ORSINGER: Okay. So this is basically causing us to pull selected rules from different places and consolidate them all and put them at the end, because we think that the practitioner really shouldn't have to even browse through them really. And that's going to cause a reordering of the whole first alignment of rules, because they're not all in the same place and we're pulling them out from all over. And hopefully if we've reached out beyond 165a we're not going to get into too much trouble, but we can't -- they've just been stuck here and there, and that's part of the problem and that's part of what we're trying to solve.

Now, then we've also independently had two projects going parallel. One is in your handout here as Section 3 on Pleadings and Motions, and one is Section 4 on Claims and Parties. And while we do have a disposition chart --

CHAIRMAN SOULES: Is that all you've got with Bonnie?

MR. ORSINGER: That's all I've

got with Bonnie.

CHAIRMAN SOULES: Let me just throw one thing out for any sort of consideration: Some of the clerk stuff helps practitioners; like the extraordinary writs, there's sort of a step-by-step process. And when you need a writ of sequestration, you need it usually pretty fast, and this is a -- this steps a person, a stranger, through that procedure through the rules. The rule steps you through pretty much what you have to do. You can go file, get an order, go to the clerk, get a writ, go to the sheriff and get it served.

And it may be that there's some value in leaving some remnants or something in some of those rules, particularly the extraordinary writ rules, to give the practitioners some direction, if that can be done. That's all I have to say about that.

MS. WOLBRUECK: I think, Luke, that the subcommittee had the same concern and felt that possibly some of this information would be repeated in the regular rules, so that the practitioner had that information

also. So I'm not sure if that will be vital for this committee to make that decision, but it was real difficult referencing back and forth, you know, exactly how that should be done, but I certainly understand that.

And for practical reasons the clerk also needs that other information to know that all of this has to be done before the clerk issues this writ, and so the references will have to still be back and forth instead of repeating the entire content of the subject matter.

CHAIRMAN SOULES: Well, some of the rules are just scattered for no reason. They just somehow got salted and peppered in in different places and they don't need to be anywhere much better probably. Others may have a reason for being where they are. Just keep your eye out for that, if you don't mind, and then let us know what you think.

MR. ORSINGER: Well, I mean, one perfect example would be with depositions. We've actually taken the nuts and bolts part of what the clerk does with depositions and put that back in the clerk section while leaving the lawyer part of

depositions in the lawyer part, and so now it's treated in two different places, but it's two different people that are going to be looking, so why muck each of them up with the others stuff. That's an example of the kind of concept that we have.

CHAIRMAN SOULES: Okay. Next.

MR. ORSINGER: Now, the work we've been doing on "Pleadings and Motions" versus "Claims and Parties" is not strictly just responding to the letters in our agenda. We have a disposition chart and we've gone through it, but in reality what we've done with this broad body of rules in there between 15 and 165a is that we've looked at the skeleton or the spine of the Task Force Report on Rules and the recommendations they made about logical areas. And rules that relate to an area will migrate into that area, and that has caused us to define for ourselves what the difference is between, say, something that relates to pleadings and motions and something that relates to claims and parties. They are actually treated in separate subchapters now. And Bill can explain some of the logic behind

that, but we think it's more workable. They are kind of mixed in right now and we're segregating them out, and as a result of that process sometimes you have to debate whether something goes in the chapter on pleadings and motions, like a motion to sever a party, or whether that ought to go into a chapter on claims and parties.

Then you also have a set of rules relating to trial which are not part of our domain and some of these things that started out in our area might more appropriately fit over in that other area. And since we don't have any overall authority, ultimately we'll probably just come back with the recommendation that in particular instances a certain rule maybe ought to move out of the domain of our committee and into another locale.

And so kind of by default, because our committee seemed to have the broadest scope, even though it was just narrow in some respects, is that we're probably going to end up promulgating a sequence for the entire set of rules from Chapter 1 through Chapter 12, or

whatever it is, even though it's really not our prerogative to do that. But we ended up being the committee that had to deal with the Task Force on Rules and all their recommendations, and so we're just kind of doing that, and that's the process that you'll see going on here.

So my proposal, Luke, is that we go forward not with the agenda first, let's do that, the disposition table, let's do that last. We've already been through "Pleadings and Motions" twice. My recommendation would be to go through Claims and Parties, Section 4, unless you feel, Bill, that we ought to do Pleadings and Motions first. We could do Section 3, which is Pleadings and Motions, or Section 4, Claims and Parties. I feel like we've been already been through Pleadings and Motions several times, and a preference would be to go to Claims and Parties. But if you feel differently, we'll do the reverse.

PROFESSOR DORSANEO: I think we ought to do Claims and Parties because we went through a good bit of that at the last

Advisory Committee meeting and then there would be some continuity in going back to it and finishing it up, if we can.

MR. ORSINGER: Okay. Let's do it. We're talking now about the handout, Section 4.

PROFESSOR DORSANEO: It's the redraft with the date at the top of July 15th, 1996. Now, to give you kind of a tiny bit more information so you can get your bearings, as I understand it, and Lee Parsley can correct me if I'm wrong, in terms of what the Court is thinking about, the promulgation of new rules will involve the Appellate Rules perhaps, if not probably, together with the rules presented by Don Hunt's subcommittee on judgments and postjudgment motions, because those subjects, you know, do go together and it's kind of a package.

As far as the Appellate Rules are concerned, we have received back, how many, 49 rules from Bryan Garner, and last week we went over, during the day that we spent on the redraft, six of them. We plan on going a little more rapidly through the rest of them,

but we only have 49 to start with and we have a promise that the rest will be forthcoming quickly, but this takes longer than you would think. But that's, you know, one package and kind of where that stands.

The Discovery Rules that we've gone through also may be part of a package involving pleadings and motions and perhaps claims and parties, because when you start talking about discovery you start talking about motions, pleadings and motions, and then when you talk about parties you think about pretrial and then you get to be thinking about discovery and deadlines. So this may be part of a second package or group of rules that would logically get promulgated together or maybe they would, and that's kind of where things stand in terms of groupings, except I will finish in that respect by saying this: If we get through pleadings and motions, claims and parties, and marry that up to discovery, we will have done basically a very large number of the rules. If we get the service and clerks material finished, essentially we will have covered up through

Rule 165a from one. That takes us to the Discovery Rules up through 215, and we have a few little rules in between, but we pretty much quickly get to the Jury Charge Rules and then we get to the Judgment Rules and the whole thing is done. It's a tedious process, but these bits and pieces are kind of coming together into an overall structure.

The overall structure the task force recommended to be the one or essentially the one contained in the Federal Rules with the book beginning with a short section on General Rules; a section on -- Section 2 on service, commencement of suit, service of process and other papers; Section 3, pleadings and motions; Section 4, claims and parties; Section 5, discovery; leading up to Section 6, trial, and that's kind of where we stand in the overall picture. All right? So it's possible we're further along in some respects than you might have thought.

It's also probable that if we follow the same process that we followed with the Appellate Rules that this will take a long time before we get to the end.

So Parties --

CHAIRMAN SOULES: Well, you're not going to say it, but I will for you; that our prose man apparently knows a lot about prose but not very much about appellate procedure, and so when the prose comes back, the appellate procedures sometimes are in disarray or at least not intact.

PROFESSOR DORSANEO: Well, he wasn't part of our intense and lengthy discussions during the preceding period and that makes it about double the work for the rest of us. We thought we were finished, and we were starting over.

CHAIRMAN SOULES: Prosaically.

MR. ORSINGER: Now, let's see, we -- it is more readable. The first seven rules or six rules are more readable, but we found -- how many inadvertent substantive changes?

PROFESSOR DORSANEO: Two big ones.

MR. ORSINGER: Two large ones, but some small ones too.

MR. HUNT: But it read well.

PROFESSOR DORSANEO: It will be better going through this process, but it's disappointing that it's such a tedious process.

MR. ORSINGER: And another problem is that every single rule is being rewritten by LawProse, whereas we only debated the rules that we wanted to change, so some of the rules we're looking at in the subcommittee we've not ever looked at even in the last four years. And so when the words get changed, all of a sudden you say, "Wait a minute, I didn't realize that about that," now that you see different language. And so we've actually been having some arguments over some stuff that we've never even discussed.

PROFESSOR DORSANEO: All right. On to Claims and Parties, since we went over that before. And the beginning part goes pretty quickly. I made changes corresponding to what was considered and voted on last time. Rules 30 and 31 do not need, I believe, to be discussed, because the changes were voted on and the specific language was voted on last time.

Rule 32, Permissive Joinder of Parties, is where I will start. The first recommendation that we have is that in the internal order, which in terms of claims and parties is essentially the internal order of the Federal Rules of Civil Procedure, not merely the overall order of sections. We strayed from our idea to stick with the same order that the Federal Rules followed because we thought it's better to talk about permissive joinder of parties before talking about joinder of persons needed for just adjudication, so we reversed that order in this draft. It's not a big deal, but it just seemed more logical to us.

The last time that we met we considered in this permissive joinder of parties rules the elimination of Rule 37 and voted to eliminate it. Judge Brister mentioned that there was a part of Rule 37, the current rules, not what you're looking at, that trial judges particularly like where it ends "but not at a time" -- this is when we're talking about joinder of additional parties -- "but not at a time nor in a manner to unreasonably

delay the trial of the case." And the committee voted to add that back in.

I at the meeting last time was concerned about where it should go. Our subcommittee considered that point at some length last week or earlier this week, I forget which subcommittee met on what date, and the last sentence of 32(a) is certainly a good place for this idea to be expressed. And as redrafted the sentence reads, "Permissive joinder of additional parties in accordance with this rule may be disallowed by the court on the motion of any party if joinder will unduly delay or prejudice the adjudication of the rights of another party."

Now, the language is not the same as the language that appears in current Rule 37. The language for the most part was taken from very similar language in terms of the idea being expressed that is contained in the Federal Rules of Civil Procedure involving permissive intervention, or rather, I should say, involving intervention altogether, Federal Rule of Civil Procedure 24.

The committee believed that the language

"will unduly delay or prejudice the adjudication of the rights of another party" was expressing the entire idea better than "at a time nor in a manner to unreasonably delay the trial," because we're talking about adjudications and not necessarily about conventional trials and perhaps giving a little more opportunity to disallow if there would be prejudice to the rights of another party.

Now, the other thing that's added is "on the motion of any party," which was passed by, I believe, a divided vote of the subcommittee as being language that should be in there as a limitation on the court doing it on its own initiative.

I'm going to finish up pointing that out by saying that we decided not to add the same type of sentence in Rule 33, Joinder of Persons Needed for Just Adjudication, primarily because paragraph (b) of proposed Rule 33 does the same thing, quoting in part, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it," et cetera, seems

to provide Judge Brister with what he would need if the joinder of a person for just adjudication was not feasible in line with paragraph (a). And so that's, you know, the first thing.

That's kind of, Mr. Chairman, what was already voted on, but it's different from what was already voted on and it probably ought to be voted on again.

CHAIRMAN SOULES: That's 32 and 33?

PROFESSOR DORSANEO: Yes, putting the sentence in 32. And that really is all we need to vote on right now, because I almost need to talk about intervention before the thought is complete.

CHAIRMAN SOULES: Okay. Any opposition to that addition to Rule 32? Judge Brister.

HON. SCOTT A. BRISTER: Yeah. The motion of any party. Ever since Dickens -- somebody give me the name of the case where the two lawyers were milking --

MR. ORSINGER: Jarndyce.

HON. SCOTT A. BRISTER: There

are really cases where both attorneys want the case to last forever, and I am the only one that can stop it. Second, the Rules of Judicial Administration, which don't apply to lawyers, they apply to the judges, give me as the guideline that I'm supposed to dispose of cases in a certain amount of time. Now, we can argue whether that's a good enough reason or not, but that's my duty, not your duty. And there literally will be cases which will stay forever which I cannot make them go away if this is limited to motion by party, because if both attorneys want a continuance, add another party, six months from now they want another continuance, add another party, as long as nobody objects, I've got to add them, give them 45 days' notice of the trial setting, enough time to do discovery, et cetera. And I would strongly oppose limiting -- you know, as long as nobody objects, you can just add parties whenever you want for as long as you want, put it off as long as you want.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: The case does,

however, ultimately belongs to the litigants, and if all of the parties believe that another party should be added and there's no objection, guidelines aside, it would seem that the parties ought to be able to control their destiny, which is what the rule permits. If everybody agrees that that's how they want to conduct the litigation, where is the problem?

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Well, I disagree, Paula. I think the system belongs to the people. We no longer can afford the notion that attorneys in a given case have some kind of proprietary right to judges.

CHAIRMAN SOULES: Speak up, Steve. I'm sorry, we can't hear.

MR. SUSMAN: They don't have any proprietary right to judges or space at the courthouse. It belongs to the people and to other litigants who have equally as pressing problems.

And if two lawyers -- I mean, in the situation that Scott poses, and I think it does happen periodically, both lawyers will

view the case as kind of a career annuity and are looking just for opportunities to join. They never want to go to trial, they just want to keep on doing discovery. Well, maybe that won't be too possible now, but they want the case bigger and bigger and bigger. I just think the judge ought to be able to say no to certain things.

I mean, even in the Discovery Rules there are certain things which cannot be, not many, but a few things that the judge can say, "No. This impinges upon my docket and my time and how I use the courtroom." And you know, I think there is this problem of not ever being able to get the case ready for trial, getting on that old list, and I think it's a good point. So I don't know what the harm would be to say that, you know, the court on its own motion can disallow a permissive joinder. That's all.

MS. SWEENEY: The harm --

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: -- if I may, comes if -- if you have a situation where the

parties -- I'm not talking about lawyers wanting a career, I'm talking about the parties, the people who are paying those annuity bills. If the parties feel that they can't get a fair adjudication, and all parties agree, without X being at the courthouse, then it's a real shame if it causes an inconvenience to the schedule, but I don't think we can let schedule inconvenience run rupshot over the parties' rights.

And if -- I'm not talking about lawyers pulling a fast one on their clients, and I don't think that's what the rule contemplates either. I'm talking about the issue where the actual litigants, the plaintiff, the defendant, the intervenor, everybody who is there agrees we need someone else in here for this to be fair and just. Then, you know, whether it's outside the 18-month guideline or whether there's other folks who want to be there, I think it's wrong to say, well, it's -- we're just going to at some point allow a judge to decide that she has had enough, end of story, you can't add anyone else, we're going to try you whether you think

you've got everyone here you need or not.

I have recognized the countervailing considerations, but fundamental fairness and due process seems to say that we have to allow parties, especially when they all agree, to have a full slate.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: We're way down the road past there, I think. I mean, we have court mandated, law mandated reports we have to go submit that are public records of how old my cases are. And we're still elected, and that makes a difference, and that is the number one thing thrown in the teeth, how many old cases have you got lying around. What does this -- this will mean no docket control orders about joining parties.

MS. SWEENEY: Right.

HON. SCOTT A. BRISTER: This will wipe that out, which is a foundation. Every judge in Harris County will tell you the main problem in delaying trial is people add a party a year -- they want to add a party a year, a year and a half, two years into the

litigation, which means putting off the trial for another year, which we don't have that many discretionary times for a trial with our other toxic tort kinds of cases.

This -- if you want to go to a system where the judge cannot control the docket, this will do it, but I think that decision has been made a long time ago and the Court is not interested, in anything I've read recently, in going back to that kind of a system.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Judge Brister, the situation that I have seen develop with that docket control system now, where you've got the time limit on adding additional parties, is what happens if somebody says, okay, they -- the statute obviously hasn't run, so you're assuming that they file a new lawsuit. And I've contemplated that, contemplated or I maybe even have done that recently, where you've got a situation where for whatever reason there's a deadline in that case for joining parties, you're beyond it, you've got -- you believe you need to bring that party in, so now you've got another lawsuit.

How do those -- how do you reconcile the need for -- I understand your desire to maintain control over your court and your docket, but with the multiplicity of lawsuits, then, that the concept of that then engenders?

HON. SCOTT A. BRISTER: It depends on the facts of the case. I mean, the language, current rule, not to unreasonably delay, if this was some -- if we sued the wrong corporate name but it's going to be the same insurance company defending the claim and everything, you just add them late because it's no big deal. It's not going to delay anything. The same discovery is going to be done and will apply.

But if this is adding the product manufacturer on what had been a car wreck case and we're ready to try the car wreck case, I'm inclined to say try the car wreck case. If you want to do a product liability, that's an entirely different deal. Do it in a different suit with different parties. So it depends on the circumstances.

But this rule means if nobody says anything I cannot do anything about it.

That's the -- this is not the direction we're headed in these days with putting control of how long a litigation lasts back into the lawyers' hands.

MR. GOLD: I just wanted to ask one other thing, since I was out. Was there a discussion about how this rule interfaces with the new joint and several rule?

MR. ORSINGER: No.

MR. GOLD: Well, I'm just throwing that out. I don't know whether it impacts it or not, you know, these things about being able to add parties and extending the statute and bringing people in. It seems to me like that may cause some problems with this rule as well.

PROFESSOR DORSANEO: No, it won't.

MR. GOLD: It won't?

MS. SWEENEY: How come?

MR. GOLD: Who said that? Oh, okay.

PROFESSOR DORSANEO: Because those problems, if they come up, will come up later.

MR. GOLD: Okay.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: I don't know that I understood these proposed changes to really adversely affect the judge's ability to enter a docket control order.

CHAIRMAN SOULES: They don't.

MR. McMAINS: I mean, the suggestion by Judge Brister is that somehow because of the provisions made to this rule or the requirement of the party that you're going against what you can do under the docket control rule. And I know the docket control rule took precedence over kind of everything in terms of you've got the power to do these things, put this scheduling order in place and so on.

MR. KELTNER: Rusty, they do, and we thought they did when we drafted the rule. So in other words, the docket control order, if it is entered under the pretrial rule, would have precedence over this rule.

HON. SCOTT A. BRISTER: That's news to lots of attorneys, because I have to cite them, when they do this, to Rule 37.

They think they've got an absolute right to add somebody that we just discovered and it's a denial of their rights not to add them, and I point to Rule 37 and I say no, not if it delays the trial. If you extend it for a month or two, you know, that's a scheduling matter that we can negotiate, and I look at how hard you try to find them and stuff like this. But this doesn't say "except for docket control order," this says --

MR. KELTNER: Well, I think the docket control order rule that we are thinking of --

MR. McMAINS: -- is our rule.

MR. KELTNER: -- yeah, is the rule that did say that that rule says that it takes precedence over the other rule.

CHAIRMAN SOULES: Well, we really ought to -- let's focus in on what Judge Brister has raised. We only have one real issue over the rule and that is whether or not the denial of joinder can be done on the judge's own initiative.

HON. SCOTT A. BRISTER: Sua sponte.

CHAIRMAN SOULES: And if anyone has anything else to say about that, anything new, let's hear it and then vote.

Does anyone have anything else?

Okay. Those who -- let's see how to state the question.

PROFESSOR DORSANEO: Let's vote on whether we should keep in or take out "on the motion of any party."

CHAIRMAN SOULES: Okay. "On the motion of any party," those in favor of taking it out so that the judge would have the initiative to do so as well as the parties, show by hands. 12.

Those who favor leaving it in show by hands. One more time. Eight. Okay. So 12 to eight it comes out.

PROFESSOR DORSANEO: Now, I would say that judges should not do that, because there are these other mechanisms, you know. You don't have to delay the trial.

MR. KELTNER: Right.

CHAIRMAN SOULES: How do you add a party 30 days ahead of trial and not delay the trial? Do you mean severance?

PROFESSOR DORSANEO: It's just a permissive joinder situation. You don't need to try that party's claims or any claims against that party in the same trial. You can just do it in another trial.

CHAIRMAN SOULES: Join them and sever them?

PROFESSOR DORSANEO: Just try them separately. Just administer it separately.

CHAIRMAN SOULES: Okay. We've voted. What's next, Bill?

PROFESSOR DORSANEO: All right. The next thing really is whether this same sentence ought to be included in the compulsory joinder rule, proposed Rule 33. It is not in the federal compulsory joinder rule. It's not in our compulsory joinder rule. It is the case that Rule 37 talks about in its first part "additional parties necessary or proper may be brought in, but not at a time nor in a manner to unreasonably delay the trial of the case."

When I went back after the last committee meeting, I redrafted what is now draft Rule 33

adding the same idea into the compulsory joinder rule. And after discussing it for about three hours at the committee level, the committee decided that it was a good concept when we're talking about a proper party, but not as good a concept when we're talking about somebody who will be prejudiced as a practical matter or who is otherwise needed for just adjudication,; that it may be under those circumstances, you know, appropriate to join them even if that will involve some delay.

A companion idea, to show you how quickly we're moving along here, is in the intervention rule. Everything between Rule 33, Joinder of Persons Needed for Just Adjudication, and proposed Rule 38, the intervention rule on Page 10, having already been considered by the committee last time -- I've kind of lost -- I should ask you to read that back. I've lost the thread of that. (Continuing) -- is --

MR. ORSINGER: This has to do with striking for undue delay.

PROFESSOR DORSANEO: -- is finished.

The same idea is over here in Intervention of Right or Permissive Intervention. What the committee basically decided is that the concept of disallowance should be in the proper party rule, not in the compulsory joinder rule, but that in the intervention rule the idea would apply to intervention of right and permissive intervention, because the sentence that talks about striking an intervention and what the court may consider is in (c), Procedure. That would apply to both intervention of right and permissive intervention.

So if you kind of get our thinking, we were thinking that if it's proper parties, permissive joinder, the court has a lot to say about it, if there would be delay; if it's intervention, in deciding whether to strike an intervention, on motion of any party, which is what our intervention rule says now, that the court can consider undue delay or prejudice both when it's intervention of right and when it's permissive intervention; but in the situation where it's compulsory joinder, that that idea ought not to be expressed.

So the two things -- the thing to vote on right now is whether a similar sentence or concept should or should not be in the compulsory joinder rule similar to the last sentence of paragraph (a) of Rule 32. If we put it in, and I drafted it in, I would propose to put it in paragraph (a) as 2(a), or (b) and (c) with it being in (c). Okay? So that's really the vote, and that's almost a mystical kind of thing, frankly.

CHAIRMAN SOULES: Well, there are other --

MR. GOLD: I felt mystified.

CHAIRMAN SOULES: There are other standards for not allowing joinder of a person needed for just adjudication already built into this Rule 33.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: It's a different standard.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: And you're saying there should be a different standard for this rule?

PROFESSOR DORSANEO: Well,

there's a different standard for -- but there -- it's a strict -- there are fewer people who are in this kind of situation, and their rights are such that it probably ought not to be expressed very forthrightly that the judge could just keep them out, even though they will be prejudiced and the litigation will be screwed up.

CHAIRMAN SOULES: Well, this imposes a stricter standard on the judge in cutting them out. That's the way it was drafted.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Does anyone disagree with that?

HON. SCOTT A. BRISTER: Well, I think that's probably all right. I mean, this is somebody -- this is when you would grant a continuance and later trial anyway.

PROFESSOR DORSANEO: Yes.

HON. SCOTT A. BRISTER: So yeah, I think that's all right.

CHAIRMAN SOULES: Okay. So no disagreement, then, with that concept in Rule 33.

PROFESSOR DORSANEO: So then let's go over to the intervention rule.

CHAIRMAN SOULES: Did you say you had already drafted that discretionary piece into 33?

PROFESSOR DORSANEO: I drafted it, and then at the committee meeting when we considered it, it was voted down, so I took it out.

CHAIRMAN SOULES: It's gone from here?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: So 33 as shown here is okay.

PROFESSOR DORSANEO: So please turn to Page 10, Intervention. At the last meeting we decided to stick with our motion to strike procedure, and it was voted that I add --

CHAIRMAN SOULES: Sever?

PROFESSOR DORSANEO: Huh?

MR. ORSINGER: I don't think the full committee voted to sever. I think, as I read the transcript, Rusty made an issue about severance versus striking on the grounds

that a strike might let someone's limitations lapse, and we debated that for a long time on our subcommittee and decided to go with strike. For what reason?

CHAIRMAN SOULES: Why?

MR. ORSINGER: I'm trying to remember the discussion.

MR. KELTNER: It was a really fine reason.

HON. SARAH DUNCAN: I thought we voted to sever.

CHAIRMAN SOULES: We voted in this committee to substitute severance for striking so that the case would not suffer any limitations.

PROFESSOR DORSANEO: And at our committee meeting the idea was expressed as well that if it's severed, then there will be this other case involving --

CHAIRMAN SOULES: Which is why we voted for severance, so that there would be a case and not a limitations question.

PROFESSOR CARLSON: No. The discussion at the subcommittee was what if the intervention is not proper maybe due to a lack

of standing --

MR. ORSINGER: -- or a venue problem.

PROFESSOR CARLSON: -- or a venue problem, and then severance wouldn't be appropriate in that situation and would dismiss --

PROFESSOR DORSANEO: No, it's essentially we concluded that starting this other case may cause -- may be a good idea, but it may, as often as not, be a bad idea. And you know, it could say "stricken or severed," as far as I'm concerned, you know, because sometimes it will be sensible to strike it; sometimes sever it.

MR. McMAINS: Well, the problem is, though, that if you intervene, whether you're entitled to, it's permissive or whatever, and then somebody waits until the limitations run or maybe you've been in the lawsuit for a year and a half and then they decide to move and strike, and this -- and you basically have a provision in here which says this is what happens, is you move to strike it. There's nothing in here that requires any

timely motion to strike. It just -- there's no time limitations, like there's no within the first 30 days.

I mean, it's one thing if somebody wants to take their chances when they're that late in the game. But it's another thing to just say that we're going to say that your only remedy is if somebody moves to strike the intervention, then that's it. It's gone. It doesn't exist anymore.

PROFESSOR DORSANEO: Well, certainly the first issue is do we really want to put "severed" rather than "stricken" or leave it up to the court. Obviously, if you say to -- I think if you intervened and you're in that situation and you told the judge, "Well, Judge, if you'll just strike me, then my case is over," and you've just -- because my limitations clock has run. And most judges will then sever it, one would think, if they think you have any kind of a case, but they might not if they thought your case was baloney.

CHAIRMAN SOULES: We voted to sever. Why did we go back to strike? The

Committe voted to use the word "sever."

PROFESSOR DORSANEO: Well, Richard -- we read it, and we weren't exactly sure that it was actually voted on.

MR. ORSINGER: I didn't think it was a vote, Luke. Now, I don't have the wording in front of me, but we looked at it in the subcommittee, and I identified it as being a suggestion by Rusty, which Bill said that we would take it back to subcommittee. Now, I may stand corrected, in which event we don't have to redebate it.

PROFESSOR DORSANEO: We're happy to put "severed" in here.

CHAIRMAN SOULES: If the subcommittee in the interim has unearthed reasons why "severance" won't work in some cases --

PROFESSOR DORSANEO: The subcommittee was divided on this too, quite frankly.

MR. ORSINGER: I mean, I was --

CHAIRMAN SOULES: And if --

MR. ORSINGER: Personally I'm in favor of severance. But the arguments

were, some of the procedural difficulties we have with venue and some other things when you order a severance rather than striking, it ended up being striking. We even discussed putting both in there and letting the court decide which was appropriate, but I'm a little concerned about the limitations issue.

MR. KELTNER: Yeah. Here was the discussion: One of the things that we discussed is, let's assume that the reason that the intervention was no good was a lack of standing, among other things, so you sever. Well, then you've severed into another cause of action, and then once again you're going to have to have another motion in the severed cause of action to accomplish what you really should have accomplished in the intervention motion. But the way to do that, of course, is to file the motion to sever. So in other words, you duplicate it. You duplicate the process time and time again. The same would be true on venue and the like.

I think all of us were sensitive to what Rusty said, because you're right, a striking, if it did have -- especially under the

circumstances that Rusty says, it's been on file for a year, now the statute has run, is a problem.

I don't think we mind going back to sever, but if we do go back to sever, realize that we're going to duplicate some work in a significant number of intervention cases. And it might be that we give the judge a choice.

HON. SCOTT A. BRISTER: And duplicate all the paperwork. Severance in a big case is an expensive and time consuming proposition copying all that stuff twice.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: David, didn't we discuss also the problem of potentially forum shopping by jumping into a case knowing that you would be severed and now you are in the court that you --

MR. KELTNER: Yeah. In fact, you brought that up, and I thought that was a good point. The point would be that what would happen is, if you had a colorable claim and you had the right judge, you would move to intervene. Well, you can't properly

intervene, but you're severed now so you're in that judge's court --

PROFESSOR DORSANEO: -- anyway.

MR. KELTNER: And that -- quite frankly, that's happened in some mass tort or litigation stuff. But let's remember the big injustice here would be to strike something causing a statute of limitations to run, so that we've got to cure that or this is an unjust rule. So I think the question has got to be either do we do "strike or sever" under the appropriate circumstances, or do we just leave it "sever" and deal with the problem.

CHAIRMAN SOULES: Well, there are the two of them. No one can intervene unless they can establish independent venue, right?

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: Under Texas Practice -- Civil Practice and Remedies.

MR. ORSINGER: Right.

PROFESSOR DORSANEO: All right.

CHAIRMAN SOULES: If somebody doesn't want to use that, well, they can use that as a -- a defendant can use that in order

to accomplish what in effect is a severance, because once that intervention is shown to have no venue in the present county, that goes to another county. That piece of it goes to -- transfers to another county. It effectuates a severance.

If the defendant -- and we don't have anything in the Rules of Civil Procedure that say that. That's over here in the Practice and Remedies Code.

MR. KELTNER: That's a good point.

CHAIRMAN SOULES: If the defendant doesn't choose to use that tool and files a motion to sever without identifying the venue problem, they're just like everybody else that hasn't identified a venue problem. They've got themselves stuck where they are.

MR. KELTNER: You would have a different result with standing, but still, I --

CHAIRMAN SOULES: Well, but standing, that's pretty quick. That's not a complicated thing. I realize that what Judge Brister is talking about, though, that is, how

much of a case has to be duplicated and transferred --

HON. SCOTT A. BRISTER: However much the attorneys ask for.

CHAIRMAN SOULES: -- is how much the attorneys ask for. And it can't --

MR. ORSINGER: Well, that's something that we can draft.

CHAIRMAN SOULES: Pardon?

MR. ORSINGER: That's something that we can draft. In other words, I think we even have some language in Bonnie's rules about copying the contents and moving them to another. We can change that. If that helps this problem, we can change how much you have to copy.

CHAIRMAN SOULES: I'm not sure we even need to speak to it, because of just what Judge Brister said. It's how much the lawyers say.

MR. ORSINGER: Well, I'm not sure that that's right. I think it's more likely that the entire file will be copied and put over in the other folder.

MR. KELTNER: Well, I certainly

think the sense of the committee is to take "strike" out at the very least.

CHAIRMAN SOULES: It doesn't make any -- the plaintiff's original petition may or may not have anything to do with cause B. If it doesn't, it doesn't need to be copied and put into cause B in a severance situation.

MR. ORSINGER: What vehicle tells the clerk what records to copy?

CHAIRMAN SOULES: There is none. There's none now, I mean, unless Bonnie wants to draft one. We don't have one now.

MS. WOLBRUECK: No, we don't.

MR. ORSINGER: What is the convention, in your experience, Bonnie, what is the convention when there's a severance? What does the clerk do?

MS. WOLBRUECK: Either of two things, either as directed in the order or else anything pertaining to those parties particularly.

MR. ORSINGER: Well, that's going to be everything in the file.

MS. WOLBRUECK: It could be.

It could be. It may not be. Those particular parties may have been brought in later in the file.

CHAIRMAN SOULES: If I intervene against you, I've got the right to your interrogatory answers, but I can't use anybody else's interrogatory answers because that's the interrogatory answers of another party. I can use yours against you, but now it's just me against you. These other people are not in our case. I mean, the right thing to do is the one we do and have done, is you go through the docket sheet or your own index and check off what it is that needs to go and give to the clerk, just the same as you designate the transcript, you designate the papers to be copied and transferred.

MR. ORSINGER: Do you think we should write a procedure to that effect?

CHAIRMAN SOULES: I don't think so. I mean, I don't think it's necessary, frankly. But I'm not the one to give the answers. The committee here should be doing that. Judge Brister.

HON. SCOTT A. BRISTER: I would

move it should be "strike or sever," because there's just too many circumstances that might apply either way. For instance, I mean, one of our big things for the district clerk and counties is the case where you have 10,000 lawsuits filed as an intervention and you get one filing fee. And that's -- you know, that's the kind of thing that drives county commissioners crazy. So I can sever those, and do what? Now I have 10,000 lawsuits that got filed, 9,999 of them without paying a fee. There are too many abuses if the only thing is sever. I agree, I think it would be an abuse of discretion if the statutes run. The only problem is, I don't think it should be tried with this first case. Just dismiss it and let -- and throw you out of court. I'm not sure that that would be the result in any event, but I agree that would be a problem. But there's going to be plenty of circumstances where that ain't a problem, and what ought to be done to you is struck and do it the right way. Do it like everybody else does, just file a separate suit.

CHAIRMAN SOULES: What is

strike, stricken or struck?

HON. SCOTT A. BRISTER: It's the same as dismissal.

MR. KELTNER: And we came to the same conclusion.

CHAIRMAN SOULES: Then we shouldn't even have those words in there. Everything just ought to be "dismissed." Then you've got 165a to get back in. Whether you do a strike or not, I don't know. I mean, I just -- if we say severed or stricken, Judge, and you strike and limitations has run, then I'm in an abuse of discretion appeal and I am in deep trouble with that standard to try to overcome that standard.

If it says sever, then I know I'm going to be all right, because my case is still going to be on file. I may not -- I may get bumped on standing, and I may get bumped on venue. There may be a lot of things that can happen.

MR. KELTNER: It's safer --

HON. SCOTT A. BRISTER: Nothing personal, but --

CHAIRMAN SOULES: I don't know,

I'm very sensitive to this. Maybe I shouldn't be.

HON. SCOTT A. BRISTER: How do we -- you know, there are fee rules that can be run around. There are forum shopping rules that can be run around, and the way to do it is intervention. And if the only thing that can be done is a severance, then you're just saying go ahead, forum shop all the want, save all the money you want. That ain't right.

CHAIRMAN SOULES: The Legislature has tried to cure the forum shopping. I don't know if they've got it done or not, but it looks like they've done something towards that way.

The fee aspect is --

HON. SCOTT A. BRISTER: Some people don't think that.

CHAIRMAN SOULES: It's cheaper to intervene than it is to file a new lawsuit, but there's still a fee for an intervention.

MS. WOLBRUECK: $15.

CHAIRMAN SOULES: And how much to file a lawsuit?

MS. WOLBRUECK: It depends on

which county.

HON. SCOTT A. BRISTER: 150.

MS. WOLBRUECK: It's 150.

PROFESSOR DORSANEO: Yeah, with the citation and all that.

MR. ORSINGER: I think you eliminate service too when you intervene. You don't have service charges. You just send it certified.

CHAIRMAN SOULES: First class mail.

MR. ORSINGER: Yeah, first class mail.

CHAIRMAN SOULES: Or certified mail.

MR. ORSINGER: It's going to be first class after these new rules, we think.

CHAIRMAN SOULES: Well, I've said enough.

MR. KELTNER: Well, what Scott I think has suggested is that it be stricken or severed, or maybe using the term "dismissed" might be better, dismissed or severed. The other situation might be to use "severed" and then put a time period upon

which the motion to sever has got to be filed.

That does -- well, Bill, here is the reason for that. That takes away part of Bonnie's problem in that the file isn't going to be -- we don't have Rusty's problem where you wait a year and you're duplicating the entire file. It's got to be filed within a particular period of time. And it seems to me that you know everything to sever out of an intervention within a pretty tight time period.

CHAIRMAN SOULES: Judge Brister, on your -- you get a lawsuit filed and then you have got 99 plaintiffs -- that's 99 parties intervene. Why don't you sever the 99 parties together into cause B?

HON. SCOTT A. BRISTER: Well, it depends on -- you know, these days, say, you have 10 people that have gotten fired from Exxon. Totally unrelated. Why should they get to because somebody does a volume business? 10 car wrecks that have nothing to do with each other, so they -- you know, there's 10 car wrecks that happened all over

town. The plaintiff's attorney does a volume business. You're getting sued in one case. You sever them out into 10 cases, no filing fee. I mean, that's crazy.

CHAIRMAN SOULES: Nine of them don't have to pay a filing fee if he files them altogether.

HON. SCOTT A. BRISTER: Yeah. But I strike them. I say, "These car wrecks are different car wrecks. They have nothing to do with each other. Go downstairs and file a new lawsuit for each one."

You're saying take that option away, and all we can do is sever them and all of a sudden -- or make it 100 car wrecks, you know. Somebody that advertises gets a thousand car wrecks, and all of a sudden all car wrecks are in Judge X's court from now on in Harris County through a balloon intervention which has been severed into 10,000 car wreck cases. That's going to be crazy.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I don't think Judge Brister has much to worry about in terms

of plaintiffs shopping for him. I do think it is a valid point, though. I mean, we're not talking about forum shopping as we are judge shopping, that is. But I don't see how you can't deal with it in a simple -- why can't the judge -- why don't we just say the judge says that that's an equivalent to a separately filed lawsuit. It goes back to the clerk's office, you pay a regular filing fee, and it gets assigned, so you don't have the statute of limitations problem because you haven't stricken it and you haven't dismissed it. It's still filed. It just goes back as if the litigant filed the case as an original case, which a litigant could do at any time they wanted to anyway, right? So why don't we just handle it that way.

HON. SCOTT A. BRISTER: Or another way around it is the Civil Practice and Remedies Code, you know. You've got 60 days if it's dismissed for lack of jurisdiction or refiled and the statute is extended. If you make this a dismissal for lack of jurisdiction of the intervention, 16064 of the Civil Practice and Remedies says

after it's dismissed you've got 60 days to refile it in the right court.

CHAIRMAN SOULES: But you have jurisdiction over the intervention, subject matter and personal jurisdiction.

HON. SCOTT A. BRISTER: I understand that, but --

PROFESSOR DORSANEO: If we did "severed or stricken" and then changed the last sentence so you take into account not only the rights of the other parties but the rights of the intervenor, why wouldn't that be enough?

MR. McMAINS: It's still discretionary.

PROFESSOR DORSANEO: Well, you take out --

MR. McMAINS: Because basically you still have a situation where what's your relief if the judge decides, regardless of what the circumstances are, I'm going to strike it, so you're gone. The limitations have run. What's your complaint on appeal? That he abused his discretion by choosing one versus another?

PROFESSOR DORSANEO: Without considering your --

MR. McMAINS: -- your limitations issue?

PROFESSOR DORSANEO: -- your limitations problems.

MR. McMAINS: There's no court in this state that will reverse a judge on that.

PROFESSOR DORSANEO: There are some that they wouldn't surely.

HON. SCOTT A. BRISTER: You would be surprised what they reverse.

MR. McMAINS: Yeah. If you're a plaintiff.

CHAIRMAN SOULES: All right. Maybe we need to -- why don't we -- I guess let's vote three ways and then we'll take the top two and vote again. Strike, severance, and either. So unless somebody has got something else they want to say --

MR. ORSINGER: Well, I think Steve's suggestion that the severance be treated as the filing of a new suit with a full filing fee would eliminate some of the

abuses that Judge Brister was concerned about.

CHAIRMAN SOULES: Well, that's going to ripple back through so many rules, how do we get time to do that? We're doing intervention. Now we're going to have to have rules on unintervention, not severance, not strike, but --

MR. ORSINGER: We've already got a rule in Bonnie's set here on what you do when a suit is severed. You haven't even seen it. All we have to do is change it according to this vote.

HON. SCOTT A. BRISTER: No. I think in the Government Code fees are covered -- is determined by the Legislature. I don't know that we can change that by a rule.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: That's one problem. But how about the other problem, which is the judge shopping, can't we change that and just have the equivalent of a new petition? Why don't we do that? I mean, that just seems to be the real problem here. Just like you, Judge, I never really thought about

this, but Judge, it's a great idea.

I mean, in a place like Houston or Dallas where you like a particular judge, you can take a completely unrelated case and you go try to intervene in a case in that judge's court. The judge denies your intervention but severs you. There you are. Lovely.

CHAIRMAN SOULES: Well, that can be -- you know, as much as I despise local rules, those matters are handled by local rules, this idea that you file a case and then nonsuit it, file it again and nonsuit until you get the judge you like, you know.

HON. SARAH DUNCAN: What distinction are you drawing between --

CHAIRMAN SOULES: They can make a local rule that any case where the intervention is severed will be reassigned on the rotating docket.

HON. SCOTT A. BRISTER: Oh, so in cases that are closely related, if I sever it three different ways, who is going to decide whether those go back in the hopper and get passed back around again, because it was really forum shopping, or it was just a good

idea to do separate trials on them. That ain't going to work.

HON. SARAH DUNCAN: My comment was I don't understand the distinction you're drawing between local rules and Rules of Civil Procedure. I don't see this as any less a matter for the Rules of Civil Procedure than any other type of procedure mechanism.

CHAIRMAN SOULES: The assignment to cases in -- the assignment of cases to courts is altogether done by local rules among the courts.

MR. GOLD: Luke?

HON. SARAH DUNCAN: But we're talking about a rule that may or may not engender assignment problems for various localities, and it seems to me that we shouldn't write a rule that we already know is going to cause assignment problems in particularly the larger metropolitan areas and particularly within that category of those which operate under centralized dockets.

CHAIRMAN SOULES: Bonnie Wolbrueck.

MS. WOLBRUECK: I was just

going to comment in regards to the fee. The clerks would be happy to address that with the Legislature. Possibly the statute -- I mean, the rule could just say that all fees allowed by statute for the filing of a new suit shall be applied to the severed case, or something in that reference which would take care of the fee problem. And clerks, you know, we historically address the fee situation before the Legislature during every session.

CHAIRMAN SOULES: Okay. Anything else on this before we vote? Paul Gold.

MR. GOLD: Judge Brister, I didn't follow the point that you were making at the end. Go back to the issue about if the case is severed it would just go into the rotating docket. Now, I understood you to be saying that, well, there may be some cases that you had severed that were closely connected that didn't --

CHAIRMAN SOULES: I'm talking about the severance of an intervention.

MR. GOLD: Right.

CHAIRMAN SOULES: Not just any

case. The severance of an intervention.

MR. GOLD: Right. But it would seem like that, regardless, that putting it into the rotating docket wouldn't unbalance, wouldn't be that harmful, and it would resolve a major problem here.

MR. SUSMAN: Because if it were closely enough connected wouldn't it go --

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I mean, when you file an independent lawsuit that's closely connected within a case in your court, isn't there a way I can get into your court? I mean, what do you have to do? Do I move to transfer or something like that? It's in the Rules of Procedure, so it's just like we're beginning from scratch.

MR. GOLD: Yeah, I think the best thing --

CHAIRMAN SOULES: Okay. We're not getting a transcript on this.

MR. GOLD: I'm sorry.

CHAIRMAN SOULES: Who wants to speak?

MR. GOLD: Well, I think

what -- Paul Gold. I think that the rule could be written where the judge would maintain some discretion or some plea could be made to the judge to maintain that case in that particular court or have the court have some discretion to retain that case in that particular court or transfer the case back to that court. But I think the idea of, if you've got an intervention that is severed, it goes into the rotating docket is -- the benefits of that far outweigh the problems that you're pointing out. I think the problems that you're pointing out could be added to the rule and resolved, I think. I don't know.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I'd like to ask Bill or anyone here that has an opinion on this. If we put the word "severance" in here, do we then adopt the standards for severance which are set out on the top of Page 6? If this is not a striking or this is a severance, does that mean that we sever according to our normal severance standards as opposed to

whatever our current strike standards are?

CHAIRMAN SOULES: Page 6?

MR. HAMILTON: I don't think you can sever according to the definition of severance, because it's just the opposite of the permissive and intervention as a matter of right. Under the definition of "severance," it has to be not so interwoven. But if you have permissive intervention, it has to be. So I think if you sever that, you're changing the definition of severance.

MR. ORSINGER: But this might be someone who didn't meet the standards for proper intervention and therefore they are being severed out. But I'm not exactly clear what the standards are for striking an intervention. We're talking here, we've -- the only ones we've specified are undue delay, but we don't say that it's limited to that. We say in your discretion, and you can consider delay as part of your discretion. But when we change the word from "strike" to "sever," we are probably borrowing the severance concept with all of its baggage or whatever you want to call what goes along with

it, and I don't know if that's what we intend to do. Perhaps it's harmless; maybe the standards are the same. But if the standards are different, perhaps maybe we ought to be consciously aware that we might be changing the standard for striking an intervention.

CHAIRMAN SOULES: Anyone else? David.

MR. KELTNER: Well, the problem is that intervention is used primarily in two ways. One, some party that has a subrogation type interest coming in and trying to collect, like a medical health care provider or workers' comp carrier and the like, and that's one thing that we deal with well. The second is somebody coming in to try to piggyback on the lawsuit, and it's the second that we're concerned about really.

And it seems to me we haven't had any great problems with intervention rules to date, but I am worried about-- I mean, the severed issue, we can go to sever, we protect everybody, but doggone it, we create some other problems.

CHAIRMAN SOULES: Let me -- all

right. I don't care whether it's subject to a severance or a separate trial, and the court has absolute discretion on separate trials.

MR. KELTNER: That's a good point.

CHAIRMAN SOULES: There are no standards on that, if you go back and look on page 5, Rule 34(b). Whether it's severed or separately tried, it does not die.

MR. KELTNER: The only problem it doesn't rectify is the potential forum shopping with the piggyback filing. I'm not so sure how big a problem that is. I haven't seen that problem, just the possibility, and I guess we haven't because of strike, so we only have the possibility of the problem.

CHAIRMAN SOULES: Well, it was a huge problem on the venue issues. It was a pretty big problem on the venue issues, but the Legislature at least tried to fix that, because they were an intervening -- pick your kind of case, breast implant cases and old cases where venue was already established in favorable venues. Other than that, I have not seen massive interventions. I don't know if

somebody else has.

PROFESSOR DORSANEO: For that matter, has anybody ever really had a case where they've run into this limitations problem?

HON. SCOTT A. BRISTER: Yeah, is there a huge groundswell of problems with cases being severed and thrown out beyond limitations? I mean, it's always been strike. And my experience has been always you don't have to throw somebody out of court. You just sever him rather than strike him, so what's the big deal? If it's not a problem, let's not create more problems.

CHAIRMAN SOULES: Anything else? Okay. We'll vote whether we -- whether the consequences of -- whether the judge's order to get rid of an intervention will be to strike, to sever/separate trial, or either at the judge's discretion.

MR. GOLD: Luke, can I comment on that?

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Am I correct that there is no definition of the word "strike"?

Is that --

CHAIRMAN SOULES: That's right.

MR. ORSINGER: That's true.

MR. GOLD: So by its ambiguity it leaves the discretion to sever, to dismiss or what?

CHAIRMAN SOULES: Well, if you analogize to your favorite area, discovery, "strike" means it's gone, and the consequence is it's no longer in the case.

MR. GOLD: I understand that, but it's kind of interesting. When you look at it, you ask youself, well, what does "strike" mean? And Judge Brister is saying it's always been strike, but he's severed, so it seems like if you've got the word "strike" there and no one really knows what it means, then the judge is within its -- it's in the judge's discretion to dismiss it, to sever it, or whatever. I don't know. I just throw that out, because you were saying use the word "dismiss," and maybe the option should be strike, sever or dismiss, because strike and dismiss may not mean the same thing.

MR. KELTNER: Why don't you

make a motion to smush?

CHAIRMAN SOULES: Does anybody want to vote on this at all? I don't care.

HON. C. A. GUITTARD: We could use the journalistic term "throw out."

MR. ORSINGER: Thrown out of court.

PROFESSOR DORSANEO: Let's vote on your three options, what the heck. What else could they be?

CHAIRMAN SOULES: Okay. Strike is one; sever/separate trial is two; or either of those at the judge's discretion is three.

Those in favor of strike show by hands. Any hands?

MR. ORSINGER: Not a single person.

CHAIRMAN SOULES: No hands.

MR. ORSINGER: Wow.

CHAIRMAN SOULES: Those in favor of sever/separate trial show by hands. One, two.

MR. GOLD: Actually, three.

CHAIRMAN SOULES: Three. And those that would leave it to either strike,

sever or separate trial up to the court. 14.

Okay. I know what I'll do if it happens to me. I'll file a lawsuit too and move to consolidate, and then at least that case would be on file, and I will spend a heck of a lot of money at the clerk, because I can't --

MR. GOLD: It seems if you start running around with the clerk --

CHAIRMAN SOULES: I sure can't afford to wait a year to find out if my pleadings are going to get struck. But I can figure a way to fix that. I don't know, I hope everybody else can too. At least we're sharing it among ourselves here today, and notify your carriers. Bill.

PROFESSOR DORSANEO: Now, on this severance/separate trial idea, probably we're the only ones in most modern procedural systems that draw such a big distinction between separate trials and severance. We make a big deal out of it. It's not that big of a deal normally. In this context I guess if somebody intervenes in my case, my judgment is not final if it's just tried separately until all that comes to an end. And I don't

like this. I don't think there are any benefits to the separate trial option that you wouldn't also get from the severance option, and I don't see the severance rule as being a trial.

CHAIRMAN SOULES: Leave that out. Leave separate trials out. Any objection to that? So it would be sever or strike?

MR. KELTNER: That's right, yeah.

CHAIRMAN SOULES: I've got sever or dismiss. Does anybody -- you don't like -- you would rather have strike than dismiss?

MR. GOLD: I kind of like the term --

MS. SWEENEY: Well, "dismiss" means something.

MR. GOLD: Well, I kind of like the fact that "strike" doesn't mean anything.

PROFESSOR DORSANEO: Well, "dismiss" is kind of ambiguous too. You have to say dismiss somehow or else you're going to worry about whether it can be with prejudice

not with prejudice.

CHAIRMAN SOULES: It cannot be done with --

PROFESSOR DORSANEO: Huh?

CHAIRMAN SOULES: Quote, striking an intervention, can't be done with prejudice.

PROFESSOR DORSANEO: I think that's right, and I think everybody knows that. We're very comfortable with that.

CHAIRMAN SOULES: Because it's not on the merits.

PROFESSOR DORSANEO: And there are all kinds of -- in some systems there are rules that if there are two dismissals you're out. I mean, like if a Texas case is dismissed and then there's another dismissal, a voluntary dismissal of a federal case and you try to refile that case, you may have a problem.

CHAIRMAN SOULES: I think that's a rule in federal court, isn't it?

PROFESSOR DORSANEO: Most other states have two-dismiss rules. They're not like us.

CHAIRMAN SOULES: Okay. Well, we've got that resolved now. It will be --

MR. ORSINGER: In light of the debate, this is again upon motion of any party? In other words, I think that since we voted before that we wanted the court to have the initiative to do what it wanted on its own, we have a limitation here. I think it's already in the rule.

PROFESSOR DORSANEO: It's already in the rule.

MR. ORSINGER: But I think everyone should recognize that this language suggests only upon motion of a party.

HON. SCOTT A. BRISTER: That's not a change.

MR. ORSINGER: That's not a change, but that is a difference.

MR. KELTNER: And somebody voluntarily coming can't ask you for relief, such as, delay the trial, I just got joined.

HON. SCOTT A. BRISTER: Yeah.

MR. KELTNER: So I think that's a good distinction.

PROFESSOR DORSANEO: I want to

add to the last sentence "or the intervenor" too, such that the whole thing reads, "A person may intervene by filing a pleading subject to being stricken or severed" -- that may be a little inartful. "In exercising its discretion to strike," or maybe "strike or sever an intervention, the court must consider whether the intervention will unduly prejudice, delay or prejudice the adjudication of the rights of the other parties or the intervenor."

MR. ORSINGER: Why not just say "the parties"?

PROFESSOR DORSANEO: Because I'm not sure that you're a party if you're trying to become a party.

MR. ORSINGER: But under our rule, you're a party and you can only be made an unparty.

PROFESSOR DORSANEO: I guess that's right.

HON. SCOTT A. BRISTER: How about "including the intervenor"?

PROFESSOR DORSANEO: I think Richard is technically right, that "parties"

without "other" would include the intervenor, but maybe somebody would prefer to spell it out absolutely clearly.

PROFESSOR CARLSON: I would.

PROFESSOR DORSANEO: Okay.

HON. SCOTT A. BRISTER: And that emphasizes the limitations problem.

PROFESSOR DORSANEO: Yeah. And I think Rusty is right. It's possible that some court would say, "I don't care. Your claim is no good." And it's possible that some appellate court would think the same thing, but probably under those circumstances it wouldn't be worth pursuing anyway.

CHAIRMAN SOULES: Okay. Bill, what else on 38?

PROFESSOR DORSANEO: Nothing. Oh, 38, yes. We did one other thing. This (a) and (b) were taken from the Federal Rule, Intervention of Right and Permissive Intervention. Our rule is just completely silent on it, although our case law is consistent with the division between somebody who is needed for just adjudication in Intervention of Right and then somebody who is

merely a proper party.

In (b)(2), though, in order to make it like our current Texas law, which the idea is that proper parties, that you need to be a proper party in order to intervene, we added some language. We added the "arises out of the same transaction, occurrences, or series of transactions or occurrences" language that also appears in the permissive intervention rule -- I mean, permissive joinder rule.

For permissive joinder there are three requirements. Let me focus on plaintiffs. The action has to be brought by the plaintiffs jointly, severally, or in the alternative, and that's not much of a requirement because there's no other way to behave. Then the claims have to arise out of the same transaction, occurrence, or series of transactions or occurrences, and there needs to be a question of law or fact in common.

What we did by adding that language is to basically codify in more clear terms that a person has to be a proper party in order to intervene permissively.

PROFESSOR CARLSON: Which is

the case law.

PROFESSOR DORSANEO: Which is the case law.

Under federal practice, they appear to think that if we already have a case, anybody who has a common question ought to be able to intervene, because if we have a lawsuit, who cares how many people we have. And I guess a federal judge can handle it, (indicating), or in the case of out west, a water pistol.

CHAIRMAN SOULES: So you're asking for a debate on whether or not the --

PROFESSOR DORSANEO: I'm really just pointing out that the debate last time was that -- we were sent back to the drawing board last time to tighten up permissive intervention, and it's tightened up by adding this "same transaction, occurrence, or series of tranactions or occurrences" language that is already part of current Texas law because it's part of the definition of who is a proper party.

And it's tightened up as well by the sentence that we just changed about "unduly delay or prejudice the adjudication of the

rights." So we did what we thought you wanted, but you didn't see the language until now.

MS. SWEENEY: Could you --

CHAIRMAN SOULES: Paula.

MS. SWEENEY: If we talked about it while I was out of the room, don't bother, but why are we saying "person" as opposed to "party" or "entity"?

PROFESSOR DORSANEO: Because you're not a -- well...

MR. ORSINGER: If you say "party," you're not a party until --

MS. SWEENEY: But a corporation is not a person.

PROFESSOR DORSANEO: It is.

MR. ORSINGER: Yeah, it is.

MS. SWEENEY: Is there a specific definition from which we are working that provides for that?

PROFESSOR DORSANEO: Probably not.

MS. SWEENEY: I just wonder. I mean, shouldn't -- is there not a reason to use "entity" or some other term that doesn't

get you into that problem?

PROFESSOR DORSANEO: It would be better to define "person," if we needed to define "person" somewhere or other in these rules.

MR. GOLD: Is a corporation a person or an individual?

PROFESSOR DORSANEO: An individual is a person, and a person is a corporation.

MS. SWEENEY: But I guess since that's so clear, we probably don't need to spell it out.

MR. ORSINGER: Well, we don't have a definitional rule in these rules, do we?

PROFESSOR DORSANEO: No. Most other codes -- and the Code Construction Act, which I don't think applies to this but I may be surprised to find that it does, does have those definitions.

MR. ORSINGER: Maybe we could write our own, or if we don't write our own, Bryan Garner may write one for us.

HON. PAUL HEATH TILL: Wouldn't

a lot of our discussions be cleared up if we wrote our own definitions particularly? We're arguing about what "dismissal" means and what "person" means and what all these other things mean. Why not define it and then we'll be clear on at least what we intended.

MR. ORSINGER: That's not a bad idea.

CHAIRMAN SOULES: Okay. You all try to write a rule that defines -- in the General Rules, I guess, write a definition of whatever.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: The problem is we end up having, as Judge Till points out, a large glossary for these rules. And if you look in a legal dictionary at the term "person," it won't be individual; it will be legal person as well as natural person.

CHAIRMAN SOULES: The Code of Construction Act has a definition that's real broad. It's everything for person.

So Bill, under (b) now you've got permissive intervention requires that a person's claim or defense arises out of the

same transaction or occurrence or series of transactions or occurrences of the main action and has a question of law or fact in common with the main action.

PROFESSOR DORSANEO: As far as the relationship of these rules to each other, the intervention of right standard is the same as the compulsory joinder standard; the permissive intervention standard is the same as the permissive joinder or proper party standard. They match exactly. They fit together, and that's of particular interest to somebody trying to teach a beginner.

CHAIRMAN SOULES: Well, isn't that a -- that seems a very tight limitation on intervention.

PROFESSOR DORSANEO: It's tighter than in most systems, but that's I believe our current law right now. Don't you think, Elaine?

PROFESSOR CARLSON: Yeah, right.

CHAIRMAN SOULES: Any party may intervene. Is there a standard for intervention?

PROFESSOR DORSANEO: The case law standard is you have to be a proper party.

MR. ORSINGER: No. That's for staying in. There's no --

PROFESSOR DORSANEO: No, not for getting in.

MR. ORSINGER: You can intervene if you're from Alaska and do nothing but fish.

PROFESSOR DORSANEO: Right.

MR. ORSINGER: But the question is whether you can stay in after there's been a motion to strike you.

PROFESSOR DORSANEO: Yeah. And we're talking about permitted to intervene in the sense of staying in.

MR. ORSINGER: Well, that's not in the rule. It doesn't say that.

PROFESSOR DORSANEO: Maybe we shouldn't say "permitted."

MR. KELTNER: Yes. But that's the standard for proper party.

PROFESSOR DORSANEO: I guess, no, we should say permitted, because it doesn't -- yeah.

MR. ORSINGER: But I would say since we're using the word "severance" here in the rule now that the standards of severance will apply if severance is what the court is going to do. And separate trials, if the court orders a separate trial, the standards for separate trial are what's going to apply, and if the court strikes, then once you figure out what "strike" means, the standards that apply to strike would apply to striking.

CHAIRMAN SOULES: I don't understand. A person may be permitted to intervene. That's (a) and (b). And (c), I have an absolute right to just step in and intervene.

PROFESSOR DORSANEO: No. (c) is just procedure.

CHAIRMAN SOULES: But I don't have to have permission. And I think the implication of 38(a) and (b) is you've got to have permission.

MR. BABCOCK: That's the difference between the state and federal practice. In federal practice you've got to get permission to get in; in state you don't.

MR. ORSINGER: Really we should say that an intervenor may be permitted to remain in the suit if. That's really what we're saying, even though that's not what the rules say.

PROFESSOR DORSANEO: That's correct.

PROFESSOR CARLSON: That's what we meant.

CHAIRMAN SOULES: That's good.

MR. ORSINGER: And we debated last time whether you ought to file a motion first, and the vote was you can intervene first and ask questions later.

PROFESSOR DORSANEO: Right.

MR. ORSINGER: So do you want us to revise that where an intervenor may remain a party to an action, number one, when?

CHAIRMAN SOULES: I think it has to be, because otherwise you've got an ambiguity here with (a) and (b) suggesting that an intervenor has to have permission and (c) indicating otherwise.

PROFESSOR DORSANEO: Well, we

can rework that, you know. A person -- by referencing (a) and (b) in some manner.

MR. KELTNER: Right, or by just saying any intervening party shall be permitted to remain.

MR. BABCOCK: Well, which way are we going?

MR. ORSINGER: We're -- if -- you have a matter of right that you can intervene subject to being -- but I think the standards are different now. We now have three standards in this rule, not just one. We used to have a standard for striking an intervention, and now we're ordering severance and separate trials --

CHAIRMAN SOULES: Not separate trials, just severance.

MR. BABCOCK: Just severance. We struck separate trials.

MR. ORSINGER: Pardon me. Okay, okay. So then we have I think a separate standard now if the remedy is severance rather than a strike, don't we?

CHAIRMAN SOULES: It's either or.

MR. ORSINGER: But the standards are different, aren't they?

CHAIRMAN SOULES: The standards are different between striking and severance, right.

MR. ORSINGER: I think they are.

CHAIRMAN SOULES: There are standards for severance and no standards for striking.

MR. BABCOCK: Luke, under the rules, we've written it if a party moves to strike but not to sever. Does the judge have authority under this rule to sever?

CHAIRMAN SOULES: Yes, I think. I haven't read severance. But the current rule has always been a judge had the right sua sponte to sever whenever, and I guess we -- has that been maintained?

MR. BABCOCK: Well, it's just that this procedure in (c) talks about it has to be by filing of a pleading by a party; that is, if a party chooses to move to strike, as opposed to moving to sever.

MR. ORSINGER: Does that limit

the court's choices?

MR. BABCOCK: Does that limit the court?

MR. ORSINGER: In answer to your previous question, our rule on severance doesn't say that it's only upon motion, so presumably it's not.

HON. SARAH DUNCAN: It's not by case law.

MR. ORSINGER: It is?

HON. SARAH DUNCAN: It is not by case law.

MR. ORSINGER: It is not by case law.

CHAIRMAN SOULES: It is not now. Let's see, severance is, what, 41?

MR. GOLD: I think, Chip, yours would be that you have to file a motion to sever.

MR. BABCOCK: Which it probably shows -- in your response you would say don't strike me, but in the alternative, sever me.

MR. GOLD: I don't even know if you need to do that. If severance requires a motion, then I can see where your dilemma

would come up. But if the judge has discretion to sever without motion, sua sponte, then the court would have the problem.

CHAIRMAN SOULES: Well, but I mean, we've changed that.

MR. BABCOCK: We've written it differently, is the problem.

CHAIRMAN SOULES: The current rule says any claim against a party may be severed and proceeded with separate. It doesn't say on a motion, and that's been construed to include the judge --

HON. SARAH DUNCAN: It's my understanding that a trial judge can sua sponte sever. Is that right, Scott?

MR. GOLD: So if someone moves to strike, the judge would always have the discretion to sever whether severance was requested or not.

HON. SARAH DUNCAN: Maybe.

CHAIRMAN SOULES: How do you get there?

HON. SARAH DUNCAN: He's making his legislative history, that's how he gets

there.

CHAIRMAN SOULES: No, this is old Rule 41, Any claim against a party may be severed and proceeded with separately. It doesn't mean -- you're right, the judge can do anything, can sever or whatever the judge wishes. Maybe these other -- it's got to be a cause of action. But now we're revising the rule that says anytime to say when a party moves.

MR. GOLD: Oh, okay. Then yeah, I do see your problem.

MR. ORSINGER: Furthermore, by putting severance in this rule, we are adding a ground for severance that's not in the severance rule, and that is the undue delay ground, because that's -- we specify the three bases for severance in our severance rule on Page 6, which is new Rule 34(c). But when the severance relates to an intervention, the court can consider in its discretion undue delay or prejudice, which is not one of the three grounds specified for a severance of a cause that's been plead by a party that did not intervene, so actually we give the court

an additional basis to rest the discretion for severance when it's an intervention.

PROFESSOR DORSANEO: Well, I don't think the severance rule is a problem, because even if it means exactly what it means in proposed 34(c), 34(c) will be satisfied in circumstances when the intervention is disallowed.

MR. ORSINGER: Not if it's disallowed on the grounds of delay.

CHAIRMAN SOULES: One answer to that is just to put in the severance rule that the court may order a severance of an intervenor.

PROFESSOR DORSANEO: Or we can just call it a different thing, you know. Instead of using the word "severance," use a different word and it's docketed as a separate action.

MR. GOLD: Let's use the word "strike" and define "strike" to mean sever or dismiss, and then you don't have any of these problems.

PROFESSOR DORSANEO: Well, it's always a bad idea to define a word to mean

something that it doesn't mean in English, like "court records." You're into tremendous difficulties forever.

MR. BABCOCK: Now, now.

MR. GOLD: Let's call it "quash." No one understands quash either.

CHAIRMAN SOULES: Let's get focused here. Richard.

MR. ORSINGER: Do we want the court to have greater latitude to sever an intervention than it does to sever a cause plead by an already joined party?

CHAIRMAN SOULES: Yes, I think so, for the reasons that Judge Brister articulated.

MR. ORSINGER: Then let's take the word "sever" out of the rule and use something like "redocketed as a separate cause" or some other language that doesn't carry the definition of severance with it.

PROFESSOR DORSANEO: I agree with that. You're convincing me that the word "severance" may at least in some minds convey a lot of extra inappropriate information in this context. "Docketed as a separate action"

or some such language, we'll write it. We understand what you're saying.

MR. BABCOCK: Wouldn't an intervenor's claim, Luke, always be one that would be the proper subject of a lawsuit if independently asserted?

CHAIRMAN SOULES: Yes.

HON. SARAH DUNCAN: No, no. What if he's got a derivative claim that doesn't exist but for the claim into which the intervention is being made?

MR. BABCOCK: Well...

MR. KELTNER: Let's think about this.

CHAIRMAN SOULES: That's really (a)(2).

MR. KELTNER: Yeah. And I think that --

PROFESSOR DORSANEO: Maybe (a) --

MR. BABCOCK: Yeah, that would be (a)(2).

PROFESSOR DORSANEO: And I think the requirements are going to be satisfied, you know; it involves another

claim; severed claim would be the proper subject of a lawsuit if independently asserted.

CHAIRMAN SOULES: But "not so interwoven" is a problem.

PROFESSOR DORSANEO: Well, if it is so interwoven, the --

MS. SWEENEY: Not inextricably intertwined.

MR. ORSINGER: See, the perception is that you have greater latitude to strike an intervention now than you would if a party who was already there amended their pleadings. And I think there's a consensus here that we don't want to constrain the court's power to sever just because we put the word "severance" in a rule that never contained it before.

PROFESSOR DORSANEO: Which what you think will happen is it will be stricken rather than severed because it doesn't satisfy the severance rule.

MR. ORSINGER: Or somebody may get reversed because they severed a claim that was inextricably intertwined.

PROFESSOR DORSANEO: We can't use the word "severance."

MR. KELTNER: That's a good point.

PROFESSOR DORSANEO: I think only a mad person would strike it when it's so interwoven because it couldn't be severed. I think you would have to be mad to think like that.

HON. SARAH DUNCAN: No, there are other words besides "mad" that one could use.

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: But we could use just "docketed as a separate action."

MR. ORSINGER: Only a mad person or a court of appeals judge would.

MR. BABCOCK: Now, now.

PROFESSOR DORSANEO: Now, Mr. Chairman, with the common consent of the committee, I'd like to change the severance thing to make it perfectly clear that the court can do it on the court's initiative. The court may order upon the motion of any

party or on the court's initiative a severance.

CHAIRMAN SOULES: That's --

MR. ORSINGER: -- 34(c).

PROFESSOR DORSANEO: That was an inadvertent change, not really a change, but an inadvertent ambiguity.

MR. KELTNER: Are we going to use "docketed as a separate cause"?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Well, do you need -- well, okay. I have no problem with that. But it doesn't say that severance can only be -- can only occur on a motion. However, under 38, if severance was used there, it would have been on a motion. 34 is okay, it seems to me. It doesn't say one way or the other.

PROFESSOR DORSANEO: But it does in -- in an earlier place there is a slight suggestion that it might mean something else, because in the misjoinder of parties section it says any claim against a party who has been improperly joined may be severed and proceeded with separately. There's a --

CHAIRMAN SOULES: Well, whatever you all think. If you think it's for clarity --

PROFESSOR DORSANEO: Yeah, I think it's better.

CHAIRMAN SOULES: -- that you -- well, you need to say that the judge can do it, but -- okay. That's draftsmanship.

MR. HAMILTON: Luke, I have a question about (a) and (c).

CHAIRMAN SOULES: Which one?

MR. HAMILTON: (a) and (c). (a) says intervention of right. Then it says a person shall be permitted. And then the procedure of (c), does that only apply to the (b) part? If you have the right to intervene, then how can the judge throw you out?

MR. ORSINGER: The answer is that we debated that and intended for Procedure, (c), to apply, so that even someone who had intervention as a matter of right could be stricken or redocketed as a separate cause because of delay. Now, that's a very debatable proposition, because we debated it.

MR. BABCOCK: Ergo.

MR. ORSINGER: I meant to say "and we debated it."

PROFESSOR DORSANEO: You know, at some point you're going to get a case where somebody has strong rights that should have been brought up earlier in the case, and the judge is going to have to decide whether to delay it because of the nature of the rights, even though that's annoying.

MR. GALLAGHER: Did anybody look at the standards that were established in Chapter, I think it's 15, 16, of the Civil Practice and Remedies Code by the last session of the Legislature as to the standards for intervening plaintiffs when they were residents of different counties but had a case that involved common questions of law and fact? Because there are very definite standards incorporated within the venue section of the Civil Practice and Remedies Code where you have one act that creates causes of action amongst plaintiffs who live in various counties. And there was a major legislative battle over that, and that was incorporated, Luke, into our Civil Practice

and Remedies Code, and it's in the new version. I don't have mine with me, nor does anyone else.

PROFESSOR DORSANEO: No, it's here.

PROFESSOR CARLSON: Here it is. It's 15.003.

HON. C. A. GUITTARD: I'd like to ask why that word "permitted" is used. Why not just start these paragraphs (a) and (b) by saying a person may intervene, any person may intervene in an action, (1) and (2) and so forth?

PROFESSOR DORSANEO: Yeah, I think that may be right, Clarence. The reason it's in there is because those paragraphs were taken from the federal rule and the federal rule has that language in it.

HON. C. A. GUITTARD: Oh, my goodness, then I shouldn't have said it.

PROFESSOR DORSANEO: And in thinking about it independently, you know, you're ultimately permitted to intervene when you're not stricken. Maybe we ought to say "intervene".

MR. GALLAGHER: I don't think we're running into any trouble here.

MR. GOLD: I think Judge Guittard's proposal makes sense.

PROFESSOR DORSANEO: I'll take "be permitted to" out.

MR. ORSINGER: Well, you can't do that with (a). You can't say "a person shall intervene."

PROFESSOR DORSANEO: Well, I take that to mean --

CHAIRMAN SOULES: Well, you and Richard are going to rewrite that, because Richard has got a concept that says a person may stay in the case and so forth.

MR. ORSINGER: Mike has something to report on the Civil Practice and Remedies Code.

CHAIRMAN SOULES: Okay. Mike, have you got something for us?

MR. GALLAGHER: I don't see -- the part I recall now is where it's maintaining venue. If you're an intervening party, you have to establish that it won't unfairly prejudice another party to the suit.

I think just perhaps you need to look at that language when you're refining this.

HON. SARAH DUNCAN: I guess I'm a little confused.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: If intervention of right is subject to the same procedure in subsection (c) as permissive intervention, why are some interventions of right and some permissive, and what is that intended to convey?

MR. BABCOCK: Because you may have guessed wrong when you intervened and said you had a right to do it and the opposing party is entitled to say, "You don't have a right to intervene. You don't meet the standards of (a). I want you out of here."

HON. SARAH DUNCAN: But either way it's a permissive intervention and it's subject to the same procedure and apparently the same test. They're both permissive interventions, and I don't understand the gradation between (a) and (b). I understand that (a) looks like the intervenor may have

greater rights than the intervenor in (b), but since they are subject to the same procedure and the same test, I'm not understanding what those greater rights really are.

MR. GALLAGHER: In (a) aren't we saying --

MR. GOLD: Perhaps we're messed up by adopting the federal rule, which requires court permission and it just has no meaning in a Texas context, and what we really just have is one intervention, at least from what Sarah says.

PROFESSOR DORSANEO: No, I don't think so, because the dichotomy between, you know, what used to be referred to as proper and necessary parties, some of whom would be classified as not just conditionally necessary but indispensible, is in the federal formulation in our rules right now and has been ever since we adopted Federal Rule 19 as our Federal Rule 39.

It's also in the case law, where we talk about people who have -- who it would ordinarily be an abuse of discretion to strike because their rights are such that they would

be prejudiced, not as a legal res judicata matter necessarily, but as practical matter, if the matter would proceed without their joinder.

So those categories of people who exist in the legal universe that are in the Federal Rules and that are reflected here in paragraphs (a) and (b) are in our jurisprudence already.

Now, we don't ever talk about, except in case law, these things when we're talking about intervention, and we could talk about less of it than this rule talks about, but it would still be the kinds of situations that you would deal with.

MR. GOLD: But isn't the issue -- if I may, isn't the issue not whether someone is permitted to make the intervention, the issue is whether they stay in the case? And if that -- if I'm right in that regard, then you don't need this dichotomy. All you need is a structure for what the court is to consider in allowing the implanted party, person or whatever to remain, so you don't need this right, permissive, because that's a

federal concept based upon whether the court allows you or whether the court has to allow you or whatever. All we're talking about is anybody can implant themselves; the question is whether the court allows them to remain.

PROFESSOR DORSANEO: Well, maybe the heading "Intervention of Right" and the heading "Permissive Intervention," maybe those headings are not good. Maybe it should say something like persons needed for just adjudication and proper -- and you know, proper parties. I mean, maybe we could even use some kind of older language.

CHAIRMAN SOULES: Bill, let me ask you this: Why don't we -- I mean, we've got this Rule 33, Joinder of Persons Needed Just Adjudication, and it's complicated because it's a complicated problem. It's not so complicated if feasible, but it becomes somewhat complicated if not feasible, because you're really subjecting parties to the prejudice of somebody else who should be a party and you don't know when that person is going to show up, so we -- and this is not bad. Rule 33 is probably about as -- it

treats that problem about as well as it can be treated and still get a case tried. Do we need much more than this to --

PROFESSOR DORSANEO: You wrote an article about that one time.

CHAIRMAN SOULES: What's that?

PROFESSOR DORSANEO: You wrote an article about that one time.

CHAIRMAN SOULES: Well, I don't remember that. That's too far back.

All right. Can't we say in 38(a), Intervention of Right, that that is governed by Rule 33? This is real shorthand.

PROFESSOR DORSANEO: Well, I think it says it already. I think the language borrowed from 33 is the exact language.

CHAIRMAN SOULES: But you don't have if -- well, of course, "if not feasible" doesn't count because they're there.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: So you don't have to worry about (b).

PROFESSOR DORSANEO: But claiming an interest relating to the property

or transaction and being so situated that your interest would be impaired, you know, is the part that's most relevant from the standpoint of somebody who wants to join in the action.

CHAIRMAN SOULES: Okay. I had this wound up in my mind and lost it for a minute. If they meet 33(a), you can only throw them out if the rest of the case meets 33(b).

HON. SARAH DUNCAN: Right.

CHAIRMAN SOULES: That's what I'm thinking. If they're 33(a) and they're there, they're in.

PROFESSOR DORSANEO: Well, we debated about whether this sentence at the end of "Procedure" ought to be at the end of (b).

HON. C. A. GUITTARD: Right.

PROFESSOR DORSANEO: I mean, that was the big debate we had.

CHAIRMAN SOULES: On 33(b)?

MR. ORSINGER: Yes.

PROFESSOR DORSANEO: No, 38(b).

CHAIRMAN SOULES: You're not following. You're not following me.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: I'm saying -- okay. Rule 38, Intervention. Rule 38, Intervention, Intervention of Right. The structure of intervention of right is if you're a 33(a) you have the right. And you can't be, whatever, gone, unless you're a 33(b), unless the case is a 33(b) case.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: So they have to leave you in.

HON. C. A. GUITTARD: I have a suggestion.

CHAIRMAN SOULES: That's what I'm talking about.

PROFESSOR DORSANEO: Well, that doesn't relate to where -- I think that does relate to the issue of whether the last sentence in 38(c) covers (a) and (b) cases or only (b) cases. And we kind of in the committee decided that, you know, maybe it's splitting the vote. We kind of decided, well, if it's intervention, most people that intervene are bollixing up the works, frankly, or a lot of them are, if not most, the second category perhaps that David Keltner was

talking about; and that there ought to be the ability of the judge to consider -- especially now that we have this "docketed as a separate action," you know -- to consider keeping them out of this other lawsuit that they weren't invited to join; they just kind of jumped in.

CHAIRMAN SOULES: But they're needed for just adjudication.

PROFESSOR DORSANEO: Well, but they may be needed for, absolutely needed for just adjudication in the sense that they should be regarded as indispensible, or they may be needed for just adjucication less than that, and maybe you can fool with it. And really this massaging it and the complexity issue and the relationship of the intervention rule to the other rules is the reason for having intervention of right and permissive, so that you can get your bearings. I mean, everybody should know that this person up here in 38(a) is a person needed for just adjudication under that other rule and we're going to think about this person that way, and this person in paragraph (b) is merely a proper party.

CHAIRMAN SOULES: Then why don't you say it?

PROFESSOR DORSANEO: To me it says it. To me, you know, being a procedure teacher and being familiar with the federal system and going through it over and over again, we teach everybody that that's what it means. Okay? I mean, we teach that already. And it doesn't say it clearly, I agree.

And I do think that the titles are not very good, based on what Paul Gold said. We could just do a cross-reference.

CHAIRMAN SOULES: In essence --

PROFESSOR DORSANEO: It might be better to do a cross-reference. Okay. I'll be happy to draft it again.

CHAIRMAN SOULES: And you can't get thrown out unless you're -- unless the court can go forward under the same standards as 33(b) and just about everything we've talked about as being a problem, if you look here at "factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him" -- it? I don't know --

"or those already parties."

PROFESSOR DORSANEO: It is true that this cross-reference is very abbreviated and not all of the compulsory joinder rule is expressly articulated here, and perhaps it should be. I thought about that after our last meeting. But you know, if the committee wants us to draft it over again, we'll draft it over again.

CHAIRMAN SOULES: All right. As I understood the subcommittee report, it was that this matter of right was to take care of the persons needed for just adjudication category of intervenors. Then they ought to be -- the persons needed for just adjudication ought to be the same whether they're missing parties, intervenors or whatever.

PROFESSOR DORSANEO: Maybe it would be just as simple to say that -- just take out (a) and (b) altogether and just say one little simple thing that cross-references 32 and 33: A person who is needed for just adjudication in accordance with Rule 32 or -- I'm going to use the term "proper party" even though that's not the title of the rule -- or

a proper party satisfying the requirements of Rule 33 may intervene by filing a pleading subject to being stricken or severed.

HON. SARAH DUNCAN: But that doesn't import the test from 33(b) into 38(a), and I thought what we were talking about is that the test from 33(b) ought to apply to those who intervene as of right, whereas the "unduly prejudice or delay" ought to apply to the people who intervene permissively.

MR. ORSINGER: We can change that.

PROFESSOR DORSANEO: We could do it like that too.

CHAIRMAN SOULES: And you've got a strike test in 32 and 33. In 32 it's "if joinder will unduly delay or prejudice the adjudication of the rights of another party." I don't know. I mean --

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

CHAIRMAN SOULES: Yes, sir, Judge Guittard. And then I'll get to Chip Babcock. I'm sorry to have taken up so much time. Go ahead.

HON. C. A. GUITTARD: I have a suggestion. If our philosophy is, as contrary to the federal rule, that a person should just have the right to intervene without any adjudication as to whether or not he should stay there or not, then we ought to sort of turn this thing around and say -- use -- the current (a) should be taken from (c), a person may intervene and so forth; and then (b) says an intervenor may be permitted to continue or shall be permitted to continue in the litigation if it meets the requirements of the required joinder clause. And then the next one, the person may be permitted to continue in the lawsuit if the requirement for a permissive joinder applies, that would seem to me to be much clearer than going through on this.

CHAIRMAN SOULES: Chip Babcock.

PROFESSOR DORSANEO: Here is what I'm going to do, with the committee's permission: I'm going to rewrite this and I'm going to refer to 32 and 33.

When it's a 32, a permissive intervention case, I'm going to pick up the idea that is

also in 32 based on our last vote about unduly delaying or prejudicing the adjudication of the rights of other parties.

When it's a 33 case, a person needed for just adjudication, I'm going to go to 33(b) and use that more complicated razzmatazz in the intervention rule as well.

I'm confident about the first two steps in that process being easy to do and that being a relatively straightforward undertaking. I may run into trouble with 33(b) and intervention, but we have enough guidance now and I think it's been very beneficial to get all of these views. Again, it takes a lot longer than you think, but you end up in a better place.

CHAIRMAN SOULES: Since we're going back on the language, which I agree, and picking up "docketed as a separate cause," if there was some way to put a filing fee on that docketing, and if not paid, dismissed, you would still need to --

PROFESSOR DORSANEO: There is a way. There is a way, but just go read Rule 89 on venue transfers which goes into all of that

in great detail about, you know, making files, paying fees, dismissing if you don't pay fees, you know. When you read it, it seems like a good idea, but after you get through it there's a sense of dissatisfaction in it being part of the rulebook.

CHAIRMAN SOULES: All right. Well, the only idea I was -- this probably doesn't meet Judge Brister's concern about striking, but couldn't we just have docketed as a separate cause similar to a venue transfer?

PROFESSOR DORSANEO: I'll do that. I could do that, if you like.

CHAIRMAN SOULES: And you pay the filing fees and cover the clerks and all that sort of thing.

Judge Cornelius.

JUSTICE CORNELIUS: I'd like to ask the question, do you intend to give the judge the power to strike or sever an intervention that is an intervention of right?

CHAIRMAN SOULES: Only if the test of 33(b) is met.

PROFESSOR DORSANEO: Sometimes.

JUSTICE CORNELIUS: What is that? Is that undue delay?

HON. SARAH DUNCAN: No, it's "whether in equity and good conscience."

CHAIRMAN SOULES: It's on Page 4. And it will have to be massaged some, because this is how you go on without that person who is needed for just adjudication.

PROFESSOR DORSANEO: You take a closer look at their interest and see if you can go on without really either wasting your time or hurting somebody badly.

CHAIRMAN SOULES: You start right here about in the middle of the paragraph. Do you see "The factors to be considered" on Page 4, the bottom of Page 4? That would be the test.

JUSTICE CORNELIUS: But it seems to me that if you're doing that then you really should not have an intervention of right.

PROFESSOR DORSANEO: We won't.

MR. BABCOCK: Unless the statute gives it to you.

PROFESSOR DORSANEO: Yes.

JUSTICE CORNELIUS: If you're going to keep the distinction between intervention of right and permissive intervention, then I think (a) ought to say that the court shall permit a party to intervene when thus and so occurs. (b) ought to say the court may permit a person to intervene when certain things occur. And then (c) ought to apply only to (b) and not to (a).

PROFESSOR DORSANEO: That's the direction we're moving in, Judge. We're moving in that direction, but we'll have to bring this language back one more time to see if it passes muster, maybe one more time.

JUSTICE CORNELIUS: You can tighten it up a little bit if you say the court shall permit the party to intervene or -- and the court may permit. That gets your as a matter of right and your permissive interventions distinguished.

HON. SARAH DUNCAN: Except that based on our meeting last week, Chief Justice Cornelius, we can't use "shall" anymore. And I'm saying this with a laugh.

JUSTICE CORNELIUS: Okay.

HON. SARAH DUNCAN: We can't use "shall." We have to use "will" now.

PROFESSOR DORSANEO: No, "must."

HON. SARAH DUNCAN: Must. I'm sorry, must.

CHIEF JUSTICE CORNELIUS: All right. Must permit.

MR. BABCOCK: We can't eliminate the procedure whereby a party contesting an intervention, whether it purports to be as a matter of right or permissive, moves to strike or to sever or whatever we're going to call it, that intervention, you can't eliminate (c) from (a). There still has to be a mechanism whereby I say, "No, that statute doesn't give you the unconditional right to intervene," or under (a)(2), "The parties that are already in the case adequately protect your interests. We don't need you. Get out of here." There still has to be that right for me to contest that.

JUSTICE CORNELIUS: Maybe so.

But that makes it no longer an intervention of right.

MR. BABCOCK: Well, that's right. There are two -- well, not necessarily so. There are two components to it. One is I say, "You have misinterpreted the fact that you have a 38(a) intervention. You're wrong about that, and I need to go to the court and convince the court you're wrong about that."

Or secondly, as you'll see in 38(a)(2), it is not an all-or-nothing thing, because it says unless the person's interest is adequately protected by existing parties, so that's something you can fight about. And there are many, many federal cases where that is fought about. And there are many, many federal cases where the party who has sought to intervene as a matter of right and is intimately bound up with the facts of the case is kicked out of the case or not let in the case.

PROFESSOR DORSANEO: It's a drafting problem.

MR. BABCOCK: Yeah.

CHAIRMAN SOULES: Okay. Well,

we've got a lot of ideas for you. I guess one that I did not hear you carry forward, I'm sure it's in your notes, is in deciding whether to strike or redocket, we have to consider the "prejudice the adjudication of the rights of the other parties."

MR. ORSINGER: We added, Luke, at the end of 38(c), actually we took out the word "other," so it's "unduly delay or prejudice the adjudication of the rights of the parties," the conception being that the right of the intervenor to bring the claim without having it lost to the limitations, by striking the word "other," I think Bill thought the prejudice to the intervenor is a factor to consider now. Is that specific enough, or do you --

CHAIRMAN SOULES: Sure. I just -- when Bill was --

PROFESSOR DORSANEO: Yeah. I was going to be more explicit than just referencing -- than saying go read 32 and 33, which economically you could write it just like that. You could just say, "Go read these other rules. They're the ones that you'll be

using in deciding about this intervention."

HON. SARAH DUNCAN: I don't know if that's such a --

CHAIRMAN SOULES: Judge Cornelius, in thinking about what you were saying, of course, there's a range of these parties needed for just adjudication that go from the old concept of indispensible to, what, necessary, I guess, are the old terms. And it may be that to add 33 picks up all of those, not just those that are so-called indispensible.

PROFESSOR DORSANEO: This is really a very interesting history lesson, because now I understand why our Texas rule was a one-sentence rule, because everybody is meant to know that all of this other information is pertinent to intervention. But if you don't say so --

CHAIRMAN SOULES: And it may be that --

HON. SARAH DUNCAN: It's also an interesting drafting lesson.

CHAIRMAN SOULES: -- there are some circumstances where a not indispensible

intervenor, just in the course of managing the court's docket trying to get other parties to trial, can be part, even considering all of the factors of 33(b). Now, you're right that that doesn't make intervention as a matter of right literally a right.

JUSTICE CORNELIUS: Well, if you wanted to keep it literally a right, except when a person miscontrues his right, then it seems to me that the exception ought to be placed in (a) rather than in (c). It's true that sometimes they will think maybe they have the right to intervene when they don't, and the court will have to determine that. But by putting the exception down in (c), it seems to me to render intervention as a matter of right a nullity. It changes it to permissive intervention.

MR. BABCOCK: And I wonder if somebody that has got an unconditional right to intervene by statute, whether a judge has the discretion to boot you out of the case. That doesn't seem to follow.

CHAIRMAN SOULES: No. He may have the power to sever, but he's got to meet

the severance standard.

JUSTICE CORNELIUS: Or a party may claim that he has a right under a statute but he in fact doesn't.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: Are there any cases involving children where there's not an absolute right to intervene?

MR. ORSINGER: I think you have the duty to join everybody that probably has a right to intervene.

HON. SARAH DUNCAN: I think if the biological father comes in, there might be a mandatory intervention in an adoption proceeding.

MR. ORSINGER: But you know, I'm not necessarily troubled by the concept that (c) is a restriction, because in exercising discretion to strike an intervention, if the court has no discretion to strike somebody with an unconditional right, then the sentence doesn't apply to them. It's only in those areas where the court has discretion that the description of

what the court can consider in its discretion even has an impact.

PROFESSOR DORSANEO: But again, we're going to have such a different draft the next time that it doesn't profit to talk about it anymore.

MR. ORSINGER: Well, it does suggest that. But the standard is -- the standard might be different between someone that's intervening under 33 and someone that's intervening under 34. But certainly the standard is different for an unconditional statutory right. They have no discretion probably if it's an unconditional statutory right. They might have more discretion of a 33 who they say is adequately protected by someone that is a party to the suit, and then they probably have very broad discretion under 38(b).

CHAIRMAN SOULES: The problem with all of that, though, is that in a partitioned case, not joined, he joins up, intervenes, he can't be stricken. There's nothing they can do about that. They've got to have -- they can't make him go away. He

has a right to be in that lawsuit.

PROFESSOR DORSANEO: I know.

MR. ORSINGER: But we don't even mention the existence of that category of people who have that right.

PROFESSOR DORSANEO: Why don't we schedule the Cesarean section on this for the next meeting.

CHAIRMAN SOULES: Okay. Let's take a break for about 10 minutes.

(At this time there was a recess.).

CHAIRMAN SOULES: Okay. Rule 39.

PROFESSOR DORSANEO: The first thing, and this is in part for the subcommittee and for David Keltner to hear too, on 39, at our meeting we noticed that substitution of parties based on our Texas rules dealt only with the subject of death. Since then I've redrafted it such that it covers death; and then in paragraph (b), "Public Officers: Death or Separation From Office," which is covered in the federal rule; and (c), Substitution for Other Reasons.

Today we're only really prepared to present to you (a) in the sense of, you know, to look at it and give us your advice. It's been submitted to a very fine retired probate judge who is now with Haynes & Boone to look it over for us.

I changed the citation thing, David, if you want to --

MR. KELTNER: Yeah. Yeah. I like that.

PROFESSOR DORSANEO: Okay. And I think that's right, but we would be better saving that until we get a read on it from somebody who really knows.

MR. ORSINGER: We took out "scire facias."

PROFESSOR DORSANEO: Yeah, and made it "citation."

MR. ORSINGER: We're using "citation" in lieu of it, but that means you're serving a citation on the executor of a plaintiff sometimes.

PROFESSOR DORSANEO: So I said in this draft, "a citation requiring the personal representative of the decedent's

estate or the heirs to appear and prosecute the action must provide notice that the action may be dismissed for want of prosecution if a timely response is not made." So the citation will say something other than you'll be subject to default.

MR. KELTNER: And we took out "suggestion of death," our theory being that death is one of those things in the main that is pretty black and white and one need not suggest it; one may give notice of it.

PROFESSOR DORSANEO: So with your permission, Mr. Chairman, we'll save that death thing, which I think is probably fine, until we get validation on that or some further suggestions.

CHAIRMAN SOULES: Good enough.

PROFESSOR DORSANEO: Suit Against Dissolved Corporation, which is listed erroneously over here as (7), I guess I don't really want to put that under "Death." We'll just call that (b), you know, Suit Against Dissolved Corporation.

And what we decided to do was to change our current Rule 160 into a rule that says go

read the Business Corporation Act, which is where this subject is dealt with expressly and in detail. We don't really need current Texas Rule 160 or this (7) to become subdivision (b) because the Business Corporation Act is complete and needs no assistance from the Rules of Procedure, except for the fact that it might be a good idea to tell somebody that this is covered over there, so that's what we recommend on that.

Public Officers: Death or Separation From Office. We have a provision in our Appellate Rules dealing with this subject. I read the provision in our Appellate Rules and I read Federal Rule 25(d), and I think that I prefer 25(d), but we've had no committee action on this, so I'll just mention it, and you know, ask for input.

This 25(d) basically says that the successor is automatically substituted, okay, and just deals with it that way.

Paragraph (c)(2), listed here as (b)(2), is perhaps more problematic and needs further checking because there is some case law about suing a public officer in an official capacity

and whether you use the official title or the name or both, and I really think that our law is too complicated on that. And whatever our law is, we'll probably come back and recommend this language, but it hasn't been done by the committee.

Substitution for Other Reasons is taken right from Appellate Rule 9. The Federal Rules have a provisions in Rule 25 for transfers of interest. In the Federal Rules, despite the fact that there is a real party in interest rule, the transfer of interest provision in Federal Rule 25 is such that you don't have to prosecute in the name of the real party in interest transferee if the transfer occurs after suit has been filed. And it just struck me that we may or may not want to do that, but we'll be better off looking at Appellate Rule 9. If substitution in the trial court is necessary for some other reason, the court may order substitution on any party's motion at any time, which is exactly the same as our appellate rule, except instead of saying "appellate court" it says "trial court."

So I recommend (7) at the top changed to (b), and (c) at the bottom changed to (d), Suit Against Dissolved Corporation and Substitution for Other Reasons, to this committee to vote on right now. And I think that we should save the remainder of this rule to be considered after further consideration by the committee.

CHAIRMAN SOULES: All right. So we're now voting to approve Rule 39(b) and (d) on Page 13 of the materials. (b) is Suit Against Dissolved Corporation and (d) is Substitution for Other Reasons. Any objection? Carl Hamilton.

MR. HAMILTON: I have a question on 39. It says, "Absent a timely appearance and suggestion." What is a timely appearance and suggestion?

PROFESSOR DORSANEO: Well, that would be in accordance with the citation. Oh, no, no, no.

MR. ORSINGER: It's not defined.

PROFESSOR DORSANEO: It's not defined.

MR. HAMILTON: Why do we need "timely"?

PROFESSOR DORSANEO: Well, we have "timely" with "appearance" --

CHAIRMAN SOULES: Where are you reading?

MR. ORSINGER: He's on (a)(1). He's in the contents of (a)(1).

MR. HAMILTON: It's on the sixth line down.

CHAIRMAN SOULES: Are we passing on that today?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Right now, Carl, and we may want to go back and talk about these rules that are not under consideration for action because they're -- the motion or the action is on Rule 39. Okay? Turn to Page 11. Nothing on that. Turn to Page 12. Nothing on that. Then we get to what was (7), that's now (b), on 13. And what was (c) at the bottom is now (d).

And all we're -- all I'm asking is does anyone have any objection to 39(b), Suit Against Dissolved Corporation or 39(d),

Substitution for Other Reasons? Okay. No objection. Those will be recommended by the Committee.

MR. ORSINGER: Can we also note that we're going to change (b), Public Officers, into (c) just to keep the nomenclature?

CHAIRMAN SOULES: Sure. And to make that change.

Now, do you want anything else discussed, not as an action item but as a discussion item, on Rule 39?

PROFESSOR DORSANEO: Well, I would like help for the public officers, if anybody is in the habit of suing public officers and is conversant with that complicated law, to step forward so I don't have to go dig it out.

Well, it won't be that hard to find.

CHAIRMAN SOULES: I don't know.

MR. ORSINGER: Look it up in Dorsaneo's Litigation Guide.

PROFESSOR DORSANEO: That's where it is, but I don't have that memorized.

MR. ORSINGER: Have you read

it?

PROFESSOR DORSANEO: Yeah, most of it.

CHAIRMAN SOULES: Is there anything else you want discussed on Rule 39, Bill?

PROFESSOR DORSANEO: No, because we'll get Judge Burnett to give us the death stuff. And any input would be appreciated, because it is tricky stuff.

I'm ready to go to Voluntary Dismissals and Nonsuits.

CHAIRMAN SOULES: Okay. On to Page 14, Voluntary Dismissals and Nonsuits.

PROFESSOR DORSANEO: And I redrafted this I hope in the way that you wanted it. We spent a good bit of time discussing paragraph (a) last time. I also added paragraph (b). That shouldn't be controversial, because it's in the rulebook right now. I inadvertently left it out in the draft that was presented at the last committee meeting. It deals with a common situation. I have cases right now where I have defendants who have not been served and I'm not planning

on serving them at this point, and it deals with that. Okay. It doesn't keep me from moving forward and it doesn't prejudice me.

But in that paragraph (a) we had, you know, that first sentence, and I did not add the words "or nonsuit" after the word "dismiss" every time it appears in this rule. You may -- I'm not -- I wasn't sure whether that's what you wanted me to do, if you wanted to change the first sentence. That's what you would tell me to do based upon the discussion last time, which was less than completely clear. Remember, when I had it in here, I had it just called "voluntary dismissals," and people said, well, we want it to cover nonsuits. So I changed the title to "and Nonsuits," but I didn't use that string of words, "dismissal and nonsuit," over and over and over again. Maybe you want to tell me to just put "nonsuit."

MS. SWEENEY: Could we put it back in over and over and over again? The reason --

PROFESSOR DORSANEO: I'm happy to do that. It's like a lot of things that I

don't like doing, I can do it and I can live it.

MS. SWEENEY: Okay.

JUSTICE CORNELIUS: But it's still in the last sentence at least.

MS. SWEENEY: Yeah, it crops back up later.

MR. KELTNER: There's no reason not to.

JUSTICE CORNELIUS: I have a question about the second sentence, if I may.

PROFESSOR DORSANEO: Yes. Then the second sentence is new. You did not see that last time. That was something that was added in committee. This draft, which is a little bit -- has got the hiccups a little bit, has slightly different wording from what was even recommended in committee, so open season on this one.

JUSTICE CORNELIUS: Is it intended to prohibit a nonsuit when there are separate trials? It says, "If the trial is bifurcated or a court has ordered separate trials, the plaintiff cannot dismiss or nonsuit any claim on which the plaintiff has

introduced all of the plaintiff's evidence other than rebuttal evidence."

MR. ORSINGER: Judge, it's intended to keep you from nonsuiting a separate trial on which you have rested, but not the untried separate trial. In other words, if you were ordered to have a separate trial on A and B and you've gone ahead with A and you've rested in A, you can no longer nonsuit separate trial A, but you could nonsuit separate trial B which has never started again.

JUSTICE CORNELIUS: I don't believe the sentence says that.

MR. ORSINGER: It doesn't say that?

MR. GALLAGHER: It doesn't say that.

MR. ORSINGER: It doesn't say that?

MR. GALLAGHER: I agree with Judge Cornelius.

MR. ORSINGER: Okay.

MR. GALLAGHER: The plaintiff can close under this reading before a verdict

is returned, before the case is even submitted to the jury. And if it's bifurcated, as I read this, he couldn't nonsuit the case.

MR. ORSINGER: Well, bifurcation and separate trials are different. Bifurcation is more like a Moriel type where you --

MR. GALLAGHER: I understand.

JUSTICE CORNELIUS: This says the plaintiff cannot dismiss any claim --

MR. GALLAGHER: -- any claim --

MR. ORSINGER: -- on which -- on which --

JUSTICE CORNELIUS: -- on which he has introduced all of the plaintiff's evidence other than rebuttal evidence. There may not be any rebuttal. He may have rested.

MR. GALLAGHER: The plaintiff --

CHIEF CORNELIUS: But you just said he could nonsuit if he had rested on that claim, but he couldn't on the other one.

MR. KELTNER: I see your point.

MR. GALLAGHER: The defendant

could -- you -- a plaintiff can take a nonsuit. Just say it's a straight-up case. A plaintiff can take a nonsuit anytime prior to verdict being returned. And whatever the consequences might be, if there's a statute or --

MR. ORSINGER: No. Under Rule 162, "At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence," we haven't changed that language from the current rule.

PROFESSOR DORSANEO: Okay. You can't nonsuit after you rest.

MR. GALLAGHER: This doesn't change that then. It does not.

PROFESSOR DORSANEO: That's cumbersome language, I agree, but it's cumbersome language because it's patterned on the first sentence.

HON. C. A. GUITTARD: Why don't we change the title by saying instead of "Voluntary Dismissals and Nonsuits" it's "Voluntary Dismissals (Nonsuits)," and then just strike "nonsuit" everywhere else.

MR. ORSINGER: I like that.

PROFESSOR DORSANEO: Well, does that --

CHIEF CORNELIUS: That's all right, but that doesn't take care of the second sentence.

PROFESSOR DORSANEO: Paula is not going to like that.

MS. SWEENEY: I wasn't listening. Someone tell me.

MR. GALLAGHER: He struck your "nonsuit" everywhere else.

CHAIRMAN SOULES: Okay. Let's get focused here and talk one at a time here.

Judge Cornelius has raised a point. The first sentence is -- well, the first sentence isn't exactly the rule because you've got the rule divided into two pieces. This is -- the first sentence says -- it applies when the plaintiff is going to dismiss the entire case or a party, one or more parties.

MR. ORSINGER: That's right.

CHAIRMAN SOULES: But it does not apply to dismissing one or more claims short of the entire case.

MR. ORSINGER: Unless the claim

is tied solely to one party.

CHAIRMAN SOULES: Okay. And then the next to the last sentence says, "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." So I guess that's where you get the authority to nonsuit a claim, one of the claims.

MR. ORSINGER: Well, the reason that sentence you just read is required is because we're now requiring notice of nonsuit in writing in the circumstances when a party is omitted, because the committee voted that you can't drop a party by merely amending a pleading. You have to file some kind of document saying that you intend to drop the party. But Rusty, I think it was, made a comment, "I want to be able to stand up and say I'm nonsuiting my negligence and I'm just going with fraud," or something like that.

CHAIRMAN SOULES: Okay. You cannot -- all right. So that sentence is where you get that authority, that next to the last sentence?

MR. ORSINGER: We feel like we've got to give you that sentence in order for you to still be able to stand up without having to file a separate document.

MS. SWEENEY: Why does it have to be in writing?

CHAIRMAN SOULES: Okay. Then the next sentence is the one that's bothering Judge Cornelius.

MR. ORSINGER: Now, the purpose-- if I may, the purpose of the second sentence is to handle two problems, the Moriel problem; and Justice Hecht wrote us a letter saying handle the problem of the fact that in a bifurcated trial you're not actually resting on all of your evidence until you're finished with the second phase of the trial.

And so this major Committee has already decided that once you close out and go to the -- once you rest on your first phase of the trial, it's too late for you to back out of the first phase but you could always back out of your punitive damage claim until you rest on the punitive damage. That's the bifurcated concept.

But then separate and apart from the bifurcated concept is bona fide traditional separate trials where claim 1 is being tried separately from claim 2. And in that sentence, if you rest in -- if you're trying claim 1 and you rest, you are stuck with your result in claim 1 but you are still free to nonsuit claim 2.

PROFESSOR DORSANEO: And we believed that it was the sense of our jurisprudence generally that if something is tried completely then you're stuck with the result.

MR. GALLAGHER: With the result, yeah.

JUSTICE CORNELIUS: I don't believe that second sentence says that, though.

MR. ORSINGER: Okay. It's supposed to say that.

JUSTICE CORNELIUS: It looks like it just contradicts the first sentence.

PROFESSOR DORSANEO: I thought the second sentence could be said in a more straightforward manner by a reference to the

concept of something being tried.

MR. KELTNER: It needs to be clarified.

PROFESSOR DORSANEO: In the bifurcated trial or separately, rather than by the reference to "on which the plaintiff has introduced all of the plaintiff's evidence rather than rebuttal evidence."

MR. ORSINGER: Judge Cornelius, is your only concern --

CHAIRMAN SOULES: Wait a minute, if you put -- if you started the second sentence with the word "however," and I'm not suggesting you do that because that's probably a poor choice of words, then it doesn't contradict. It's saying --

JUSTICE CORNELIUS: It doesn't contradict, but it doesn't make sense to me even with that, because --

MS. SWEENEY: Well, could you start the first sentence with "In any case other than a bifurcated case," or "In a nonbifurcated case," or something like that?

HON. SARAH DUNCAN: What if you changed the second sentence to read -- and I

agree with Luke, there needs to be some introductory signal used to say that there's going to be an exception. Bryan Garner would say that you use "but." But if we change the second sentence to say, "But if the trial is bifurcated or the court has ordered separate trials, the plaintiff cannot dismiss or nonsuit any of the claims being tried and on which the plaintiff has introduced all of the plaintiff's evidence other than rebuttal evidence."

PROFESSOR DORSANEO: Well, don't we mean that you can't dismiss or nonsuit any claim that has been tried?

JUSTICE CORNELIUS: Right. That would be clearer.

MR. ORSINGER: But "tried" could mean submitted to a jury.

JUSTICE CORNELIUS: But you're saying that in the negative. You say on any that he hasn't introduced all of the evidence.

PROFESSOR DORSANEO: Well, how about tried in the first phase of the bifurcated trial, or separately?

MR. ORSINGER: Why don't we

write two sentences, one for bifurcated trials and one for separate trials. Then we don't have to balance both in the same sentence. Then when we have a bifurcated trial we could just say, "has introduced all of the plaintiff's evidence in the first phase of the trial" or something.

PROFESSOR DORSANEO: I don't really know why we need to even reference separate. I would have thought it would have applied to separate trials only; maybe not.

MR. ORSINGER: You're saying that you should be able to nonsuit trial A just because you haven't finished trial B?

PROFESSOR DORSANEO: No. I'm saying that it never would have occurred to me that this sentence would be necessary given the first sentence.

JUSTICE CORNELIUS: That's right.

MR. KELTNER: I tend to think that's right, but since we were specifically asked to address it --

JUSTICE CORNELIUS: I think the second sentence just confuses the issue.

MR. ORSINGER: Well, Justice Hecht's letter only asked us to address the bifurcated trial. It didn't mention the separate trial problem.

CHAIRMAN SOULES: Well, tell me what you think if we say, "But" -- suppose we start with the word "But if the trial is bifurcated or a court has ordered separate trials," on that condition, if you have that condition, the plaintiff cannot dismiss or nonsuit any claim on which the plaintiff has introduced all of the plaintiff's evidence.

MR. ORSINGER: It's too bad we just can't say "rested."

CHAIRMAN SOULES: What that says to me and what they're trying to say is -- see, what I'm trying to do is get to where the ambiguity is, because I want to fix it.

PROFESSOR DORSANEO: I think the way to fix it isn't the way that I suggested a moment ago. I mean, the problem is when somebody gets a bad result in the first and then they have the second case planning probably in the first 10 seconds of

the second case to nonsuit the entire litigation on the theory that someone would buy that as a proper interpretation of our Rules of Procedure. Now, I personally would not buy that you could do that.

But you could just simply say, "But if the trial is bifurcated or the court has ordered separate trials, the plaintiff cannot dismiss or nonsuit any claim tried in the first phase of the bifurcated trial or any claim tried in the first separate trial," and that covers it.

MR. ORSINGER: So if you --

PROFESSOR DORSANEO: You don't need to be talking about resting, because it's going to be tried all the way to the end.

MR. ORSINGER: As long as you --

CHAIRMAN SOULES: One at a time. Richard Orsinger.

MR. ORSINGER: As long as you define the word "tried" to mean rest, because when you say "tried," I think closed, gone to the jury and got a verdict. And we're not actually talking about trying, we're talking

about resting.

JUSTICE CORNELIUS: Well, say "on which he rested."

PROFESSOR DORSANEO: Well, the only situation where you would run into that is where somebody managed to get two of these separate proceedings running simultaneously and they rested in one of them and they had the other one going --

MR. ORSINGER: No, I don't agree.

PROFESSOR DORSANEO: Well, that's the practice.

CHAIRMAN SOULES: We're going to have to let everybody talk one at a time. If somebody jumps in and says, "I disagree," whenever somebody has got a sentence half completed, we can't make a record that way, and I'm not sure that the person who is disagreeing has heard everything that has been said. So let's talk one at a time. Who would like to speak first? Sarah Duncan.

HON. SARAH DUNCAN: I'd just like to say that it seems to me that we're making this a whole lot more complicated than

it is, and I think maybe the reason we're all kind of going down that complicated route is that we are not thinking about singular claim.

As I understand it, I, as a plaintiff, can dismiss or nonsuit a claim at any time before I have put on all my evidence other than rebuttal evidence on that claim. Well, if that's true as to a claim, it certainly becomes true as to all claims and all evidence on those claims. The same is true with bifurcation and separate trial.

And I guess I don't understand why we need anything other than that one sentence, because when you take that sentence as to a claim, you then move from a claim against one party or a claim against all parties or all claims against one party or all claims against all parties or all claims being tried in the first phase of the trial or all claims being tried in separate trial 1 through separate trial infinite. It's the same principle in all of those situations.

And I think we're complicating it by trying to pluralize it into claims, parties,

cases, claims being tried in the first phase of a bifurcated trial, claims being tried in one or more separate trials.

PROFESSOR DORSANEO: We probably are complicating it, but part of the reason is that we're really not quite sure about the preclusive effect of litigating one claim on other claims that could be in the same litigation but that aren't necessarily part of the same transaction.

If you start thinking about claims, you get this sentence that does think about claims: "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." Well, that will only work if, when you abandon the claim, you aren't already precluded by preclusion principles, which you might or might not be depending upon the relationship of the claims that were actually tried and this one that you say, "Pardon me, we didn't try this and I want it entered of record my such and so claim."

Now, maybe when you say that that doesn't do you any good under res judicata, but

maybe --

HON. SARAH DUNCAN: Well, we know it doesn't.

PROFESSOR DORSANEO: -- res judicata doesn't head you off.

HON. SARAH DUNCAN: Right.

CHAIRMAN SOULES: One at a time.

HON. SARAH DUNCAN: If res judicata applies, that doesn't do you any good.

PROFESSOR DORSANEO: But res judicata, although it applies more often than it did a couple of years ago because the test is broader, doesn't apply --

HON. SARAH DUNCAN: -- always.

PROFESSOR DORSANEO: -- across the board. So our thinking is you should be able, if you're not barred by res judicata, to in a case at any point have it entered of record that this claim was not tried with the view toward maybe litigating it at some later time.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: The thing that concerns me, and this is not in direct response to the sentence Bill is talking about, it's more in response to what Sarah said, the thing that bothers me about separate trials language is that we need to be certain that someone cannot say, "Because I haven't rested on my last claim to be tried, I'm therefore free to nonsuit a claim that I have tried."

CHAIRMAN SOULES: First of all, rested is not -- I just tried to check it. I don't think there's anyplace in the rules we're talking about rested.

MR. ORSINGER: I know that, but that's a hell of a lot easier to say than "concluded all of my evidence except for rebuttal evidence." Now, I'm not writing the statute, I'm just trying to get the concept across.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Well, Rule 265 does mention "rest," I believe.

CHAIRMAN SOULES: No. It says introduces as evidence --

PROFESSOR DORSANEO: Ah, that's right. You're right, Mr. Chairman. I stand corrected.

MR. ORSINGER: See, to me the problem with the separate trials is that the normal statement of the rule that you have rested on your case in chief or whatever might leave the door open so long that something that should have been shut off is not shut off.

CHAIRMAN SOULES: Well, separate trials are created by orders.

MR. ORSINGER: True.

CHAIRMAN SOULES: And if I've got 10 causes of action or 10 defenses, whichever, I don't know, well, it's got to be the plaintiff who nonsuits or counter-plaintiff, so whichever side I'm on, I've got 10 claims and I rest. Any five of those -- I can't nonsuit them anymore, and the five on which I introduced no evidence, they've been tried to a directed verdict, no evidence. They don't -- you can't carve them out at that point. If you announce ready on your pleadings with 10 claims and you put on all

your evidence and you're done, you can't carve out half of your claims at that point, can you?

MR. ORSINGER: Well, let me ask you, Luke, if the rule said nothing more than the first sentence of (a), do you feel like we have no problem with separate trials? Is it apparent to you that each separate trial is treated as if it's a standalone lawsuit and that you're cut off when you rest in that separate trial, or does the fact that these are all claims under one cause keep that door open after you rest on the first trial?

CHAIRMAN SOULES: Well, separate trials complicates it.

MR. ORSINGER: So if --

CHAIRMAN SOULES: Let me finish this thought. I can have 10 claims and I can say before I rest, "I nonsuit five of them." Okay? That's --

MR. ORSINGER: Sure.

CHAIRMAN SOULES: But if I rest before I nonsuit the five, I'm stuck.

MR. ORSINGER: True.

CHAIRMAN SOULES: Now, your

question, though, has to do -- well, separate trials can be a small piece.

MR. ORSINGER: True.

CHAIRMAN SOULES: The judge can say, "Well, I'm going to try liability. I'm going to try only the liability question, strict liability. I'm not even going to try negligence" or whatever.

HON. SCOTT A. BRISTER: Or I'm going to try reasonable diligence on whether your service -- because I think you've got a problem showing reasonable diligence. That's quick and easy, and if you don't show reasonable diligence, we don't do anything else. That can be a real small thing, very short or very long, and in that particular circumstance you don't get anything by nonsuiting if that's the -- if you've got a limitations problem on it.

MR. ORSINGER: But the pertinent question is, does our general statement of the rule cover us or do we have to specifically craft a rule for separate trials?

MS. SWEENEY: I think we're

making it a lot worse with the additional sentence. We're raising all kinds of potential problems that the existing rule makes pretty clear.

HON. SCOTT A. BRISTER: Is the only problem we're trying to address the one Bill says, that somebody might be confused if you nonsuit during the second trial whether you resurrect the first trial?

MR. GALLAGHER: Moriel.

MS. SWEENEY: It's been tried.

CHAIRMAN SOULES: Taking your example, Judge, because I've been trying to think of one, we just tried reasonable diligence after filing a lawsuit to get service, and the jury says no, and I say nonsuit. I haven't tried my whole case. I've only tried that separate trial, only tried a piece of it, and I nonsuit the whole thing. Now, do I get a new jury on the first tried issues?

MR. ORSINGER: You have to refile a new case.

CHAIRMAN SOULES: I know. But do I get a new jury? Do I get to retry that

separate issue?

MR. ORSINGER: You shouldn't be able to.

CHAIRMAN SOULES: We say you shouldn't, but I don't think there's any law on that. I don't know of anyplace where there's a line of demarcation. The line of demarcation seems to be when the plaintiff has tried his case on the merits to the point of resting, as it were. Now, that is a place where we clearly have a line of demarcation. You can't nonsuit after that. But short of that in a separate trial context I've never seen any decision.

MS. SWEENEY: Luke, could I ask Lee, maybe you remember, and maybe this is the genesis of the Justice Hecht's letter. I think there is a recent case or else somebody has just lectured about it or something where in a Moriel context the negligence case was tried. They lost, the plaintiffs lost. And they said, "Well, our statute hasn't run yet. We haven't tried punitives so we haven't tried our whole case. We haven't put on all our evidence. We want to nonsuit the whole

thing." I think that's -- I mean, I think this has just happened. Do you remember?

MR. PARSLEY: Well, they -- some amicus briefed at Moriel, I believe. And then the only recent case I recall was a summary judgment case where somebody -- a summary judgment on part of their claims and they tried to nonsuit the whole thing.

MS. SWEENEY: So it was --

HON. SARAH DUNCAN: That was the Hyundai case.

MR. PARSLEY: That's the only recent one, but there may be others.

MR. ORSINGER: Luke, it seems to me that the first thing we have to decide is whether we want to permit a nonsuit and a refiling under your hypo. I thought that you couldn't do that. If you tried it and you lost, even if it was a separate trial, I thought you were bound by that result. You're saying there's no case law saying that, and I'm getting the feeling that there may be some people here that feel like you should be able to bail out anytime before you finish the last separate trial.

CHAIRMAN SOULES: Well, you could analogize to the summary judgment case that Justice Duncan is talking about and say, well, once you have -- you know, a summary judgment may be a trial. Once you have had that trial, if you nonsuit, then that piece of it is dismissed with prejudice. Of course, in is the case of reasonable diligence, the tail shakes the dog; the whole thing is gone. But that would only be by analogy. I don't know of any decision.

HON. SARAH DUNCAN: That was part of the problem with the Hyundai case, I think, both for the court of the appeals and the litigants; that there just wasn't a whole lot of law that really told anybody what the answer was.

CHAIRMAN SOULES: Oh, yeah. That was a revelation. That's the decision we're talking about, the summary judgment. That was a revelation at least to me when I read it.

So by analogy the Supreme Court would seem to be lining up along the lines of this sentence. If you've had a trial, if there's

been a disposition on the merits of any particular question and you nonsuit, then that's -- that is dismissed with prejudice. That nonetheless become dispositive on that issue.

MR. ORSINGER: The nonsuit rule goes further than that, because this is -- our rule is imposed even before disposition. Our rule is imposed that when you have put all your evidence before the fact finder and rest, even though you don't have a summary judgment, directed verdict, nothing, you have crossed the point of no return. You are now in the litigation system and you will live with the result. So actually the Supreme Court ruling on a summary judgment would be like, you know, once you have filed your motion for summary judgment and have all your affidavits in, you can't back out anymore.

CHAIRMAN SOULES: And the way this reads, just to complicate it further, suppose I say -- I get to the point of needing to rest and I say, "Okay. I want to dismiss counts -- five of my 10 counts."

The judge says they're dismissed, and I

say, "I rest."

Well, I better put on some more evidence first, because I've already put on all my evidence before I took my nonsuit. And this says when your evidence is complete it's over. You can't wait until you put on your last piece of evidence to nonsuit your five -- the five claims you've still got in the case under the test of this rule.

MS. SWEENEY: That's the existing law, though.

CHAIRMAN SOULES: Well, and it may --

MS. SWEENEY: Well, you all are reading the existing rule. That's what it says.

CHAIRMAN SOULES: That's right. And that may be the consequence of it. I was wondering about that.

MR. ORSINGER: Well, you always nonsuit before you --

CHAIRMAN SOULES: I better put in another document or something. I've got one more exhibit.

MR. ORSINGER: No. As long as

you rest before you nonsuit -- I mean, nonsuit before you rest, you don't have a problem.

CHAIRMAN SOULES: Well, even if you put on all your evidence. The test here is have you put on all your evidence, not whether you've rested.

MS. SWEENEY: But once you have nonsuited it, you can't put in more evidence about it. The judge won't let you.

CHAIRMAN SOULES: I'm going to put on one more --

MR. GALLAGHER: -- piece of evidence on the non-nonsuited claims.

CHAIRMAN SOULES: -- piece of evidence on the five I've got left.

HON. SARAH DUNCAN: He's right.

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: I think we need the second sentence in there, but I just think it needs to be clarified some.

And I have a trouble with the term "claim." That's going to give rise to a lot of dispute as to what constitutes a claim. I would suggest that we use -- that we simply

say that if a person has tried one separable or bifurcated issue by putting on all of his evidence on that issue, then he cannot nonsuit the entire cause of action, or he cannot nonsuit as to any other separable or bifurcated issue. Would that clarify that?

MR. ORSINGER: But he can nonsuit as to the other issues. He just can't nonsuit as to that one.

JUSTICE CORNELIUS: Okay. Well, he can. But he cannot nonsuit the entire case.

MR. ORSINGER: That's for sure.

CHAIRMAN SOULES: That's exactly what this is getting at, but it's not getting at it in exactly those words.

JUSTICE CORNELIUS: And I think if you use the word "claim" in there, you're going to get yourself into a lot of trouble about what constitutes a claim. It seems to me that a separate issue or a bifurcated issue would be more clear.

CHAIRMAN SOULES: Yeah. Go ahead, Justice Duncan.

HON. SARAH DUNCAN: I agree.

Except that we don't nonsuit issues, we nonsuit claims and defenses, counterclaims.

MR. ORSINGER: Actually we nonsuit cases according to Rule 161.

MR. GALLAGHER: That's what has been plaguing me, is whoever stands up and -- Mike Gallagher, I'm sorry.

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: (Continuing) -- and says, "I'm nonsuiting my negligence claim, but I'm maintaining my intentional tort claim or my defect, my marketing defect or design defect claim," with an intent to preserve that cause of action for a later date.

HON. SARAH DUNCAN: We actually had this in a case where the guy nonsuited his -- tried his breach of contract claim and put of record that he was nonsuiting his derivative negligence claim. In that one it was clearly barred by res judicata, and Judge Chapa wrote an opinion that was refused saying, "You can't do that."

The question that I think Bill raised is but what if it's not barred by res judicata

even under the broader bar test than what we used to have.

But the problem with -- if I separately try reasonable diligence on service, it's not that I would nonsuit, try to nonsuit the service issue, it's that that is an essential element to my underlying claims and I've already tried it.

JUSTICE CORNELIUS: Well, I understand, but that's why I use the term separable or bifurcated. But instead of "issue" we could use "claim," I guess, so long as you have "separable or bifurcated claim." What I'm trying to avoid is just having nonultimate issues --

HON. SARAH DUNCAN: Well, but you can --

JUSTICE CORNELIUS: -- inserted as a claim for the purposes of the nonsuit.

HON. SARAH DUNCAN: You can separately try, though, issues; for instance, as Scott said, the reasonable diligence issue. And that might be dispositive of your claim, but it's not a separable claim in and of itself.

MR. ORSINGER: I can give you another example. In PJC 5 they make the recommendation that if you're trying the enforceabilty of a premarital agreement that the court order a separate trial on the premarital agreement, because you don't know what law to charge the jury on unless you know whether the agreement is enforceable or not. And so they actually recommend that the court consider a separate trial, and yet whether the agreement is enforceable or not is just one little part of the property division and it's not severable in any sense and it's not a separate issue really. It's a question of whether the law we charged the jury on has been modified by contract. So it's as part and parcel of the ultimate claim as you could possibly get.

So if I try the enforceability of my premarital agreement to a jury and the jury finds that it's not enforceable, I shouldn't be able to nonsuit my divorce at that point, because we've already invested all of this time and energy into getting a jury verdict on this important issue. And yet I wouldn't even

call that a claim. That's less than a claim. That's a part of a claim, I guess.

HON. SARAH DUNCAN: It's an issue.

PROFESSOR CARLSON: It's an issue.

MR. ORSINGER: It's an issue. Okay.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: We're talking about nonsuits and dismissals of suits. It seems to me that it ought to read, "Anytime before plaintiff has introduced all of plaintiff's evidence other than rebuttal evidence, plaintiff may dismiss his entire suit or that part of his suit being tried in a separate or bifurcated trial." We're talking about dismissing the suit, not talking about claims.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I thought about putting a reference to the trial in the first sentence, Carl, and the problem that I

have is that you're going to be nonsuiting things before trial more frequently than at trial, so that didn't work out.

But I do think I can draft this second sentence now based upon what Justice Cornelius said about separate claim, bifurcated claim or release at issue and then when to claim, and I can draft it pretty clearly incorporating the concept of introduction of the plaintiff's evidence. I'm confident that I can draft it, but I need to know what the committee thinks about whether it should say "claim" or "issue" or both. That's really the one that I don't have worked out yet.

I mean, trust me, the language -- it's possible to draft the language clearly based upon what I've heard so far, but I don't know whether it should say issue, you know, separate claim or bifurcated claim or separate issue or bifurcated issue or some combination of the two.

CHAIRMAN SOULES: Well, this isn't responsive to that, but it adds another complication. Frequently at the discovery stage of the case the judge will rule that

something is discoverable that I don't want discovered, and my reaction to that may be to drop an element of damages; for example, an element of damages on which my client's mental health records are going to be germane, and I don't want those discovered or used in evidence, and they would be only relevant to an element of damages. And so I say, "Well, that's out now," so it's no longer relevant to the cause.

It's pieces of pleadings that are dropped that are -- I don't know whether they're issues, claims, elements or what the right word is, but I guess we need to work that out.

PROFESSOR DORSANEO: The committee thought that if it's just amending a pleading to take out a claim and not closing the entire case, and not a party but just a claim, that this wasn't even really about that; that that's covered by the pleading rules.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: But that's not --

CHAIRMAN SOULES: Okay. You

show up -- let me take it to -- let me put it in another context. You show up for a motion in limine and you get some bad rulings and you nonsuit.

JUSTICE CORNELIUS: Doesn't the rule on separate trials refer to issues rather than claims?

CHAIRMAN SOULES: The rule doesn't. The rule is so short. It's just the court may order separate trials or make other orders to prevent delay or prejudice.

MR. ORSINGER: What rule is that?

CHAIRMAN SOULES: It's Rule 40(b).

PROFESSOR DORSANEO: And then there's 174 that has additional information.

CHAIRMAN SOULES: Is it in 174? But you clearly can separately try issues.

PROFESSOR DORSANEO: It's "claims or issues" in 174(b).

CHAIRMAN SOULES: Is that what it says?

JUSTICE CORNELIUS: "Claims or

issues."

PROFESSOR DORSANEO: Uh-huh. So I think it ought to be "claims or issues."

JUSTICE CORNELIUS: Then let's use the same language in this rule.

PROFESSOR DORSANEO: It has to be, if it's going to --

MR. ORSINGER: Well, I mean, in family law cases we use "issues" because we might try custody to a jury -- well, no, that's probably a claim. That's a bad example.

But on a premarital agreement it's clearly an issue. It would sure help us if you use the word "issue" or "claims and issues."

HON. SARAH DUNCAN: Or on the separate or community nature of property, don't you go ahead and try that and then the court still makes the division based upon what the jury finds maybe?

MR. ORSINGER: Yes. But I would say if you rest during that process --

HON. SARAH DUNCAN: Oh, I agree. I'm just saying we've got to include

issues. I don't think there's anybody here that's advocating that issues that are separately tried shouldn't be subject to the limitation on your right to nonsuit.

CHAIRMAN SOULES: Well, "claims or issues" are used under 174, if that's going to survive.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Let's use them both.

PROFESSOR DORSANEO: I now know that it should be claims or issues, so I have -- in this -- I have enough information now to redraft that second sentence.

On this claims/issues thing altogether, though, I'll ask Rusty to explain to me again what current Rule 165 is meant to be about.

I'm still troubled by this sentence that we have as the next to the last sentence, "A party who abandons any part of a claim or defense contained in the pleadings." If all that means is somebody who amended the pleadings, and you know, did what you said, can then say at the trial --

HON. SARAH DUNCAN: But you can

do it without amending your pleadings.

PROFESSOR DORSANEO: Yeah, well, I don't know whether it means -- the current rule says that, "may have that fact entered of record so as to show that the matters therein were not tried." And frankly until our last meeting I didn't have much of an idea of what that was about or how it relates to res judicata or nonsuits or any of the rest of it. It's just kind of there.

And Rusty said something at the last meeting that I thought made me understand what it was about, but it's kind of like when I read Stephen Hawking; I have it for a little bit, but then I have to go back and get tuned in again because I can't --

MR. GOLD: I'm glad somebody else has that feeling.

CHAIRMAN SOULES: Okay. Bill, what additional assistance do you need?

PROFESSOR DORSANEO: I just think we'll be back talking about that "the party who abandons" sentence again. I'm not sure whether it's a good idea to have it in here, because if it is normally the case that

you can't do that without getting into trouble, then I'm not sure I want a sentence in the rulebook that suggests to somebody that they can abandon claims and then bring them back again later.

HON. SARAH DUNCAN: That was definitely what this lawyer thought he could do.

PROFESSOR DORSANEO: That lawyer may have been following this sentence --

HON. SARAH DUNCAN: He was.

PROFESSOR DORSANEO: -- off into res judicata land.

HON. SARAH DUNCAN: He did. That's all he briefed, was that sentence.

PROFESSOR DORSANEO: It's not a good sentence if it suggests to somebody that they should abandon claims on the theory that they're going to come back and do something later. We would be better off without the sentence from the plaintiff's side if the sentence is just, you know, a land mine.

MS. SWEENEY: And the other question would be what good does it do. It

allows you that you may have it entered of record. I mean, what -- "Judge, write this down."

PROFESSOR DORSANEO: Well, "may have it entered of record," and then the current rulebook says, "so as to show that the matters therein were not tried." Well, but that, I took that out, because that's even worse.

CHAIRMAN SOULES: I agree.

MR. GALLAGHER: That is worse. That's a real trap.

CHAIRMAN SOULES: Does anybody see any reason for maintaining that language?

MR. GALLAGHER: No.

PROFESSOR DORSANEO: We can ask Rusty what his reason was and evaluate it when we get it from him.

MR. ORSINGER: My recollection of what Rusty said was that he wanted to be able to drop a claim out of the lawsuit without have to amend his pleadings as long as he did it in open court.

MR. HAMILTON: Why do you have to do it?

PROFESSOR DORSANEO: Why?

MR. GALLAGHER: Yeah, why.

HON. SARAH DUNCAN: Well, it does sort of clarify things.

MR. GOLD: Well, I think you can do that. That's a judicial admission isn't it?.

HON. SARAH DUNCAN: No, it's not an admission.

MR. GALLAGHER: No.

CHAIRMAN SOULES: Well, I mean, you can do it -- why do it --

MR. GOLD: I'm dropping this claim --

CHAIRMAN SOULES: The question was why do you do this. Do you mean by that why would you do it strategy-wise; why would you do it --

MS. SWEENEY: Because the judge is fixing to let in some real bad evidence that only goes to that one thing.

CHAIRMAN SOULES: That's right.

MS. SWEENEY: And you're going to spike him.

MR. ORSINGER: There's another

time where you really want -- you want a negligence finding because you've got insurance, but you want to inflame the jury so you have an intentional tort in there.

CHAIRMAN SOULES: That's right.

MR. ORSINGER: And so you pour all of this horrible evidence in on the intentional tort, and then right before you go to the jury you drop your intentional tort and you channel all of that anger into a negligence finding. That's a routine --

MR. GALLAGHER: Well, but you do that on submission. I mean, the plaintiff controls the -- well, to some extent controls the submission, and if you don't -- you know, if I don't draft -- prepare an issue as to the intentional tort, then I can submit it on negligence only. I can choose the theory under which I'm going to submit the case to the jury --

MS. SWEENEY: So for --

MR. GALLAGHER: -- still.

MR. ORSINGER: So you don't need to -- you can waive your claim by failing to submit it. You don't have to, quote,

abandon it.

MR. GALLAGHER: No, correct. That is correct.

PROFESSOR DORSANEO: And I suppose you may want to abandon it to avoid the rebuttal evidence, even though you may have introduced evidence on it. Your bad rebuttal -- your same thought process happens. You say, "Oh, my God, they're just about to -- not just about, they have discovered this other bad evidence and I didn't know about it. They discovered it on their own and now they're starting to introduce it." Well, I would just like to slam that door shut by saying, "This claim to this type of damage, we're dropping it, Judge." If it means that, I guess that's okay.

MR. GALLAGHER: There may be a circumstance in which you would want to, but this has not been a big part of most of our practice.

CHAIRMAN SOULES: Well, it's used strategy-wise quite a bit, Brother Gallagher.

MR. GALLAGHER: No. I tell you, Luke, in 35 years of trying lots of multiparty litigation, maybe I'm trying to get somebody's strikes, but I thought Sarah's fix awhile ago pretty much addressed the issue, maybe not as to the claim, but certainly as to -- not as to separate trials, but certainly as to bifurcation.

Abandoning a negligence theory or a contract theory might in some circumstances be of strategy benefit, but it's not a big deal.

HON. SARAH DUNCAN: But do we really need a rule to say you can do that? Can you enter it of record without a rule?

MR. GALLAGHER: Sure, you can.

HON. SARAH DUNCAN: You just say it and it's on the record, right?

MR. GALLAGHER: I would think so.

MS. SWEENEY: The area that's of concern is not the ability to, you know, quit doing some part of your case. It's the ability -- in my view it's the ability to nonsuit the whole thing at any time up until, you know, the end as a matter of right.

That's the area that is critical and is central, and the rest of this that we're having all this discussion about --

PROFESSOR DORSANEO: I could write it now. What I would propose to say is something like this, is that before trial you can abandon any part of a claim or defense by amending your pleadings, and then continue with this thought, a party who abandons any part of a claim or defense, speaking about during trial, without amending the pleadings, if that's what we're trying to say.

MR. GALLAGHER: But this Rule 165 is very, very -- it can be misleading.

PROFESSOR DORSANEO: It's very misleading.

MR. ORSINGER: Well, it's only the last phrase that's misleading, "so as to show that it wasn't tried."

MR. GALLAGHER: Because they were tried.

MR. ORSINGER: It's not misleading to say that you can abandon it in open court on the record. That's simple and

straightforward.

MS. SWEENEY: Yeah.

MR. ORSINGER: What's misleading is to say "and therefore that means you didn't try it."

CHAIRMAN SOULES: Correct.

MR. ORSINGER: All we need to do is drop that off and the rule is probably okay.

PROFESSOR DORSANEO: Well, don't you think it's a good idea, though, to spell out that you can abandon a claim before trial by amending, you know, your pleadings?

MS. SWEENEY: Or in open court on the record.

CHAIRMAN SOULES: Now, you're not talking about that being the only place you can abandon a claim, are you?

PROFESSOR DORSANEO: No. And then during trial you can just stand up and say, "I did that," without amending pleadings.

MS. SWEENEY: Or at any time you're on the record, at a hearing, at a summary judgment.

MR. GALLAGHER: Why not just a

period, if that's what you want to say, after "record," and as Richard says, delete the rest of it. Doesn't that have that same effect?

HON. SARAH DUNCAN: Luke.

CHAIRMAN SOULES: I don't see any reason -- I'm sorry. Sarah Duncan. Excuse me.

HON. SARAH DUNCAN: Well, the one -- it may be clear to everybody in the room that if you do this you're still subject to res judicata, but you all aren't -- I don't think you all are representative of most lawyers at all. And I like -- it's fine with me to have it in a rule, and all you would have to put in is "subject to the doctrines of collateral estoppel and res judicata," just so that people understand that this is not an exception to res judicata and collateral estoppel law, because I do think it trips some people up who may not understand the ordering. And supposedly you only waive claims hopefully intentionally and knowingly.

MR. GALLAGHER: Knock out everything after "record" and then put in

"subject to" or however you dress it up, "subject to the applicability of the doctrines of res judicata and collateral estoppel" --

HON. SARAH DUNCAN: That gives them a hint to go look and find out what that means.

MR. GALLAGHER: -- "statute of limitations or" --

MR. ORSINGER: See, I mean, that's not a rule of procedure now. That's a kind of rule of procedure mixed with some commentary on the rule of procedure. Maybe we ought to put it in a comment instead of in the rule.

PROFESSOR DORSANEO: It's easy to put it in the rule. It's real short.

MR. ORSINGER: Well, there are a lot of rules in here that have a lot of effects and we're not telling anybody what the effects of it are.

MR. GALLAGHER: The nonsuit rule certainly has an effect in a circumstance in which the statute has expired. And that's the only problem I see with that kind of fix,

is that you say, "subject to collateral estoppel, res judicata, statute of limitations, Article 4590(i)." I mean, it's trying to -- when you begin to enumerate, then you exclude.

HON. SARAH DUNCAN: That's right. And the one question I had in the margins about the draft was the Hyundai exception or extension or whatever one would classify it as.

MR. GALLAGHER: It could say, "In any suit or" --

HON. SARAH DUNCAN: Because that's another instance where most lawyers who have been through a summary judgment proceeding I don't get the feeling at least that they think they've been through a trial, and they sure don't think they've put on all their evidence.

MR. ORSINGER: Well, Luke, should we leave it in there or bring it back next time or should we vote in our dwindled numbers on whether to drop abandonment altogether from the rule or --

CHAIRMAN SOULES: I don't think

we can do that.

MR. ORSINGER: You don't want to do that?

CHAIRMAN SOULES: Drop abandonment altogether?

MR. GALLAGHER: Well, but Luke, don't you think --

CHAIRMAN SOULES: I don't see any -- I haven't heard anyone suggest that we drop all of it. The suggestion is do we keep the "so as" clause or phrase, whichever it is.

MR. GALLAGHER: That almost sounds like --

CHAIRMAN SOULES: And no one has come up with a reason for keeping it except for something that Rusty may have said that we can't remember, and I think we ought to leave it. I mean, as I'm hearing the debate, that sentence would stay in as it is, but it's not really a dismissal or a nonsuit. It's not subject to the same timing. That's the biggest issue.

PROFESSOR DORSANEO: I think we should say "at any time" if we mean at any time.

CHAIRMAN SOULES: That's right. And a party may be entitled to have a jury, where their case is -- where the evidence is closed, may be entitled to have the jury instructed that claims have been abandoned that have been tried because a lot of prejudicial stuff is coming in that may neutralize it. The plaintiff may not object to that, if he drops intentional and leaves in negligence. Carl Hamilton.

MR. HAMILTON: Luke, I thought that under the permissive joinder of claims rule that you could join claims against a defendant that were unrelated, not in same transaction, under the permissive joinder. And then you may decide later you don't want to try that claim so you dismiss it. I don't think that precludes you from bringing it later, does it?

PROFESSOR DORSANEO: Not in that situation, no.

CHAIRMAN SOULES: Not unless jeopardy is attached.

MR. HAMILTON: Well, isn't that what that rule is talking about, that if you

abandon it --

MR. ORSINGER: Or double jeopardy.

MR. HAMILTON: -- that if you abandon that claim, then under Rule 165 then that's the reason for that language "as though it were not tried."

CHAIRMAN SOULES: Well, let me see if I can encapsulate this. There can be all kinds of consequences to abandonment. It depends on when the abandonment occurs. It can occur in the discovery stage. It's gone. That claim -- and if it's an unrelated claim that just happens to be between the same parties, then that claim is never going to be tried unless it's put back in.

On the other hand, if it's abandoned at the charge stage and has stayed in the pleadings all the way along, it's probably precluded. And if we start trying to say at which point what the consequences are of abandonment at each stage of the litigation --

MR. ORSINGER: We'll have a Law Review article about it.

CHAIRMAN SOULES: -- we'll

never -- you know, I don't think we'll ever cover the waterfront then.

HON. SARAH DUNCAN: You're right.

MR. ORSINGER: Luke, while we're focused on this rule, there are two other things in here that are important. Can we talk about them?

CHAIRMAN SOULES: Well, let me see if we can bring it into focus here. It appears to me that we should leave abandonment in there as something that a party can do, either a claim or a defense or an issue. But we should not state whether or not it's been tried or any other consequences; and that that should not be temporal. That should not have any anchor at any particular time or any cutoff. Is there any disagreement with that?

PROFESSOR DORSANEO: I think it should say "At any time during a hearing or trial without amending the pleadings."

MS. SWEENEY: There you go.

PROFESSOR CARLSON: Why don't you make it a subsection?

PROFESSOR DORSANEO: I think it

should be a separate subsection.

MS. SWEENEY: And actually you don't need to amend the pleadings. You can just -- I just send out a notice of nonsuit and I leave my pleadings alone until the next time I get to them, but it's effective when it hits the courthouse.

CHAIRMAN SOULES: That's probably right, the way this is written.

MS. SWEENEY: Yeah. You don't need to amend your pleadings.

CHAIRMAN SOULES: Do you have a question that that may not be right?

PROFESSOR DORSANEO: Well, as to claims I do, as opposed to entire cases and parties.

MS. SWEENEY: Parties.

CHAIRMAN SOULES: Well, if --

PROFESSOR DORSANEO: I think that will work, but I think that's kind of a bad way to amend your pleadings.

MS. SWEENEY: Yeah.

CHAIRMAN SOULES: The way this is --

MS. SWEENEY: I kind of -- it's

like a little present to whoever you're letting out, you know. They like that notice of nonsuit.

CHAIRMAN SOULES: The way this is written, you either dismiss the action or one or more parties by nonsuit and everything else is abandonment, which also may be subject to -- it's something that maybe you ought to take a look at that too.

PROFESSOR DORSANEO: I'm going to make it a separate subdivision.

JUSTICE CORNELIUS: Where is that now?

CHAIRMAN SOULES: See, the operative first sentence says, "At any time before the plaintiff has introduced all of plaintiff's evidence other than rebuttal evidence, the plaintiff may dismiss an entire case or dismiss the action as to one or more or several parties." So it's got to be that a party is gone or the case is gone.

MR. ORSINGER: Not just one claim.

CHAIRMAN SOULES: All of it. All of it.

JUSTICE CORNELIUS: Well, do you want to change that to claim --

MR. ORSINGER: I don't know.

CHAIRMAN SOULES: A party may dismiss --

JUSTICE CORNELIUS: I think that sentence about abandonment ought to be deleted entirely.

MS. SWEENEY: Mr. Chairman.

JUSTICE CORNELIUS: I think it's going to confuse people and confound the law of res judicata, because somebody is going to get the idea that they can go through a trial and right at the end of the trial abandon a claim and escape res judicata. And I don't believe they can, because the rule of res judicata is if you tried it or if it could have been tried in that suit, it's foreclosed by res judicata.

MS. SWEENEY: Confusion is why my hand is up.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: At the risk of being annoying after all of this discussion,

this ain't broke. There are no problems currently existing in Texas practice having to do with nonsuits and voluntary dismissals. We have just created the possibility of hundreds of appellate opinions. Isn't this something we should just leave be? I mean, it sounds like we're making a lot more mess --

MR. ORSINGER: Luke, let me respond.

MS. SWEENEY: -- with the changes. All right.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: We've been requested to fix a Moriel problem.

MS. SWEENEY: Aside from Moriel.

MR. ORSINGER: That Moriel problem raises the separate trial problem. We have also been requested and have voted to keep people from inadvertently dropping defendants by amending their pleadings. And we've also undertaken to include in here that while a nonsuit may be effective immediately for purposes of the trial court, it has no

effect for purposes of appeal until there's an order confirming it, which is what the Supreme Court held.

Now, none of that is apparent in the rules as currently written. So we have four things that we have to do, and then the rest of it we don't have to do. But if we're doing those four things, this isn't going to look a thing like what it looks like already.

MS. SWEENEY: Okay. You're right. I was just being annoying.

CHAIRMAN SOULES: All right. Another alternative may be to say in that first sentence, "At any time before the plaintiff has introduced all of his evidence other than rebuttal, the plaintiff may dismiss any claims or issues as to one or more of several parties." That's really what the practice is now.

MR. ORSINGER: That's true. Do you want to say "any or all claims or issues"?

CHAIRMAN SOULES: That's fine with me if that adds clarity.

MS. SWEENEY: Claims, issues or parties.

CHAIRMAN SOULES: Any or all claims or issues as to one or more of several parties.

MR. HAMILTON: You don't dismiss issues, you dismiss claims.

MR. ORSINGER: Well --

CHAIRMAN SOULES: I don't have a problem with that unless somebody else does.

MR. ORSINGER: Yeah, the problem I have with that concept is that we might have a separate trial on an issue but we haven't completed our trial of the claim. I don't like the outcome of my separate trial on my issue, and I say, "Ah, but you nonsuit claims, not issues." And therefore, since I haven't completely tried my claim, I can nonsuit now.

CHAIRMAN SOULES: All right. Leave it "claims," as Carl suggested, in the first sentence and then pick up in the second sentence, "But if the trial is bifurcated into separate trials, the plaintiff cannot dismiss or nonsuit any claim or issue." Put it there. That's where we need to talk about it, because issues would be tried separately on

that rule.

PROFESSOR DORSANEO: I don't think you want to say "claims" in the beginning, Luke, because you want to be able to abandon the claim after you've rested because the rebuttal evidence is messing up the rest of your case

MR. ORSINGER: We can't mix up abandonment and nonsuit, though. The first sentence is a nonsuit sentence, isn't it, and not an abandonment sentence?

PROFESSOR DORSANEO: Well, but if we're talking about claims, then it's both.

MR. HAMILTON: You're talking about the whole suit, aren't you? On a nonsuit you're talking about the whole suit.

CHAIRMAN SOULES: No, we're --

MR. HAMILTON: And if it's bifurcated, you're talking about the whole bifurcated part or the whole separate part.

MR. ORSINGER: Well, what is the difference --

CHAIRMAN SOULES: All we're really talking about, it seems to me, are three things. And I do believe that we

nonsuit claims without nonsuiting the entire case.

PROFESSOR DORSANEO: I thought it was parties. I think it's parties.

CHAIRMAN SOULES: All right. Parties. Claims and parties.

PROFESSOR DORSANEO: No, I just think it's just parties, you know; entire case, nonsuit all the parties or nonsuit one party. I think with claims we're talking about amending pleadings. Now, maybe that's just --

CHAIRMAN SOULES: Well, if you're right --

PROFESSOR DORSANEO: -- too technical.

CHAIRMAN SOULES: Okay. Then we still need the second sentence to have a preclusive effect on whatever has actually been tried. Whether it's in the right words or not I'm not suggesting. And then we need abandonment to take care of relinquishing --

PROFESSOR DORSANEO: -- relinquishing claims --

CHAIRMAN SOULES: -- issues or

claims, things smaller than the entire cause of action.

PROFESSOR DORSANEO: Well, I think that I'm going to take abandonment out of here.

CHAIRMAN SOULES: And Judge Cornelius, Chief Justice Cornelius feels like that the abandonment thing I guess should be ignored altogether, should be deleted altogether.

PROFESSOR DORSANEO: Because the little bit of benefit -- I would think the argument would be that the little bit of benefit that it confers is far outweighed by the mischief that it could create.

CHAIRMAN SOULES: Well --

PROFESSOR DORSANEO: Maybe we ought to draft it and see if you think that afterwards.

CHAIRMAN SOULES: It could be pretty beneficial if your case is -- if you need to start doing something to shape your case --

JUSTICE CORNELIUS: But you can do that anyway, can't you, by just announcing

it into the record?

CHAIRMAN SOULES: That you abandon that element of damages, yes. But there has to be a mechanism, and this is the mechanism that we're on.

PROFESSOR DORSANEO: Somebody could say, Judge, that you can't do it without leave of court because you're amending, because you have to do that by amending your pleadings and you can't amend your pleadings, you know, during trial even to take something out.

JUSTICE CORNELIUS: I would think that if the attorney stood up and announced in open court that he was abandoning his claim as to a particular issue that that would be a judicial admission.

MR. LATTING: It's always worked for me.

JUSTICE CORNELIUS: And that would be it.

MR. LATTING: I never had any trouble doing that.

PROFESSOR DORSANEO: When you would do it, though, is when you were hearing

this rebuttal evidence that you think is going to cause you to lose your entire case that you can keep out if you abandon a claim that is still in your pleadings. And I can hear somebody saying, "They can't do that, Judge."

JUSTICE CORNELIUS: Does it have to be entered of record in the court --

MS. SWEENEY: They opened the door. They can do it.

CHAIRMAN SOULES: It would be on the record. I mean, it sure should be in the court reporter's notes.

JUSTICE CORNELIUS: It would be on the court reporter's notes, but this says --

MR. GALLAGHER: You would keep 165 --

PROFESSOR DORSANEO: -- but make it clear --

MR. GALLAGHER: Yes.

PROFESSOR DORSANEO: -- as to what it's about. And I would write it to talk about before trial and during trial.

JUSTICE CORNELIUS: They have the fact entered of record.

MR. GALLAGHER: Yes.

MS. SWEENEY: A big difference.

CHAIRMAN SOULES: "Entered of record" is also a poor choice. "Entered" is what the clerk does after judgment and with orders. We're really talking about --

MR. ORSINGER: We're talking about three things.

CHAIRMAN SOULES: We're saying it's in open court --

MR. ORSINGER: We're talking about in the statements of facts, in a docket entry probably, and by the signed order. That's really what we're talking about, isn't it?

MS. SWEENEY: No, we mean on the record.

CHAIRMAN SOULES: Well, what if we add a sentence "while on the record"?

MS. SWEENEY: On the record.

CHAIRMAN SOULES: Judge Cornelius says let's just get a show of hands on those who think that the concept of --

MR. ORSINGER: In the court reporter's notes.

CHAIRMAN SOULES: Those who feel we should keep the concept of abandonment in the rules show by hands. Keep it.

MR. GALLAGHER: In the rules, period?

JUSTICE CORNELIUS: In this rule.

CHAIRMAN SOULES: In the rules.

MR. GALLAGHER: In the rules, period?

CHAIRMAN SOULES: Anywhere.

MS. SWEENEY: Somewhere there is permission to abandon things.

MR. GALLAGHER: Okay. Yes.

CHAIRMAN SOULES: In addition to the concept of --

MR. ORSINGER: -- nonsuit.

CHAIRMAN SOULES: -- nonsuit. 14.

Those opposed. Two.

Okay. Well, it stays in.

Does that pretty well wrap this up in terms of our assistance?

MR. ORSINGER: No. I've got -- there are two things that I feel like we ought

to talk about while we're focused on it. Do you want to do that?

CHAIRMAN SOULES: Okay. Let's do. Let's talk about it.

MR. ORSINGER: Okay. We have a sentence here, "Omission of a party from the pleadings does not dismiss the action as to the omitted party." We put that in there because of people that inadvertently drop defendants when they amend pleadings. However, it may result in a party having a judgment entered or rendered against them when they're not in the pleadings. And I have due process problems with that. If no one else does, let's move on.

But if I'm dropped from somebody's lawsuit, I'm not in the pleadings, I'm not getting certified mail notices of anything else, and then all of a sudden a judgment is rendered against me because this rule says that they have to file a separate piece of paper saying I was dismissed, I've got a problem with that.

Number two, the next sentence, "Notice of voluntary dismissal of the entire case or one

or more parties is immediately effective without necessity of court order if the notice is filed separately from the pleadings," that kind of follows from the previous one that if we're going to dismiss everybody or if we're going to dismiss one party, we have to do it in some manner other than by filing -- by just filing an amended pleading. But it also makes it look like you cannot become immediately effective unless you file the separate notice. You see, it becomes immediately effective if the notice is filed separately.

Those of us who have nonsuited, it's critically important to know that your nonsuit is effective before the other side can race out and file a counterclaim, so we want to be careful that the immediately effective part is upon oral utterance of the nonsuit and that the requirement of a separate document to tell everyone that they've been dismissed is just more of an administerial thing rather than a condition for the nonsuit. The way this is written, it makes it a condition of the nonsuit.

CHAIRMAN SOULES: The way this

is written you can't have a nonsuit except in writing.

MR. ORSINGER: Well, if the nonsuit entirely removes a party, that's true. You can nonsuit a claim, but if you try to take a party out --

CHAIRMAN SOULES: That's abandonment.

MR. GALLAGHER: You don't nonsuit a claim, Richard.

MR. ORSINGER: I think you can nonsuit claims. And I think that as long as you don't take a party out entirely --

CHAIRMAN SOULES: Well, where were you 15 months ago?

MR. ORSINGER: I'm sorry. Okay. You can't nonsuit a claim.

What do you do when you decide to --

MR. GALLAGHER: -- not pursue it?

MR. ORSINGER: Yeah.

MR. GALLAGHER: You don't say you nonsuit it.

CHAIRMAN SOULES: That side of the table says that you can't nonsuit it

because you can only nonsuit parties and --

MR. GALLAGHER: -- and cases.

MR. ORSINGER: Look, I heard Bill's speech, but he's a procedure professor.

CHAIRMAN SOULES: Well, Carl is down there too. He's --

MR. ORSINGER: I'm a trial lawyer; I nonsuit claims all the time.

CHAIRMAN SOULES: Carl is a real lawyer. Now -- Bill, excuse me.

MR. ORSINGER: Maybe you can't nonsuit a claim.

MR. HAMILTON: I'm just going by what the rule says.

MR. GALLAGHER: Well, if we're using "dismissal" and "nonsuit" in the same phrase, it talks in terms of dismissing or nonsuiting a case, not a claim.

CHAIRMAN SOULES: That's what it says.

MR. GALLAGHER: And that's what the rule has always said.

MR. ORSINGER: Well, I would like to at least have someone think about the

wisdom of the requirement that you can't nonsuit a party -- pardon me. Yeah -- no. That would be correct. You can't nonsuit a party without filing a written notice of it.

MR. GALLAGHER: I agree with that.

MR. ORSINGER: And if that written notice is in fact something we're going to require, I would like it to be clear that the nonsuit is effective the instant you utter it regardless of the fact that it may take you a day to confirm it by a written document.

I also want to make it clear that when the day comes that somebody who has been dropped from the pleadings and doesn't show up for trial has a judgment entered against them because the separate piece of paper was never filed, there's going to be some angry defendant. And I think we're writing that into this rule.

CHAIRMAN SOULES: Well, that's two things.

MR. GALLAGHER: But first can I just respond real quick?

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: To the first point, if a party is omitted from the pleadings, Richard, and subsequently the case is set for trial and that party is not notified of the trial setting or not notified of any other proceeding that's taken in connection with that case, they have a lot of due process with --

MR. ORSINGER: -- constitutional arguments, but not rules that help them. Our rule doesn't help them. Our rule says you're still a party. The constitution says --

CHAIRMAN SOULES: Richard, you can't do that.

MR. ORSINGER: Am I wrong?

CHAIRMAN SOULES: You're doing the same thing. You're jumping right on top of Mike's words.

MR. ORSINGER: I'm sorry. Sorry, sorry, sorry.

PROFESSOR DORSANEO: On the one part, the notice of voluntary dismissal, we

could approach this a different way by reference to a relation back concept. The Supreme Court case that said when somebody was in the case and then they got dropped out and then they got added back in, I think, does require them to be added back, all right, before they're in the judgment. But it thinks about relation -- it talked about it in terms of relation back. Now, that complicates it perhaps unnecessarily.

What we're trying to do is to save somebody who amends, does the fifth amended petition, leaves some people out and then realizes it before trial and then puts them back in. And the people who were dropped out say, "Ha-ha, when you dropped me out, your clock starts all over again from when you add me back in," and limitations bars the claim, even though it was an inadvertent omission.

But relation back takes care of thinking -- it complicates this from a drafting standpoint, but it takes care of some of your conceptual problems.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: Well, as to the

one problem, I think if you provide, with regard to speaking it versus writing it, that it is effective upon either a written notice or being spoken in open court, you know, on the record, or on the record as opposed to being entered in the record or of record or whatever that was, if it's on the record or it's in writing, it's effective, and that solves that problem.

And as to the other, if they're inadvertently omitted and you realize it and you put them back, we've added that sentence that says that doesn't constitute a nonsuit. And of course, anything that happened that they didn't have notice of isn't going to be binding against them. And all of the rules that we already have drafted and argued about forever about notice and mailing and three days and all of those things already covers that.

PROFESSOR DORSANEO: This says it's immediately effective, which you wanted me to add back in and I may have misunderstood, if the notice is filed separately from the pleadings, if and only if

notice is filed separately from the pleadings.

MS. SWEENEY: Or made in open court -- sorry.

PROFESSOR DORSANEO: But what I'm hearing people saying now is you want it immediately effective. But if it's inadvertent, you want the new pleading that adds the person back in to relate back to the pleading that included that person to begin with.

MS. SWEENEY: Because you're mixing concepts, because the one is an affirmative "I nonsuit you," whether it be in writing or orally. I am doing this. You are out of here. The other is, gee, my secretary didn't put it in the pleadings, and two weeks later somebody notices it, which is an entirely -- it is not an affirmative, overt act of nonsuit; it is an omission from a pleading.

And the two are totally distinct, and all the omission from the pleading language is meant to do is say that does not constitute a nonsuit. It's not a nonsuit. It's just an

omission. It's a typo.

PROFESSOR DORSANEO: Well, I can understand what you're saying, but I think people should read their pleadings, not let somebody else just type them up.

MS. SWEENEY: Every time?

PROFESSOR DORSANEO: Yeah.

MR. BABCOCK: But suppose it's not an inadvertent two-week deal, but that I've been in this case and then all of a sudden I get a pleading that omits my client and omits all of the allegations to him and that goes on for a year, and then in month 13 all of a sudden I'm back and the trial is in month 14. Do you want to allow that to happen?

PROFESSOR DORSANEO: If we write it in relation back terms, we could provide some protection. But it's a very --

MR. BABCOCK: I know that's a way-out example.

PROFESSOR DORSANEO: Maybe it's so complicated it's just very hard to --

MR. BABCOCK: But I've now gone a year thinking I'm out of the case, and so

I'm not doing anything.

MS. SWEENEY: Oh, you did not think that; you just hoped that they wouldn't catch it.

MR. BABCOCK: Or I'm hoping. I hope that I'm out of the case.

MR. GALLAGHER: Yeah.

HON. SCOTT A. BRISTER: Or you've had an oral conversation where you were told, "I'm going to drop you" --

MR. GALLAGHER: Yeah. And that does happen.

CHAIRMAN SOULES: Now, one at a time. Okay. What?

HON. SCOTT A. BRISTER: If you have an oral conversation saying, "I'm going to probably drop your client," and then you get a petition that does drop your client, is that going to satisfy Rule 11? Not if they come back in and say it was inadvertent.

CHAIRMAN SOULES: Well, does -- didn't we get a show of hands once before that omission of a party from -- I guess it should say amended pleadings, does not dismiss --

JUSTICE CORNELIUS: It really

should say -- it presupposes that, but you might ought to say "amended or supplemental pleading."

MS. SWEENEY: And if you forgot to put it in your original petition --

CHAIRMAN SOULES: (Continuing) -- does not dismiss the action as to the omitted party. We had a division of the house on that, and the majority was for this rule. Now, we -- I don't recall whether the debate included the points being raised now by Richard. Do we want to change that?

MS. SWEENEY: No.

CHAIRMAN SOULES: We've never voted on the rule as a whole, so if we need to adjust it, we can.

PROFESSOR DORSANEO: The Supreme Court opinion assumes that when you're getting down to the trial and judgment that the person will be in the pleadings, I think. And it does try to analogize this to a relation back concept, and maybe we ought to give it another try and stay closer to the Supreme Court opinion.

CHAIRMAN SOULES: What relates

back?

PROFESSOR DORSANEO: The --

MR. ORSINGER: The finally amended pleading relates back to the previously correct pleading.

PROFESSOR DORSANEO: You skip the one --

MR. ORSINGER: There's a gap.

PROFESSOR DORSANEO: You skip the one that you don't like because it left out your plaintiffs or defendants.

MR. ORSINGER: Your final amendment relates back to your last pleading where the party was mentioned because they inadvertently dropped them and then added them later, but there was a gap and their limitations ran, and so they're saying your finally amended pleading related back to your third most recent pleading, which was your one accurately stated.

CHAIRMAN SOULES: Okay. This will work whether it's an omitted plaintiff or defendants?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: So if you

fail to name a plaintiff in that amended pleading, it's not a dismissal?

MR. ORSINGER: We better say "amended," because what if we fail to mention them in the original pleading and come in and add about 15 parties after the limitations has run.

MR. BABCOCK: It relates back.

MR. ORSINGER: It's inadvertent. We have to say amended.

JUSTICE CORNELIUS: Obviously if he's omitted from the initial pleading he is --

MR. ORSINGER: He's out of luck.

CHAIRMAN SOULES: So omission of a party from amended pleadings does not dismiss. How many agree with that, that it does not? Four.

Okay. How many say it does? Five.

MS. SWEENEY: There were actually five hands the first time, if you want to do that again.

CHAIRMAN SOULES: Okay. Oh, you counted five the first time?

Does not dismiss.

MR. HAMILTON: We're talking about an inadvertent --

MR. GALLAGHER: Yes, sir.

MR. HAMILTON: -- omission?

MR. ORSINGER: Well, we don't know if it's inadvertent or not.

CHAIRMAN SOULES: How do I know when I get it whether it's inadvertent?

MR. GALLAGHER: I will tell you as soon as I find out.

CHAIRMAN SOULES: It has to be as soon as somebody figures it out. I think it's got to be on the face of the pleadings, either there or not there.

HON. SCOTT A. BRISTER: On the initial pleading?

MR. ORSINGER: No, only amended.

CHAIRMAN SOULES: We're -- the initial pleading -- we're starting with an initial set of parties, plaintiff and defendant. Now we're getting to amended pleadings. The amended pleadings omit either a plaintiff or a defendant. That does or does

not dismiss as to the omitted party. Okay. Those in --

MR. GALLAGHER: Does not dismiss first?

CHAIRMAN SOULES: Does not dismiss, right. Six.

Okay. Now, who would say that it does? Who would hold that it does? Five.

All right. Six to five it does not.

MR. HAMILTON: Luke.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: Suppose you have him omitted in an amended pleading and then the next pleading puts him back in. That's one scenario. Clearly --

CHAIRMAN SOULES: You've got to serve him again.

MR. HAMILTON: Huh?

CHAIRMAN SOULES: Under this vote you've got to serve him again.

MR. HAMILTON: Well, I was saying that clearly under that scenario it was an inadvertent omission which doesn't dismiss him. But if he never gets put back in and you

go to trial, then that could clearly be a dismissal. So you've got different scenarios as to what could happen.

MR. ORSINGER: And the problem I have with what Carl just said is that we may have an excellent 14th Amendment argument, but our Rules of Procedure shouldn't just break down and our safety net is the 14th Amendment. Our Rules of Procedure should require that if someone is going to trial against you, you know it.

CHAIRMAN SOULES: I think so too.

MS. SWEENEY: Luke.

CHAIRMAN SOULES: How can you get a jury question if --

MR. GALLAGHER: You can't get an issue --

CHAIRMAN SOULES: -- if the person is not named?

MR. GALLAGHER: You cannot get an issue against that party. That party's name will not be in the charge if they are omitted from the pleadings and remain omitted.

CHAIRMAN SOULES: Unless

there's a trial by --

MR. GALLAGHER: The problem they were trying to address is a problem that we all face, particularly if you're suing a defendant that has many different corporate shells, all of which look and appear very similar to one another. And I think you've done it.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: You all are doing angels dancing on the head of a pin here.

MR. GALLAGHER: Sure.

MS. SWEENEY: This rule was never meant to contemplate I leave you out of the pleadings, I try the case against you, I get a verdict, and then I execute, and you first realize, gee, you weren't dismissed.

It was meant to contemplate a situation where you get left out, nothing happens that's prejudicial, and you come back in. That's what it's about.

MR. LATTING: Yes.

MR. GALLAGHER: The rule, Chapter 32 or 33 of the Civil Practice and

Remedies Code says that the only persons whose conduct would be submitted to the jury are those from whom the plaintiff is seeking relief at the time of submission of the case to the jury.

If a party is omitted, they're not a person from whom the plaintiff or claimant is seeking relief at the time of submission of the case to the jury.

MR. ORSINGER: I disagree, if this is our rule, because our rule says don't look at the pleadings, look to whether they were in prior pleadings and there's a separate document dismissing them. If they were in prior pleadings and there is not a separate document dismissing them, they're still in the lawsuit even though their name isn't in the pleadings. That's what this rule would do.

PROFESSOR DORSANEO: It does. It has to be written, again, in terms of relation back. This, our committee draft, is no good.

MR. BABCOCK: Says the author who drafted it.

MR. ORSINGER: That's pride of

authorship talking there.

MR. GALLAGHER: But when we took our vote a moment ago, we were only voting on the question of whether or not what we all recognize we're trying to deal with here, an inadvertent omission --

MS. SWEENEY: Exactly. A temporary inadvertent omission.

MR. GALLAGHER: -- would have the effect of a nonsuit.

CHAIRMAN SOULES: Well, I don't know.

PROFESSOR DORSANEO: I'm going to --

CHAIRMAN SOULES: Well, if we're going to talk about relation back, I guess we ought to raise it. How long does it relate back; how does it -- what triggers relation back?

PROFESSOR DORSANEO: I don't know whether we're -- the only thing we know now from the opinion is like what's called inadvertent -- whatever the opinion says, but I think it is inadvertent, nonintentional omission.

MS. SWEENEY: Nonprejudicial.

PROFESSOR DORSANEO: And nonprejudicial. And I think we're back to the drawing board on this, and it doesn't really profit to -- it was profitable to go back to learn that we need to go back to the drawing board, and that this approach has the problems that Richard mentioned. We don't have pleadings -- I mean, maybe you could just do it without -- have no pleadings at all, but there's no notice of -- no notice of separately filed, but you still have a case.

CHAIRMAN SOULES: Okay. Then the next thing is notice of the voluntary dismissal is effective immediately without the necessity of court order. I thought that was in the rule, but apparently it's not. I can't find it.

MR. BABCOCK: There's case law.

CHAIRMAN SOULES: There is case law.

MR. ORSINGER: But we get tripped up because of the "if" clause that follows that.

PROFESSOR DORSANEO: It is

in --

CHAIRMAN SOULES: Where?

PROFESSOR DORSANEO: Without necessity of court order is in rule one --

MR. GALLAGHER: -- sixty-two.

PROFESSOR DORSANEO: Yeah, Rule 162 in the second unnumbered paragraph.

CHAIRMAN SOULES: It just says notice shall be served on any party without necessity of court order. It doesn't say that the nonsuit is effective without necessity of court order.

MR. ORSINGER: Well, the Supreme Court has clearly said that.

MR. BABCOCK: They have said that.

MR. ORSINGER: They definitely have said that, because I have saved my butt many times.

CHAIRMAN SOULES: So --

MR. ORSINGER: But the "if" clause makes that absolute right to verbally nonsuit conditional, and it makes it look like it is effective immediately only upon the filing of a separate notice. And that bothers

me, because now you'll announce a nonsuit and if they can get a counterclaim on file before you can get your separate written nonsuit on file --

PROFESSOR DORSANEO: The redraft will not say that, because the relation back concept replaces that.

Paula's idea about --

MS. SWEENEY: -- or in open court.

CHAIRMAN SOULES: We haven't talked about that, relation back.

MS. SWEENEY: No, this doesn't have to do with relation back. This is where you're going to put in the "or in open court." You can do it in writing or in open court, and that solves his problem.

CHAIRMAN SOULES: It should be either filed of record or announced in open court on the record.

MS. SWEENEY: Exactly. And that solves Richard's problem; that if you say it and there's a court reporter there, then you don't have to write the piece of paper; or you can write the piece of paper from your

office and send it, and then you don't have to say it.

PROFESSOR DORSANEO: Or by amending your pleadings, too.

MR. ORSINGER: Yeah, yeah. But we're forgetting something here. The "if" clause is in there to pick up the same concept that you can't -- you might inadvertently be nonsuiting somebody, so we're asking for written confirmation. Perhaps we shouldn't. But this "if the notice is filed separately from the pleadings" I think follows from the same concept that we want to know the names of the people that you're nonsuiting.

PROFESSOR DORSANEO: "Written confirmation" is out of the redraft.

MR. ORSINGER: Out of the redraft.

PROFESSOR DORSANEO: Because it's going to be relation back. When you amend your pleadings and drop somebody out, they are out, you have nonsuited them, but you're going to get to add them back in. It's going to relate back under a relation back concept.

MR. ORSINGER: I follow you. I follow you.

PROFESSOR DORSANEO: So the approach is wrong here. And if you change the approach, you satisfy almost all of the other things you people are talking about.

CHAIRMAN SOULES: Notwithstanding limitations, you get to add them back.

MR. ORSINGER: That's what the Supreme Court has said.

MR. GALLAGHER: Yes.

MS. SWEENEY: Yes.

HON. SCOTT A. BRISTER: That's the law.

MR. HAMILTON: But what Richard is --

CHAIRMAN SOULES: I mean, the -- okay. Go ahead.

MR. HAMILTON: But what Richard is suggesting does not cover that. He's saying that -- I mean, Paula is saying that you can make your nonsuit in open court or by filing something, so that doesn't have anything to do with relation back.

MR. GALLAGHER: This is the intentional -- this is the nonsuit with an intent to get the party out of the case --

MR. HAMILTON: Right.

MR. GALLAGHER: -- for whatever reason.

CHAIRMAN SOULES: Okay. We're talking about two different things.

MR. GALLAGHER: And then when we're talking about omission, you're talking about a circumstance in which there has been an inadvertent failure to include a party in a pleading.

CHAIRMAN SOULES: We're talking about two different things. This pleading thing, the omission from a pleading, Bill is going to write it.

PROFESSOR DORSANEO: Right.

MR. GALLAGHER: And you're right, it should be amended pleading.

CHAIRMAN SOULES: That's a dead issue right now. As far as this meeting is concerned, that's history. Bill is going to rewrite that and we're going to look at it again.

The other thing, though, however, is when is a nonsuit effective. And that should be --

MS. SWEENEY: Instantaneously.

CHAIRMAN SOULES: -- either when it's filed or made in open court on the record.

MR. ORSINGER: Whichever is first.

MR. HAMILTON: Except that you may not want to limit it to on the record unless that includes a docket entry, because a lot of times you may not have a court reporter there.

MS. SWEENEY: That's true.

PROFESSOR DORSANEO: There are cases which are pretty broad, and I don't think you're probably going to want to depart from them, that indicate as to how you go about doing a nonsuit, and they're very liberal and they include all of these. And what you want added into the rule, I'm hearing, is you want the rule to the say how or what the various ways are doing this nonsuit, which it doesn't say now.

MS. SWEENEY: Right. It just

needs to be real clear what the law is now, which is you can speak it, you can write it, you know.

PROFESSOR DORSANEO: And Mr. Chairman, I will put those in from the cases, and then when we review it again, if somebody doesn't think that they're sufficient or doesn't like one, then we can change it then.

CHAIRMAN SOULES: Okay. And then you're going to struggle with what is this thing that we call -- that we do that releases part of a cause of action.

PROFESSOR DORSANEO: I'm pretty -- in my head I think I have it. If I go back and do this pretty quickly, I don't think it will take me that much time.

CHAIRMAN SOULES: Okay. Now, then that pretty well wraps up (a), is that correct?

MR. ORSINGER: Yes.

CHAIRMAN SOULES: We're going to go to 5:30, so let's try to get (b) out of the way too, if there's anything here to discuss.

PROFESSOR DORSANEO: (b) should be easy. The only change -- (b) is a very good rule. The only thing I did with the rule was take out some archaic word that was in here. And this basically says that if you don't serve somebody, you can keep going or stop.

MR. BABCOCK: Why don't we just say that?

MR. LATTING: That's a great rule.

CHAIRMAN SOULES: But there's another issue here as to where it says, "but no dismissal shall be allowed as to a principal obligor without also dismissing the parties secondarily liable except in cases provided by statute." Now, there are a lot of contractual provisions that permit that.

PROFESSOR DORSANEO: Well, true. And that's really part of the next rule that you haven't seen either, Actions Against -- I don't know what it will be titled, but now it says Actions Against Accommodation Makers and Endorsers, which has been added.

MR. HAMILTON: Is (b) a new rule or is that an old rule?

PROFESSOR DORSANEO: That's an existing rule almost verbatim. And it's a very good rule considering that you have a case and you've named an individual and four corporate shells as parties and you don't ever serve one of the corporate shells because frankly you end up reaching the conclusion that it may not even exist as a corporation, but you thought it might be one when you started.

This says that you can proceed against those who are served -- no. The plaintiff may either dismiss as to those not so served and proceed against those who are, or take new process against those not served, or obtain severance. And then the last sentence indicates that there's no exoneration.

Maybe the rule could be improved on, but it seems like a pretty good rule, and when I left it out, it was completely inadvertent.

MR. HAMILTON: Does it give one a right to a severance even though he might not otherwise be entitled to it?

MR. ORSINGER: Sure. In other words, you probably wouldn't meet the regular standards of severance because the claims probably are intertwined and all of that, but you can't proceed against them without service and you can't say that the ones who are in court don't ever have to go to trial until they find this missing person. To me this supplants the ordinary severance standards.

CHAIRMAN SOULES: We don't have clerks here, do we?

The citations no longer have times, do they? It used to be they lasted for 90 days, but I think that's been changed.

PROFESSOR CARLSON: No, that's gone.

CHAIRMAN SOULES: What?

PROFESSOR CARLSON: That's gone.

CHAIRMAN SOULES: That's gone. So this "with process in due time," that must be what that means.

MR. ORSINGER: We certainly don't need to take new process against those served then, do we, Luke, because our process

doesn't expire now.

CHAIRMAN SOULES: That's right. That change was made some time ago.

MR. ORSINGER: Then in the fourth line we can take out "he may take new process against those not served."

PROFESSOR DORSANEO: No.

MR. ORSINGER: Why not?

PROFESSOR DORSANEO: No, you shouldn't -- well, take out "he" and fix that. And I think "in due time," you're probably right, Luke, probably that could come out.

But you may have served somebody, and you need to -- because of this corporation you need to serve them again because your first service was ineffective because you had some misinformation about the home office or the principal office, you know, or some other problem, which can happen a lot.

HON. SCOTT A. BRISTER: I'm not sure about the 90 days anymore, but I know that constables after two or three tries send it back to the court. And if you want them served, you're going to have to call the

constable again.

CHAIRMAN SOULES: Right, or get a court order.

MR. ORSINGER: Do you have to get a new citation out under those circumstances?

CHAIRMAN SOULES: Let's go through this first before we --

HON. SCOTT A. BRISTER: Or at least a new request.

CHAIRMAN SOULES: No, you don't have to get a new citation. Well, I'm not sure of that. I guess if the citation is returned --

PROFESSOR DORSANEO: Unserved.

CHAIRMAN SOULES: -- with some notation that it can't be served, you may have to get a new citation, because that one may be canceled by that sheriff's notation or some server's notation.

But let's see, just tracking through it, "When some of the several defendants in a suit are served with process" -- I think "in due time" should come out unless you all come up with a reason for it -- "and others are not

so served, the plaintiff may either dismiss as to those not so served and proceed against those who are, or he may serve those not served."

That doesn't require -- it may or may not require a new process, right? Take out the words "take new process against," but insert "served."

MR. ORSINGER: Why do we need to say that he can serve them? He knows he can serve them. He tried to get them served the first time. If he hasn't served them, he can serve them? We all know that.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Do we need that clause that if he hasn't got service he can still serve them?

HON. SCOTT A. BRISTER: Is this just a nonsuit rule for nonserved parties?

MS. SWEENEY: Or severance. That's the other part of it.

CHAIRMAN SOULES: Well, I guess it says --

HON. SCOTT A. BRISTER: Why doesn't nonsuit cover everybody served or not

served, and severance cover severance?

CHAIRMAN SOULES: Richard, I think it's an either/or. He can either proceed against those -- he can either dismiss those that aren't served and proceed against those who are, or he can get service.

MS. SWEENEY: Is this a new rule?

MR. ORSINGER: No. This is an old rule.

CHAIRMAN SOULES: And that's why it's got some old stuff in it that doesn't apply.

I think you need it in the rule, Richard.

MR. ORSINGER: Okay. Whatever you say.

CHAIRMAN SOULES: It says he can either dismiss and go to trial against those that are served, or serve those others. I guess that's -- or may obtain severance of the case as between those served and those not served. Now, that is an additional severance remedy.

And I don't think we need "but no dismissal shall be allowed" and so forth

because that's substantive law. Either the principal obligor has to be in the case or doesn't have to be in the case depending on statutes and contractual agreements.

PROFESSOR DORSANEO: Well, save that until we look at the next rule. That may be right. I think that's right on some days and then on other days I think something else.

CHAIRMAN SOULES: All right. There's a question that that's -- again, I think that's substantive law, can you get a judgment against a secondary obligor without also taking a judgment against the primary obligor.

MR. HAMILTON: But if you take that out, then somebody is going to argue that it was taken out to permit the contrary.

CHAIRMAN SOULES: Well, but there's substantive case law that it depends on the circumstances whether they're essential parties. And if we're going to start -- if we're going to put this in there, then we've got to write all the exceptions, and we've only got one, which is statute. And there's a lot -- there's at least one more big one.

MR. ORSINGER: Contract.

CHAIRMAN SOULES: Contract.

And then "No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liability, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered," I guess that's okay. It doesn't --

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: -- say anything.

PROFESSOR DORSANEO: I'm beginning to see why I left it out the first time around a couple of years ago.

CHAIRMAN SOULES: What, the last sentence?

PROFESSOR DORSANEO: No, the whole thing.

CHAIRMAN SOULES: The whole thing?

PROFESSOR DORSANEO: I mean, it really is just a special rule for people not served.

MR. ORSINGER: And we're restating the fact that they can nonsuit and

that it's without prejudice. It's really just a corollary to the main rule.

CHAIRMAN SOULES: The only thing it adds is a basis for severance.

MR. ORSINGER: Which is important, because you're not going to meet the oral criteria for severance.

CHAIRMAN SOULES: That's right. And that is an issue.

PROFESSOR DORSANEO: I'd say we leave it in and make it -- but what if we call it -- do we want to say "dismiss or nonsuit" to have nonsuit in there too? I guess so just for the sake of --

MS. SWEENEY: Otherwise, there's going to be some assumption that there was a reason for not doing it.

PROFESSOR DORSANEO: Except we have the last sentence. Maybe you would like the last sentence in the regular nonsuit rule, but use the word "dismiss."

HON. SCOTT A. BRISTER: Well, the interesting thing about that last sentence is it's not in the first paragraph.

PROFESSOR DORSANEO: Yes.

HON. SCOTT A. BRISTER: Because the first sentence just assumes that nonsuit is without prejudice, so say so.

MS. SWEENEY: Well, and that's the importance of the language "nonsuit," just because of the baggage that it carries with it.

CHAIRMAN SOULES: Okay. Well, any other discussion on (b)? Bill, do you see anyplace you need assistance on that we haven't talked about?

PROFESSOR DORSANEO: I would take out -- I do think "in due time" should come out, and "take new process." I do think we could say "served" or "obtain service on those not served or not properly served" or something. And take "he" out and say "the plaintiff."

It's not a rule that's hurting us any, and actually, you know, I have one case right now where I have some defendants that I'm really not planning on serving at this point. I'm happy to have this rule.

MR. ORSINGER: I would like a proposal that on (c), Avoidance of Prejudice,

that we say, that we insert that it's not without prejudice to the nonsuiting party as well. "Any dismissal or nonsuit taken pursuant to this rule does not prejudice the plaintiff's right to refile or the right of another party to be heard on a pending claim."

PROFESSOR DORSANEO: Where are you?

MR. ORSINGER: Oh, Judge Brister mentioned that it's just implicit that a nonsuit is without prejudice to the nonsuiting party under (a), but under (b) we make it explicit. But (c) has to do with avoidance of prejudice, and couldn't we just put the fact that it's nonsuiting without prejudice to the plaintiff under (c) and solve that problem?

CHAIRMAN SOULES: You would put that where?

MR. ORSINGER: Well, the suggestion is, "does not prejudice the right of the nonsuiting party to refile, or the right of another party to be heard on a pending claim," et cetera.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: We can put that in there if you want to. The right to the refile is what you want.

CHAIRMAN SOULES: Okay. That sounds sensible. How about (d)?

PROFESSOR DORSANEO: That's verbatim.

MS. SWEENEY: It is verbatim.

CHAIRMAN SOULES: The second sentence is really a separate concept from the heading.

MR. ORSINGER: It sure it. We ought to have (e), Taxation and Costs, or something like that.

PROFESSOR DORSANEO: Okay. (e) something. That's taxation of costs or just costs.

MR. PRINCE: Can we carry through with what Paula has been talking about, and that is, any -- although I don't think it matters -- put "dismissal or nonsuit." And also in subpart (e), "dismissal or nonsuit." In other words, make it parallel to what we've been doing before.

PROFESSOR DORSANEO: Done.

CHAIRMAN SOULES: Good idea. What's next, Bill?

PROFESSOR DORSANEO: Well, it's this last rule, and this is one I've been going back and forth on. I at one point personally recommended that we take out the rules that concern surety and suretyship defenses. Then after our last meeting I heard people say things that made me rethink that, even though they didn't exactly say that it should come back in. And I went back and concluded the opposite of what you just said a minute ago about the secondary and primarily liable people in this paragraph (a).

It's not that big of a deal, and I actually do agree with you that all of this is governed by statute or is controlled by contractual waiver of these rights or a contractual provision modifying these rights. And maybe we don't need anything like this, the "In General" paragraph (a) part. I don't think it hurts to have it in here either. It says, "except otherwise provided by law or these rules." And maybe that would satisfy you better than the preceding rule, which is,

"except in cases provided by statute," which does perhaps seem to be a little bit too narrow.

The reason the title is Actions Against Accommodation Makers and Endorsers is that it's my perception that Article 3 or Chapter 3 of our Business and Commerce Code is being, or well, either has been redone or is in the process of being redone; I think has been redone, or perhaps it's in process.

MR. ORSINGER: Bill, I think Elaine talked to a professor.

Did you already tell him about that?

PROFESSOR DORSANEO: Yeah. But he didn't address that part of --

MR. ORSINGER: He didn't?

PROFESSOR DORSANEO: -- anything. And as I understand this, our procedural law is trying to play catchup with the substantive law on using the right terms. And once upon a time I understood a guarantor as somebody who is primarily liable, but if you're a surety you're secondarily liable and you had suretyship defenses. And our rules speak in terms of this surety person having

suretyship rights, I think, coming from that time.

Then we went in 1967 to the Business and Commerce Code, Article 3 of the Uniform Commercial Code, and we picked up different language, where the modern language became somebody is a guarantor of payment or a guarantor of collection or negotiable instruments. But we had a separate provision in the Business and Commerce Code for other contracts, and we didn't change our language in the procedural rules to exactly match that, but we did say to go read the Uniform Commercial Code.

Now, under the current commercial lawyers' way of talking about things, they call somebody who lends credit to another an accommodation maker, and you can be an endorser without being a maker. And I just kind of wonder whether we should try to keep up with this language in some shape or form. I'm actually beginning to think that we should not because it keeps changing. And I ended up recommending in the draft that we talk about people who are primarily liable and people who

are secondarily liable.

The professors from South Texas say that, well, you ought to -- why don't you just talk about a secondary obligor and a primary obligor in order to make it parallel. But even they say that they don't like the rule at all because this is all covered by contract. They say that they're self-avowed creditors lawyers and freedom of contract fans, so they don't want even any notion that there are these special rights protecting people who are secondarily liable who haven't waived those rights by contract.

So my own personal recommendation and I think the committee's recommendation is to have a paragraph like paragraph (a), even though it doesn't say very much that's informative, just to have the matter covered in the procedural rules.

Unlike in other circumstances where we have cross-referenced to a special code, we haven't made the recommendation to do that, perhaps fearing that we don't know how to draft that.

MR. ORSINGER: Or what code to

cross-refer to.

PROFESSOR DORSANEO: Yeah. I think it's always in the Business and Commerce Code, but not necessarily the same chapter.

MR. ORSINGER: Isn't there some aspect in the UCC or some other statute that fills it out?

PROFESSOR DORSANEO: It's all in the Business and Commerce Code.

MR. ORSINGER: Everything is?

PROFESSOR DORSANEO: I think, but I'm not certain that it is.

CHAIRMAN SOULES: The UCC is.

MR. ORSINGER: Well, I heard some discussion about there being something in a UCC revision that wasn't adopted into our Business and Commerce Code. Maybe I'm very confused.

CHAIRMAN SOULES: That won't be Texas UCC.

MR. ORSINGER: No. It's in the Texas statute, but it's --

PROFESSOR DORSANEO: Well, that makes the point --

MR. ORSINGER: Forget it. I

don't understand anything about it.

CHAIRMAN SOULES: This is UCC, not the Business and Commerce Code --

MR. ORSINGER: No, but the part I'm talking about is, I understand that there were some amendments that were made that didn't show up. They came into our law in a different fashion rather than through the Business and Commerce Code, but I don't know this area, so let me just withdraw that.

PROFESSOR DORSANEO: The other paragraphs --

CHAIRMAN SOULES: Did you have something on that, Carl?

MR. HAMILTON: Yeah. What does the last sentence in (a) add to the first sentence in (a)? Isn't it saying the same thing?

PROFESSOR DORSANEO: Maybe it doesn't say anything different. It says they can be sued, it says it affirmatively, and may be jointly sued with the person's primary obligor.

MR. HAMILTON: That's what the first sentence says.

PROFESSOR DORSANEO: Well, it says more.

CHAIRMAN SOULES: And it says they may be sued alone.

MR. HAMILTON: Only by statute.

CHAIRMAN SOULES: Well, that has to be changed to "as provided by law."

MR. HAMILTON: But that's what the first sentence says.

PROFESSOR DORSANEO: I think you're probably right, Carl. One says it one way and one says it a different way. I think they probably say the same thing, even though it's in slightly different ways.

CHAIRMAN SOULES: You're probably right. I think that's probably right.

PROFESSOR DORSANEO: Now, the question is which way should we say it, may not or may?

CHAIRMAN SOULES: I think the first sentence is --

PROFESSOR DORSANEO: Better.

CHAIRMAN SOULES: -- better.

PROFESSOR DORSANEO: And I

might pick up with the professors, the commercial law professors saying that an action may not be maintained against a secondary obligor unless the primary obligor is joined. It's just more economical and more parallel.

CHAIRMAN SOULES: And it sounds good. Does anybody else have anything else on this?

MR. ORSINGER: Now, are we comfortable with the bonds and sheriffs? This is the same language unchanged?

PROFESSOR DORSANEO: Yeah, it's pretty much -- the ones below are just extra things that deal with official bonds. This isn't even exactly the same kind of thing. (b)(1), which is in the rulebook and probably should be retained because it's not otherwise covered in the rulebook by one of the other rules, at least it is a clearer way.

It says if you have a subordinate officer who is given a bond, that you can -- that the superior officer and the subordinate officer and the sureties on the bond may be joined as defendants. Or maybe it just says that

sureties and the superior officer can be joined as defendants. But it deals with the specific problem of state officers, subordinate officers who have given bond with the sureties being on the subordinate officer's bond rather than on the state officer's bond. I don't know how big a deal that is, but it's in the procedural rulebook and it seems to be a sensible enough thing.

HON. C. A. GUITTARD: Do you want to say "such superior officer" or do you just say "a superior officer"?

PROFESSOR DORSANEO: I don't like "such" very often.

MR. ORSINGER: Well, you should say "the" rather than "a," shouldn't you?

PROFESSOR DORSANEO: And it's not Rule 36, it's 136 -- no, it isn't. It's Rule 36.

MR. ORSINGER: Well, it's surely in the wrong place.

CHAIRMAN SOULES: That looks all right. Bill, would you consider changing on Page 14 in that paragraph (b), changing "statute" to "as provided by law."

PROFESSOR DORSANEO: Yeah. And I think that will pick up contract and case law, don't you think?

CHAIRMAN SOULES: I think so.

PROFESSOR DORSANEO: And "Sheriffs and Constables" is a similar kind of thing. Who is "he"?

CHAIRMAN SOULES: Oh, that's the sheriff, constable or a deputy or either.

PROFESSOR DORSANEO: Well, this --

MR. ORSINGER: What it says is that he can join his bonding party in as a co-defendant.

PROFESSOR DORSANEO: Well, that's probably so anyway, but why not leave it in here. It's in the current thing.

CHAIRMAN SOULES: And the cause may be continued to obtain service on such parties. It's okay with me.

PROFESSOR DORSANEO: And then the last one is another special deal where you have different sureties for different periods of time, and you -- it's kind of like Big Daddy Lipscomb; you get them all in there and

see which ones are the ball carriers.

MR. BABCOCK: That was also Bubba Smith.

MR. ORSINGER: I'll make a note of that.

MS. SWEENEY: Are you all talking about judges or football players?

MR. BABCOCK: Baltimore Colts football players.

CHAIRMAN SOULES: Okay. Good job.

MR. ORSINGER: Bill Dorsaneo gets credit for that, because he has his own committee, which is the Appellate Rules, which is a plateful, and in addition to that, he is the scrivener and chief draftsman of this committee, and it's not even his responsibility.

CHAIRMAN SOULES: Well, we admire Bill for that.

PROFESSOR DORSANEO: Well, it is a pleasure to work with you people mostly.

CHAIRMAN SOULES: You mean most of us or most of the time?

PROFESSOR DORSANEO: I'll take

the Fifth on that.

CHAIRMAN SOULES: Okay. We're adjourned until 8:00 o'clock in the morning. We'll be in the same room. You may leave your materials in here.

(HEARING ADJOURNED 5:30 p.m.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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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 July 19, 1996, Afternoon Session, and the same were thereafter reduced to computer transcription by me.

Charges for preparation of original transcript: $1,353.00.

Charged to: Soules & Wallace.

Given under my hand and seal of office on this the 29th day of July, 1996.

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