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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 7, 1997

(MORNING SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 7th day of March, A.D., 1997, between the hours of 8:45 o'clock a.m. and 12:45 p.m. at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

MARCH 7, 1997

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
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Russell H. McMains
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Hon. Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
Hon. F. Scott McCown
Anne McNamara
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Paula Sweeney

EX OFFICIO MEMBERS:

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

W. Kenneth Law
Hon. Paul Heath Till

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INDEX OF VOTES

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

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CHAIRMAN SOULES: All right. We will be in session. It's about 8:35 here on March 7. We appreciate all of you being here. We will pass a sign-up sheet so that you can sign up your attendance. We have an agenda that you have received, but I would like to start this morning by also welcoming Justice Hecht, our liaison member from the Supreme Court. We appreciate your being here today, Justice Hecht, and I had asked Justice Hecht if he would give us a status report on where our various projects are in the process of the Supreme Court, and he said he would do that. So we would like to have that, if you will, please, sir.

JUSTICE HECHT: All right. The Court met yesterday and talked about rules. The appellate rules were sent to the Court of Criminal Appeals several weeks ago, and we asked them to expedite their consideration of them and they have; and Judge Womack, who I think will be here eventually, Paul Womack of that court is their new liaison to this committee in place of Judge Clinton; and they

have an internal rules committee, and Judges Baird and Keller are members of that internal committee; and they completed their work on the TRAP rules late last week. And since then we have made a few more changes to them and sent them down yesterday or the day before in hopes that we could have them finished this week; but we didn't quite make that, so we will finish up I think next week.

The deadline for printing them in the May Bar Journal is the middle of this month, and we will make that deadline. We have already notified the Bar Journal that they will be printed. So we expect that the appellate rules will be adopted by both courts and ordered published this month, in the next few days.

CHAIRMAN SOULES: That's great.

JUSTICE HECHT: Then the Court will take up the evidence rules next, and I imagine that they will be approved by both courts within 60 days and published as soon thereafter as we can. There are not a whole lot of issues pending in the evidence rules. Then before our break around the 1st of July

our Court expects to complete work on the discovery rules, the jury charge rules, the sanction rules, and maybe another project or two that relates to the civil rules, and have a draft ready for some comments maybe for several weeks over the summer, kind of like we have done on the appellate rules; and I anticipate the Court will publish those separately from the rest of the civil rules and go ahead with those while we are waiting on the committee to finish the remainder of the civil rules, and then get to those as soon as we can, complete the recodification of the civil rules, and then we will be done.

CHAIRMAN SOULES: If the legislature will leave us alone.

JUSTICE HECHT: If the legislature will leave us alone, which apparently they won't, so... You know that they put in virtually every bill now that has anything to do with -- arguably to do with procedure that the Court cannot change the statute by rule, so that is a result of some 1987 events, but nothing that can be done about that, so...

MR. ORSINGER: What is the status of the summary judgment rule?

JUSTICE HECHT: The summary judgment rule we have talked about. We are still looking at it. We are still thinking about it. House Bill 95 is moving along, and so we are kind of waiting to see what happens, but we are not in a big hurry if the legislature is not, but if they are, then we have got something to act on.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: Has any thought been given to looking at the Government Code provisions that deal with appellate procedure that need some little adjustments here and there in order to match up to our appellate rules?

JUSTICE HECHT: Like which ones?

PROFESSOR DORSANEO: Well, Government Code 22.001, I think subdivision (c), talks about writ of error, and it also talks about cases being brought to the Supreme Court from the courts of appeals by certified

question. We have got the term in the provisions of 5 of the Civil Practice and Remedies Code or the Government Code "writ of error" in terms of the court of appeals, writ of error business --

JUSTICE HECHT: Right.

PROFESSOR DORSANEO: -- including a six-month time period in there. There is not many things.

JUSTICE HECHT: Right.

PROFESSOR DORSANEO: And they are probably not that big of a deal, but there are some things that should be adjusted.

JUSTICE HECHT: No. But we will look at those. I think the publication and comment period gives us some time to fix that. The Court's view in the past has been that if we get comments during the publication period and before the effective date we can respond to those without republishing them as long as they are not too major, and otherwise you would never get to the end of it, but that's what we have done in the past.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: What's the

proposed effective date?

JUSTICE HECHT: September 1.

MR. McMAINS: September?

JUSTICE HECHT: Yeah.

MR. McMAINS: For all of the rules that you are talking about?

JUSTICE HECHT: No. Just the TRAP rules.

MR. ORSINGER: No. Just the appellate rules.

JUSTICE HECHT: No, the evidence rules will probably be like November or December and then the first group of civil rules probably the first part of next year.

CHAIRMAN SOULES: I did get feedback on the summary judgment, back that Representative Nixon -- I understand. I didn't get this directly from him, but indirectly that Representative Nixon, who is a representative from Bellaire, Republican, he's board certified I think civil trial, maybe personal injury, but I think civil trial lawyer, so he is a lawyer and is a lawyer who's board certified; and he has a bill, a summary judgment bill that he sponsored that

he is the author of the bill in the House, and there are two authors in the Senate. I don't know whether they are different bills, Armbrister and Buster Brown.

Those are the ones I know about, but at least the feedback I'm getting is that Nixon is satisfied with what we sent to the Court and that if that's going to be the rule, he's not going to pursue his bill at all, which I think is good news and a credit to all of you-all who worked so hard to get that done, and hopefully if that is his mind-set now, as I understand it is, any of you who have an opportunity to reinforce that, do what your conscience leads you to do. There is also some feeling that given his satisfaction with it, that at least Buster Brown would probably feel the same and things would follow suit in the Senate as well, so I think that may be some good news, Judge.

JUSTICE HECHT: Yeah. And, Mr. Chairman, this is Paul Womack, Court of Criminal Appeals.

CHAIRMAN SOULES: Judge, good morning to you. I'm Luke Soules. Judge

Womack, of course, we are just introducing you to our Supreme Court Advisory Committee and welcome you to our midst, and I hope that we can make it worth your while.

HONORABLE PAUL WOMACK: Thank you.

CHAIRMAN SOULES: I know we will want to introduce ourselves individually to you on a break.

HONORABLE PAUL WOMACK: Thank you. Let me apologize. I'm going to have to leave out of here at 9:45 because I meet a class over at the University of Texas this morning, and I'm going to miss part of the proceedings, but I did want to get here for a little bit.

CHAIRMAN SOULES: Good. Well, we hope to have an opportunity to introduce ourselves to you individually at some time, Judge. Thank you.

Anything further on our preliminaries before we move to our regular business? Okay. I think the first thing up today is -- do we need to take anybody out of order since we published the agenda, Holly?

MS. DUDERSTADT: Not to my knowledge.

MR. LOW: Luke, I would like to sometime today get to evidence. It won't take five minutes.

CHAIRMAN SOULES: Okay. Let's go ahead and go to the evidence rules for Buddy. He has a special problem here, and I don't think it's going to take long, probably not more than past noon tomorrow. That's usually what happens when I say it doesn't take long.

MR. LOW: Well, I told you almost everything I know when I said "Hello," so it won't be that long. Let me call first on Mark Sales. He is working on --

CHAIRMAN SOULES: This will be under Tab 10. Oh, I'm sorry. Report of TRC subcommittee. This is what it looks like. Is it back behind us here?

Okay. Mark Sales.

MR. SALES: I would report as chair of the State Bar rules of evidence committee that there were I think about eight or nine cleanup items on the agenda regarding

the unified rules. Those were submitted to our committee back, I think, the end of last year. We have had subcommittees working on those. We expect the reports. They are actually coming in this week, I think they are due.

Our committee is going to meet I believe the second week of April to vote up or down on those recommendations, and then we propose to have our recommendations to this committee for its May meeting, if not sooner. I think -- I don't think many of them are going to be very controversial. They are really just mainly cleanup items, so I will try to provide this committee with our reports, even -- you know, maybe, if the Court would like it, the subcommittee reports sooner, if there is the haste that I gather we are trying to get these things cleaned up as soon as I can.

CHAIRMAN SOULES: All right. Get them to us as soon as you can so we can take a look at them and then maybe it will go pretty quick when we have another meeting.

MR. LOW: Luke, the first thing I always report on, I wasn't here last time

and nothing was said in our report on the action that was done the time before. So in November I have got a chart that shows, and I don't think it needs any discussion, as to what we did at the November meeting. Then I have, for this meeting I have -- let me go to my chart here.

First will be, if you have the agenda for January, I believe it is, that was not discussed. First is, there is a question on 503. Does everybody have what I have got here, the agenda for March?

Okay. Some question was raised to us about 503 and changing that, and it was given rise to by the National Tank as to whether some changes should be made, and I have prepared a history which I think accurately reflects what we did and why we were sometime doing it, and our committee has already voted, the full committee, not to make any changes at this time. Now, is your committee further considering that, Mark?

MR. SALES: I don't know that there is anything that's up in the next meeting. I know that there is still a very

strong sense in the State Bar committee that something needs to be done to address the attorney-client privilege following Brotherton, and obviously I think that was almost a unanimous report that was voted on at the January meeting that came from the State Bar committee, but there is nothing right now as far as I know on the table on that.

MR. LOW: So the only thing I know that gave rise to that again, Luke, is that the legislature might be considering doing something with that, and we have learned a long time ago we can't keep them from going wrong, I mean, from doing what they want to.

Rule 902, there is a letter from Lloyd Lunceford complaining of medical records being obtained without being authenticated. Somebody just gets the medical records and doesn't authenticate them, and it says he's complaining about that. Well, our present rules allow parties to get copies and then you can authenticate with the affidavit. I don't know how we can improve on that, and our committee recommended no action be taken.

CHAIRMAN SOULES: Any different

view on that? Okay. The committee's recommendation is accepted.

MR. LOW: Then from Allen Hector and Lloyd Lunceford concerning improving necessity and reasonableness of medical bills, and apparently they overlooked 18.001 and 18.002 of the Civil Practice and Remedies Code, which is a pretty easy method of doing that by, and our committee doesn't think we can improve on that.

CHAIRMAN SOULES: So you recommend no action?

MR. LOW: No action.

CHAIRMAN SOULES: Any different view on that? The committee's recommendation will be accepted.

MR. LOW: Okay. And with that I think there is nothing else. Do you know of anything else, John?

MR. MARKS: I can't think of anything.

MR. LOW: Okay. That cleans our docket.

CHAIRMAN SOULES: All right. So your docket is clean now except for the

edit work that the --

MR. SALES: There is the edit work, and I think that there is one other item which dealt with the Robinson issue, the letters regarding the social science aspect of it and whether there should be any consideration or change or comment to the rule based on the scope of Robinson, whether it's science or social science, and we have a subcommittee. I think Dean Sutton is heading that up. He is going to report I think at our April meeting on that one as well, which obviously may be controversial, and we hope to give this committee a report on that shortly after.

MR. LOW: Yeah. We are waiting on your committee there.

CHAIRMAN SOULES: But as I understand, these are issues that are lodged in the State Bar of Texas rules of evidence committee, and they are being attended to. They are not something that's come from the public sector or something. It's more or less work being internally done.

MR. SALES: It's being

internally done. I mean, we received a number of letters that I think started the process actually going back several years; but the other items, I think there are eight or nine items that are just pure cleanup items; and, like I said, I think that we will have those probably in hand in the next couple of weeks, the subcommittee reports; and our committee will vote, I'm sure, to adopt most of those in our April -- I will send them on as soon as I get them, though.

CHAIRMAN SOULES: As far as any outside inquiries are concerned, they are all buttoned up now?

MR. LOW: The outside inquiries were on that and referred back to Mark's committee were the very issue raised. I think that's the only one that we have received outside that's been referred back, and the question, it gave rise because of a case, Supreme Court case, and I think one of the justices raised the question whether our committee should study it, and it was a question of repressed memory and an expert on that, and our committee felt that you just

can't have qualifications for experts of every type, and that's been referred back to Mark. I mean, you are going to have to have one general rule.

CHAIRMAN SOULES: Okay.

MR. SALES: I think we will have a pretty good report on that, too, because, I mean, Dean Sutton does an excellent job, and I expect that we will have a very thorough report to provide this committee about that.

CHAIRMAN SOULES: So we have got Dupont vs. Robinson and some edit issues, and we will be through with, as far as we know, everything that's currently on the evidence committee docket?

MR. SALES: That's correct.

CHAIRMAN SOULES: Okay. That's fine. Richard.

MR. ORSINGER: I would just like to make it known that as a result of Justice Gonzalez' opinion the Family Law Council has created a committee to articulate standards on the admissibility of psychological and psychiatric evidence, and

this needs to be coordinated, and I suppose the effort will be submitted at the State Bar, but if Justice Gonzalez is right and that the stringent standards of the Robinson case would be applied to mental health evidence, it would have a significant impact on family law. In fact, a lot of things like Rorschach analysis and other things might never be admissible, and so we are going to take a shot at trying to articulate some standards.

MR. SALES: Richard, you may want to have whoever is on that committee maybe attend our meeting in April. We would certainly welcome them.

MR. ORSINGER: Definitely.

CHAIRMAN SOULES: It would be great if you-all could cross the lines there a little bit and participate in each other's project because there is some great thinking in both of those areas.

JUSTICE HECHT: Luke?

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: The Court has the committee's January 24 report on the

evidence rules, which we are thinking about taking up pretty quickly; and if we were, we would ask the Court of Criminal Appeals to do likewise. So are there some out -- I'm not sure of the scope of the outstanding issues.

CHAIRMAN SOULES: Let me ask for some authority from the committee on that, and see if we can get this done. As far as the cleanup edit items are concerned -- what?

MR. LOW: Let me tell you, we met with, let's see, Mark, your predecessor, and we think the rules are okay now. I mean, there are always going to be some changes. There is nothing -- those are items --

CHAIRMAN SOULES: Imperfections.

MR. LOW: Right. That doesn't have to be considered right now, but, I mean, isn't that your understanding, Mark?

MR. SALES: Yeah. I think as far as the language and the physical merging of the two and those type of things, that's not what we are -- we have got a few little things about whether there should be distinctions between where it says in criminal cases versus in civil, is there any reason for

that.

CHAIRMAN SOULES: Okay. Timeout. Timeout. Let me get to what I was trying to do. As far as the perceived imperfections that may be in the rules that Mark is working on right now, does anyone object to him finishing that, sending it to me? I will send it to the Court, and I will send it to all of you. If some big flags go up, we will talk about it next time. Otherwise, the Court will at least have that input while it's working on the rules. Any objection to that?

Okay. That's what we will do. If you will send them to me and I will get them directly to Justice Hecht. And as I understand, in a week or ten days you can have that to me?

MR. SALES: I probably will have most of the reports maybe by the end of this next week, I would think. Subcommittee reports.

CHAIRMAN SOULES: Is that responsive to your concern?

JUSTICE HECHT: That's plenty.

We won't be moving that fast, I don't think, but we might be looking at a May 1 or June 1 completion date, and so where is Richard's project?

MR. ORSINGER: It's not progressed very far at all.

JUSTICE HECHT: This is going to take months, I would think.

MR. ORSINGER: It's an intractable problem unless -- Bill just told me there is a professor at SMU who has done a lot of work in this area, but the standards that are promulgated make good sense for hard science, but in the mental health area a lot of those standards probably could never be met, and maybe they shouldn't be, but at least we have been practicing law as if it's all admissible.

CHAIRMAN SOULES: Are you aware of the Federal Manual on Scientific Evidence that came out shortly after the Daubert decision?

MR. ORSINGER: Huh-uh.

CHAIRMAN SOULES: It is a really tremendous piece of work. If you will

call my secretary, and Mark knows about it, we will get you a cite to it. It's a paper bound book about an inch across the spine where some pretty knowledgeable people got together right after the Daubert decision and explored the problems and some of the solutions. It's a good start.

MR. ORSINGER: Well, it seems unlikely to me that this committee -- which, you know, I can try to light a fire under it since we have such a close timetable, but I doubt it's going to have anything by the time you're talking about.

CHAIRMAN SOULES: Okay.

MR. SALES: Our committee will have whatever recommendation we will have by probably mid-April on that.

MR. BABCOCK: Luke, there is another manual that Morris puts out that has the Federal thing incorporated in it, with a lot of good commentaries around it, and you might want to look at that, too.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Don't they call it The Federal Manual on Scientific

Evidence?

MR. BABCOCK: Right. And then there is a thing called Morris Federal Manual on Scientific Evidence which has got the manual plus commentary.

CHAIRMAN SOULES: Okay. Great.

MR. LOW: Luke, there are two other things. There are a couple of -- there is a lot written about this, Law Review articles; but also there is currently -- and I haven't seen the decision down yet -- a case in the Supreme Court that involves this very issue; and that was another thing that we were holding up on; and I had put in my report that we didn't give last time, we were waiting on Richard; and our committee felt one way, as I stated earlier, that, you know, it's going to be difficult to draw a line for this kind of expert and that kind; but we are waiting on his committee and we are waiting on the Court to see -- I mean, you know, they have got DuPont, but I think it's one of the --

CHAIRMAN SOULES: Oh, SV. Is it motion for rehearing been overruled? SV?

MR. LOW: No, no, no. That's

not the one I'm talking about. It's --

JUSTICE HECHT: Merrell Dow against Hefter.

MR. LOW: Merrell Dow. Right. And that could also have an impact on how we draft it, too. My committee drafted a rule that followed DuPont, but, you know, in the event the Court decided they wanted a rule, and we have one and drafted even a procedure, but we felt it unwise to proceed, if we do have a rule, until we see how it is modified.

CHAIRMAN SOULES: Some more experience.

MR. LOW: Right.

CHAIRMAN SOULES: Okay.

MR. SALES: Luke, I think our committee also -- I know it was voted down, but we also had come up with a comment, not a change to the rule per se on that issue, and that's before this Richards case and this other stuff.

MR. LOW: And, Luke, I have one other item I forgot to mention that was brought up and --

CHAIRMAN SOULES: Okay. Let's

do it.

MR. LOW: -- that should have been brought up in November, and that was on 609, a letter from Judge Martin -- I can't pronounce the last name, showing an inconsistency with Section 51.13(b) of the Family Code, and we have recommended his approval so that a juvenile's prior adjudication and disposition could be used to impeach juvenile only in subsequent proceedings in which the juvenile was a party, and it makes the rule consistent. There is nothing controversial. It makes the rule consistent with the statute.

CHAIRMAN SOULES: "Evidence is not admissible under this rule except for" -- what you're adding is "except for proceedings conducted"?

MR. LOW: Right. To make it consistent with the Family Code. It's just a housekeeping. It's not a change. It's just to be consistent, and he pointed out the inconsistency in our rules.

CHAIRMAN SOULES: Any objection to that change in 609, Texas Rules of

Evidence, Civil Evidence, 609(d)?

Okay. With no objection to that, you recommend it be passed?

MR. LOW: I do.

CHAIRMAN SOULES: Your recommendation, the subcommittee's recommendation, is accepted.

MR. LOW: Now I am current. That's all.

CHAIRMAN SOULES: Okay. Next?

JUSTICE HECHT: I've got one more thing.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: I'm sorry.

CHAIRMAN SOULES: Thank you. Yes, sir. You always have priority.

JUSTICE HECHT: I hate to be the fly in the ointment here or some other kind of obstruction, but the college of state judges met this last week in Houston, and a large part of their program was devoted to the scientific evidence issue.

I was not there for the presentation on, I think it was, Wednesday morning, but I

understand they had a lengthy discussion about a lot of these issues; and one of the issues that this committee has already discussed and not made a recommendation on, other than that there be no change, is the problem of court-appointed experts; and, of course, you know that Rule 706 of the Federal rules allows for that; and there is some growing concern in two directions. One, that the -- well, that to the extent that trial judges will have to make determinations about the reliability of scientific evidence, which may not be that often, but to whatever extent it is that they have to do that, they may need some help.

So since that issue has been raised again, maybe the subcommittee and Mark's committee can take another look at that. The Federal rule is quite broad and allows the district court to appoint an expert basically whenever he wants to, and that may be much too broad for our purposes, and at least we should think about that. But by the same token, to the extent that these cases keep arising then I think it's unrealistic to expect trial judges, at least in the hardest cases, to go

it on their own; and I know they are all -- I know this is an area fraught with strong feelings and with peril; but it isn't going away; and, again, I don't know whether we can get -- how far we can get on that kind of an issue in the next several weeks or months, but maybe we ought to start on it.

MR. SALES: We can certainly take it up at our April meeting and try to come up with something. Since we already have a committee sort of dealing with this issue, we could just add that to their load.

MR. LOW: If I'm not mistaken, we did get an inquiry, and I don't have all my history. I have a history book concerning --

JUSTICE HECHT: Bob Martin.

MR. LOW: Yeah. About that and concerning -- it had to deal with even the judge questioning. I think his letter might have even gone to that extent maybe, and I think we voted, and maybe it was presented to the committee, not to accept that. We certainly will revisit that if that's the desire of the Court. We will be glad to have the committee --

JUSTICE HECHT: No. I think that's right. In July you-all reported back and recommended no change, and the committee accepted the recommendation, but Mike Hatchell raised the question of whether we didn't need to look at this with respect to scientific evidence and then sort of nothing happened, but now, as I say, with the conference devoted almost largely to that issue and its effects both in the civil and criminal courts, we are going to have to face up to it, and maybe you better take another look at it.

CHAIRMAN SOULES: Okay. Buddy, will you take another look at it?

MR. LOW: It goes hand in hand with, you know, DuPont and the Robinson rule. We will.

CHAIRMAN SOULES: Okay. Well, that will be assigned to your rules of evidence subcommittee of this committee for pretty much ongoing study, and if you can maybe give us at least a threshold report on that next time.

MR. LOW: I will.

CHAIRMAN SOULES: Judge, are

you asking or hoping that we could get this to you before the rules of evidence are passed through the joint courts?

JUSTICE HECHT: Yes. I think we are going to go ahead. Our next meeting is the first part of April, and so even if we got all the way through them in April we could still hold off until we heard back from the committee and still look for a summer deadline to finish up.

MR. LOW: And, Judge, this didn't go to the point he raised. You are not so concerned about the trial judge questioning. You're just talking about appointing an expert in scientific cases?

JUSTICE HECHT: Right. The 706 of the Federal rules.

MR. LOW: Right.

HONORABLE SCOTT BRISTER: In other words, from the judges' standpoint, it's one thing if I can just appoint any experts I want in all my car wreck cases, which is what the Federal rule is, but that would be a tremendous change, but if I have got a specific scientific Robinson question, the new

thing is -- you know, do animal studies apply to humans? I'm going to -- may need more help than what I'm going to get from the parties on that question. Not for -- and not for somebody I'm going to call at trial or whose report is going to be presented at trial. This is just an expert to appoint by the court for me to decide the gatekeeper question as to what the parties can call. This is a different question from what I think we voted on last time.

CHAIRMAN SOULES: I understand. But did you say there was another concern besides the ones that -- there may be two concerns or just that?

JUSTICE HECHT: No. Just that one.

CHAIRMAN SOULES: Okay. All right. That's been assigned for study. Anyone want to volunteer to be of assistance to Buddy and his subcommittee on that project? Judge Brister. Anyone else?

MR. LOW: Could I ask one question for clarification?

CHAIRMAN SOULES: Yes, sir.

MR. LOW: Are you talking about or was the gist of the discussion about just helping the trial judge, as Judge Brister says, or that would actually be called as a witness?

JUSTICE HECHT: It wasn't that detailed.

MR. LOW: It wasn't that detailed.

JUSTICE HECHT: It was just a free ranging discussion at the college about the whole scientific evidence problem, and both the -- all the update speakers talked about it from a substantive law standpoint, but then the judges were saying, "Well, what are we going to do? How do we do this?" Because they are unaccustomed to facing this problem.

Again, when you devote nearly an entire day to it at the college it makes it sound like, you know, it's going to be as commonplace as a motion for sanctions or something, and I don't want to give -- I hope they don't have that impression because that's not my view of how frequently it needs to be

used, but they were just talking about when we need help what can we do.

MR. LOW: 706, the Federal rule, was discussed there?

JUSTICE HECHT: Yeah. Uh-huh.

MR. LOW: Okay. Thank you.

CHAIRMAN SOULES: Okay. Judge Brister, Alex has a commitment I think, what, around 10:30 or 11:00, you need to go?

PROFESSOR ALBRIGHT: I have to be there at 11:00.

CHAIRMAN SOULES: Be there at 11:00. Do you want to go ahead and move to venue now and then when we take a break, when she needs to leave, we will interrupt that and take on any cleanup on 18a or b? It looks like it's pretty well buttoned up anyway. Is that okay?

HONORABLE SCOTT BRISTER: You bet.

CHAIRMAN SOULES: Okay. Alex, you're on.

PROFESSOR ALBRIGHT: Okay. Does everybody have their venue drafts in front of them? There will be -- Holly, would

you tell us how they are put together so everybody knows?

MS. DUDERSTADT: There is one stapled together that says "3-6-97 draft" with motion to sever/strike and then a one-page of Rule 257.

PROFESSOR ALBRIGHT: Okay.

MR. HAMILTON: You said 3-6 or 1-6?

CHAIRMAN SOULES: 3-6. They are back behind us on the table if you haven't picked one up.

MR. McMAINS: They haven't been sent out.

CHAIRMAN SOULES: Pardon?

MR. McMAINS: They haven't been sent out. They are there. They are only on the table.

CHAIRMAN SOULES: Yes. Okay. Let's go ahead and start.

PROFESSOR ALBRIGHT: What you have in this packet with the 3-6-97 draft on the top, there is another draft that's just entitled "Rule 86," and if you look at the bottom, it's a 3-4-97 draft and then at the

very -- the last page is a fax from Sarah Duncan that is a redraft of some of the language in these rules.

What I would like to do is talk about some of the bigger issues here. A lot of the changes that are made in these rules were taken directly out of the transcript that we voted on last time, and we can go through those later, but for right now I would like to stick with some of the bigger issues that are addressed in these drafts.

First of all, we need to talk a little bit more about procedurally what kind of motion should be filed to raise the issue of joinder and intervention when you have multiple plaintiffs and the additional plaintiffs cannot independently establish venue. Under the 1995 venue statute the defendant can object to joinder of the plaintiffs who cannot independently establish venue, and then --

CHAIRMAN SOULES: I guess, for the record, so that somebody can find this if they ever start looking for it, I should say that the focus of your report has to do with

venue.

PROFESSOR ALBRIGHT: Correct.

CHAIRMAN SOULES: Right. So we are -- this joinder and so forth that we are talking about right now is in the context of venue, and all of your report is in that context.

PROFESSOR ALBRIGHT: Correct.

CHAIRMAN SOULES: Okay. Let's proceed. Thank you.

PROFESSOR ALBRIGHT: With this multiple plaintiffs, the defendant can object to thhe joinder of additional plaintiffs who cannot independently establish venue. Then the plaintiffs have an opportunity to establish four criteria to convince the judge that they should be allowed to maintain their joinder in this particular lawsuit, even though they cannot independently establish venue.

In January we voted that the multiple plaintiffs' motion should be a simpler motion than our ordinary motion to transfer venue, and that is reflected, if you look in the 3-4-97 draft, so the draft that is in the

middle of your packet, in part (2)(b) of that rule. The second sentence says, "In a case with multiple plaintiffs, the motion to transfer may challenge a plaintiff's joinder or intervention on the ground that the plaintiff cannot establish independently of any other plaintiff proper venue in the county of suit, and the motion need not specifically deny pleaded venue facts nor seek transfer to another specified county of venue."

We decided that the defendant could simply say, "Plaintiff, I don't think you can establish -- you can independently establish venue. I move to transfer." The result that we voted on if the court decided to grant this motion is reflected in Rule 86, part (9), which is on page 3 of the 3-4-97 draft. "If the motion challenging a plaintiff's joinder or intervention is granted, the court shall sever the plaintiff's claim and transfer the severed cause to any county of proper venue. However, if a motion challenging a plaintiff's intervention is granted, the court shall either sever or transfer the intervenor's claims or strike the intervention."

So what we decided is that if it was a -- we had a big discussion about the ordinary remedy for a motion to strike an intervention is striking the intervention, but we recognize that that could be a problem with the plaintiff's statute of limitations, so we decided to give the judge the authority to either sever and transfer or to strike the intervention, and then we also decided that in the multiple plaintiff situation that if the court did grant the motion, that we did not want to let either the plaintiff or the defendant be the one to decide where the case should be transferred to, but that the court would be the one to decide the county of proper venue to which the case should be transferred.

So that's the history of what happened in January, and those changes are reflected in the 3-4-97 draft. Yesterday we had a conference call with the subcommittee; and we talked some more about these issues of what kind of motion do you file; and I think the sense of the subcommittee was that it really does not make sense to have two kinds of

motions to transfer venue, to call them the same thing, to call them motions to transfer venue when one was, in fact, a motion to transfer venue where a defendant set forth a county to which venue was proper, where the defendant wanted it transferred and the defendant had some obligations in that motion and then have the second type of motion to transfer where the defendant has no -- does not have the same obligations, and that the remedy is -- involves a severance or a striking of an intervention and not simply a transfer, as it does under an ordinary motion to transfer.

So what we decided to do is to draft -- take a stab at drafting a rule that had two different types of motions, and that's what this 3-6-97 draft does. We finished our conference call at about 4:30, and I had to be somewhere at 5:00, so I admit that this is a rather quick stab at this, and you will see some footnotes that say, "I deleted this, but I need to think some more about whether it really should be deleted," but generally what this does is take out the provisions relating

to the objection to joinder when that joinder is a late joinder.

So you have a motion to transfer venue that must be filed in due order, if the defendant is objecting to venue being proper at all in the county of suit, so your ordinary motion to transfer that we all know about now; and you would also file a motion to transfer if you had a multiple plaintiff situation and those plaintiffs were joined in the lawsuit from the beginning, from the time the lawsuit is filed.

The defendant would file a motion to transfer and say, "This is a multiple plaintiff case and these additional plaintiffs cannot independently establish venue," and it would be handled just like a motion to transfer venue where the defendant says, "Venue is not proper for you, additional defendant" -- I mean, "additional plaintiffs, and I want the case to go to another county of proper venue," and the defendant has the burden of proof on the transferee county, that it's a county of proper venue. So that would be the motion to transfer that would be filed

before the answer.

Then we had a second type of motion that would be appropriate if additional plaintiffs joined later in the lawsuit. This would be when you had plaintiffs added by amended pleading or plaintiffs who try to come in by a plea and intervention, or who come in. That's not trying. They have come in, because when you intervene you are there unless you are stricken. So these are late added plaintiffs. The defendant then has to object to their joinder on venue grounds, and they would do this not by a motion to transfer, but on page 4 of the 3-6-97 draft, part (11), motion to sever or strike.

Within 30 days of the service of an amended pleading joining additional plaintiffs or a plea and intervention, the defendant would file either a motion to sever and transfer the plaintiff's claims or a motion to strike the intervention to challenge the joinder or intervention on the ground that the plaintiff cannot independently establish venue. This motion need not specifically deny pleaded venue facts and need not seek transfer

to another specified county.

Then the plaintiff has the burden of either independently establishing venue or establishing the four criteria under 15.003 of the Civil Practice and Remedies Code, and in this situation the judge would review the evidence and transfer to -- if motion was granted, transfer to any county, and I added here, "taking into consideration the convenience of the parties and the witnesses in the interest of justice." And also included here is that the court has the option of either severing or striking an intervention if a motion to strike an intervention is granted.

So this is purely a procedural issue as to whether we should handle the late added plaintiffs differently from the plaintiffs that are included in the original petition, and Rusty was the one who spoke about this the most, so, Rusty, is there anything you want to add?

MR. McMAINS: No. Of course, we haven't seen, you know, just how -- have looked at the fix.

PROFESSOR ALBRIGHT: And the fix is -- you know, if we decide to go this way, the fix needs some work.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Luke, the issue is -- as it developed basically in the course of our discussion, is there is no question that the statutory amendment to the venue rules does require when there are multiple plaintiffs, even initially joined, that each of those plaintiffs be able to satisfy a venue. We don't have any dispute about that. However, I believe there is a serious question as to whether or not, if you look at those sections of the venue statute -- because this is the way it's been presented at virtually every seminar that I have been to wherever, is, is the interlocutory appeal parts for what in my judgment appear to be people who are later added than the initial parties, is it limited to people who are later added? Because that's the way everybody has been talking about it. That's the way most of the courts of appeals have been talking about it,

internally and at various seminars.

And so it seems to me that if you don't do that then what you're saying is you have an interlocutory appeal right under the venue statute every time you have more than one plaintiff, and that seems to me to be a considerable and conspicuous enlargement of the burden on the judiciary than was intended. So if, in fact, the appellate situation is different then it makes sense that the procedural devices be different with regards to where you are challenging venue as to an opening lawsuit where you have got everybody in there and there is a motion to transfer, you all follow the same procedure, and then if somebody wants to come in later then you have a streamlined procedure because that's what's really got to go up on an interlocutory appeal for either side.

If the judge wants to handle it and it comes out a particular way then there are interlocutory appeal rights as to that decision, and, you know, one can make the argument that under the statute that the interlocutory appeal might conceivably apply

even to plaintiffs who joined in the first suit, although I think that's a stretch, because the interlocutory appeal talking about from an order where plaintiffs are seeking to join, and if you've filed the lawsuit, you are not seeking to join. That's the initiation of a petition, and every -- you know, when this stuff first came up, the immediate reaction by most of the courts of appeals was, my God, are we going to be flooded with interlocutory appeals, and then they looked at it and thought that this was an attempt to respond to the situation in the Valley that was in the Maloneys' case in Laredo, I guess.

PROFESSOR ALBRIGHT: Valeros, Maverick County. Eagle Pass.

CHAIRMAN SOULES: Maverick County.

MR. McMAINS: Yeah. Eagle Pass. Yeah. And that's really what that was -- you know, that was what I think everybody perceived to be responsive to that.

So you are talking about when somebody files and then tries to bring in a bunch of people later or other people try to intervene

in the lawsuit based on venue having been established initially as to a particular plaintiff or a particular group of plaintiffs, and it seems to me that we should be encouraging the differentiation in those circumstances procedurally, and it makes sense to file a motion to transfer if you are dealing with the first filed lawsuit and just treating that as a procedure, but if you are talking about later added people then those are different, you know, have different procedural ramifications, and that's why that we have got into this discussion of whether or not we should treat them in a shorter version when we are dealing with that situation.

CHAIRMAN SOULES: As a predicate I have this question of you. You said the words, "if a plaintiff seeks to join." The plaintiff doesn't any more have to seek to join an amended petition than it does an original petition. There really never is a seek to join, as I perceive the process, so how can you differentiate between the original and an amended on that basis?

MR. McMAINS: Well, that is the

language -- unfortunately that's the language, you know.

CHAIRMAN SOULES: I know.

MR. McMAINS: We all know that the legislature didn't understand our procedures when they passed the statute, because they also assumed -- in terms of giving the interlocutory appeal right, they assumed that there was an order allowing an intervention, and there is no such order. There are orders striking interventions, but there are no orders allowing interventions.

So we are just trying to do the best we can, and I'm not saying that -- this obviously doesn't have anything to do directly with the appeal. It only has to do with whether or not we should treat, procedurally, what you do at the first of the lawsuit the same, regardless of what your grounds are and what you do after differently, if that makes sense, and it seems to me that does make sense, and that's all the purpose of this amendment was.

CHAIRMAN SOULES: Richard, and then I will get back to Alex.

MR. ORSINGER: If I can argue,

not necessarily without personally -- I mean, without personally endorsing the opposite view, it seems essentially to me to be an arbitrary decision either way. If you are going to have multiple parties who are there in the first pleading treated differently from multiple parties who are there in an amended pleading, that doesn't have any inherently greater logic to me than to treat them the same.

In other words, the multiplicity issue is the same whether the multiplicity issue is there from the first pleading or whether it's there from the second pleading. The issue of 15.003 of the Civil Practice and Remedies Code, the language doesn't help very much because subpart (a), which probably we would all agree on definitely applies to original pleadings filed, talks about may not -- that a person unable to establish proper venue may not join a lawsuit unless these four exceptions are met.

(B) says a person may not intervene or join in a pending suit. So (b) clearly applies to somebody that's not filing an

original pleading, and then (c) says, "a person seeking intervention or joinder." And since joinder could occur in the original pleading, it could occur in an intermediate pleading, but intervention clearly only occurs to an existing pending lawsuit, it's unclear to me whether (c) applies to the original pleading or a subsequent pleading.

Furthermore, you don't seek to intervene. You just intervene; and if down here you are talking about an appeal from the order denying the intervention, allowing or denying the intervention, you know, if you intervene, you intervene, and then someone files a motion to strike your intervention and then your intervention is struck; but your intervention, you don't have an order perpetuating the intervention, which I think Rusty was referring to.

So it seems difficult to me to tell from the statutory language that the issue of multiple plaintiffs is different when it arises from an amended pleading or an intervening pleading as opposed to an original pleading, and in our discussion at the last

committee meeting I think Lee Parsley shared with us a conversation he had with a lawyer who had worked for the Senator who sponsored this bill, who said that the Senator's intent -- and if I am not misquoting you, Lee, the Senator's intent was that this kind of multiple party thing should be somehow simpler than a straight out motion to transfer venue. It ought to be easier. You shouldn't have to do as much, but I don't consider that to be legislative history. That just is the motivation of the sponsoring Senator, which may or may not reflect the intent of the entire legislative body.

And it seems to me that we are not forced into the position that Rusty has said if we don't want to be. Now, it may be logical that we have to be careful about what we say about joinder in an original pleading, because it may carry with it the implication that you have interlocutory appeals from rulings on initial pleadings, but even that is not necessarily sure because the descriptions in (a), (b), and (c) are all different. You know, (a), to me, you can't tell at all; (b)

for sure applies to a going lawsuit; and (c), I don't think you can tell at all.

So I kind of feel like we are writing on a clean slate, and I am not overly impressed by the private intent of the sponsoring Senator, which I don't think is part of the formal legislative history, and that we ought to make a conscious decision that we do or don't want to treat people differently depending on whether they are in an original pleading or an amended pleading or whether they file an intervention.

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: Well, I have to admit that I have read the statute many, many times, and it never occurred to me that (c), the interlocutory appeal, only applied to late added parties, but I wasn't there at the birthing of this statute, so I don't know.

But regardless of what this statute means for interlocutory appeal, I became convinced that it does make some sense to make the motions different for the late added parties instead of the originally included plaintiffs.

Rusty was talking about, well, what if you have a situation where the defendant is challenging venue as to all the defendants first, then alternativley -- I mean, all the plaintiffs first, then alternatively as to, well, if maybe one of these plaintiffs has venue, the rest of them sure don't. It seems silly to have to file two different kinds of motions at that point in time in the proceeding. Why can't those just be alternative grounds to the defendant's motion to transfer? Then so you have all those motions to transfer that look alike in this first part of the lawsuit.

They look different when they have a motion that you have to file after additional plaintiffs join after your due order time has expired, and then it is really not a motion to transfer issue. It's what you are doing is objecting to the late joinder of parties, and so intuitively that makes some sense to me.

CHAIRMAN SOULES: Comments? Anyone? Bill Dorsaneo.

PROFESSOR DORSANEO: I'm not altogether sure why this paragraph has

different content in terms of what the motion needs to say when it's a motion to sever or strike. For example, "The motion need not specifically deny pleaded venue facts," but it does seem to make sense to me, because of due order thinking and the due order language of our rules and the statute, to have this subsequent addition of plaintiffs issue dealt with in a separate paragraph.

Right now it takes a little bit of ingenuity to think about, you know, how can I file whatever I'm going to call this motion late in the lawsuit after I've answered and there have been additional proceedings because, in effect, the lawsuit has changed. There is somebody new on the scene. So I think it's a good idea to do it in a separate paragraph.

For that reason I also, frankly, don't think that -- and I may be wrong about this, that this part of the Civil Practice and Remedies Code that was spawned by the Abiscall case is that big of a deal. I don't think it's going to be that important a provision. So that would be another reason why I would

like to isolate its operation. It may be that it will turn out to be something that plaintiffs are really concerned about, you know, working on; but I really doubt it in light of what the statutory provision says. So that would be a separate reason for putting it in a separate place that you wouldn't have to worry about very often because it wouldn't come up very often.

CHAIRMAN SOULES: Anyone else? Okay. So I guess the first consensus we need is whether or not we should have a separate subdivision of the rule to cover venue litigation as to late added parties, right?

Those who favor that show by hands. Separate subdivision. 13. Those opposed? One. Okay. So we will have a separate subdivision.

Now what do we need to move to?

MR. ORSINGER: Luke, if I can comment, I think it's inferential from our vote that we are agreeing that 15.003(a) applies to initial parties and that the remainder of 15.003 applies to later added parties. I think that's implied in the vote.

PROFESSOR ALBRIGHT: No. I disagree.

MR. ORSINGER: You disagree? Well, then pardon me then.

CHAIRMAN SOULES: That's what I heard. There was disagreement about that topic, but whatever, we were going to write something separately, separate to take care of that.

MR. ORSINGER: Okay.

PROFESSOR ALBRIGHT: I think the interlocutory appeal issue is completely separate. All we are talking about is how you file the motions in the trial court for two different kinds of plaintiffs.

MR. ORSINGER: Well, does the less formal motion to strike apply to multiple plaintiffs who are in the original petition, or are we not deciding that by this vote?

PROFESSOR ALBRIGHT: No. The original plaintiffs, the plaintiffs that are in the original petition, if you want to object to them being in the lawsuit, file a motion to transfer.

MR. ORSINGER: Okay. So I

think our vote is implicitly saying that the motion to strike does not apply to initial plaintiffs, only to intervenors or plaintiffs added in an amended pleading.

PROFESSOR ALBRIGHT: I don't think that's implicit. I think that is explicit.

MR. ORSINGER: Okay. That's fine. That wasn't what we said we were voting on, but I think it needs to be in the record that that's the effect of what we voted on.

PROFESSOR ALBRIGHT: But that has no effect upon interlocutory appeal.

MR. ORSINGER: It may or may not. I could argue that.

PROFESSOR ALBRIGHT: I think it's up to the powers that be to decide about interlocutory appeal. I think there is a lot of us that disagree about what the interlocutory appeal statute says. Is that fair? Is that a fair statement, that this does not --

MR. McMAINS: I don't know about a lot of us. You disagree with a lot of the people I have talked to it about.

PROFESSOR ALBRIGHT: Okay. I disagree.

MR. McMAINS: But there is disagreement.

CHAIRMAN SOULES: What's the next issue we need to grapple with on this venue?

PROFESSOR ALBRIGHT: The next one is to look at paragraph -- we are working on the 3-6-97 draft. Look at paragraph (8). Actually, I think what I would rather you do is look at the 3-4 draft on page 3, paragraph (10).

PROFESSOR DORSANEO: What?

PROFESSOR ALBRIGHT: Page 3 of the 3-4-97 draft, paragraph (10), "Motions filed after reruling and rehearing." In January the subcommittee sent Judge Brister, Justice Duncan, and me off to redraft this rule, and we started talking about it on Thursday. Wednesday, I guess. We talked about it on Wednesday.

But anyways, the issue here is, first of all, the issue of the effect of the nonwaiver provision in the statute. There is a

provision in the statute now, 15.0641, venue rights of multiple defendants. "In a suit in which two or more defendants are joined any action or omission by one defendant in relation to venue, including a waiver of venue by one defendant, does not operate to impair or diminish the right of any other defendants to properly challenge venue."

CHAIRMAN SOULES: Where is that?

PROFESSOR DORSANEO: 15.0641.

PROFESSOR ALBRIGHT: So the current venue rule says that there will -- that late added defendants cannot have a motion to transfer venue considered by the trial court unless they are raising new grounds for mandatory venue, a mandatory ground that was not available to the original defendant.

I think this statute changes that. I think that under this statute a defendant who is late added has a statutory right to assert any grounds that were not asserted in the earlier motion, and the defendant has a right to assert their own claim for inconvenience

and in the interest of justice transfers. So I have drafted this paragraph (10) to say that, "If a court has ruled on a motion to transfer, no further motions under this rule shall be considered, except that if the prior motion was overruled, the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling, based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to 15.002(b) of the Civil Practice and Remedies Code."

So this expands the opportunity for late added defendants to file motions to transfer venue and have them considered by the trial court. So you might want to discuss this and vote on it before we go to the other part of part (10), or we can do it altogether.

HONORABLE SCOTT BRISTER: I would propose we do it altogether because I'm going to -- it seems to me the best thing to do is just drop this whole thing, and if we do that, we don't need to do them separately.

PROFESSOR ALBRIGHT: Okay. Then let's talk about -- then the second part of this is what do you do about fraudulent venue allegations, when a court overrules a motion to transfer and it then appears later in the proceeding that the plaintiff had fraudulently joined the defendant that establishes venue for all the other defendants or lied in a venue affidavit or whatever may have happened that makes it clear that venue was not proper in the county of suit, and this is a -- no one realizes this until after the motion to transfer has already been overruled.

The current venue rule is rather unclear about how this is to be handled. Originally this part of the venue rule was entitled, "No rehearings." Then it was changed. The title was changed to "Motion for Rehearing," but actually the words in the rule itself never mentioned rehearings. It only talked about late filed motions.

So there has been a disagreement as to whether a court can rehear a previously overruled motion to transfer or reconsider it. Justice Duncan recently wrote an excellent

opinion that says that a court has a right to rehear or reconsider a previously overruled motion for as long as that court has plenary power over the proceeding, and this is just an interlocutory order like any interlocutory order.

I wrote this rule limiting the ability to rehear a little more than that. I was not sure that we wanted to open the door to rehearings of every motion to transfer venue, of every ruling on a motion to transfer venue. So what I tried to do was draft it so that a court could rehear and reconsider the motion to transfer when it appeared that the circumstances were such that there would be reversible error or fraud, and so the court could transfer the case rather than having to try the case and then have it reversed on appeal, automatically reversed on appeal.

So I put in there three different situations where the court could reconsider a previously overruled motion to transfer. One, if the original ruling was legally incorrect. That would be a situation where, in fact, there was no evidence that venue was proper at

the venue hearing, and the judge recognizes that the decision made at the venue hearing was simply wrong.

The second one would be, "The defendant against whom proper venue was established is dismissed from the cause before trial." I think this is overly broad. This was intended to get to the situations where the plaintiff is joining -- has fraudulently joined a defendant for venue purposes. There is a court of appeals opinion from the Texarkana court of appeals that reverses a case on venue grounds where there was a directed verdict against a defendant, where there -- the court says there was absolutely no evidence presented at trial of any liability of this defendant; therefore, it was improper to base venue on this defendant.

So if you take that concept then you could say, well, a defendant who gets summary judgment before trial, perhaps that defendant should -- a court could reconsider a venue ruling that was based upon that defendant's venue.

Then you also have a situation where,

well, what about where the plaintiff joins a defendant and -- who joins a defendant for venue purposes and then settles with him for a dollar or dismisses them from the lawsuit? Do we want to cover those, or do we want to say we are not going to worry about that? I think this is the place for discussion. I put "dismissed from the cause before trial" because I knew that we were going to discuss it, so I didn't work very hard on the language. My footnote on the four talks about some -- Footnote 4 talks about some of the different considerations for that particular idea.

And then the third one would be when the prima facie proof of proper venue is conclusively negated. So this would be during trial if the trial court realizes that the venue proof is conclusively negated, the trial court could stop the trial and transfer it at that point rather than waiting for the trial to be over with and then having an appeal and reversible error.

I think it's just up for discussion as to how far you-all want to go with this, if you

want to do this at all. Sarah Duncan faxed me a redraft of this provision which is attached at the end of your package, and you can look at that, too. So those are the issues on paragraph (10).

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Yeah. My proposal would be just to drop this. As I understand it, the only reason to have this is to protect judges or plaintiffs from being harassed by repetitive motions, and as far as judges go, don't worry about me. I can take care of people that try to harass me. I can defend myself. I have plenty of things I can do to people if I think they are going over the same grounds we have covered. There is no question about it. I don't need the help of that.

Now, plaintiffs, again, to be harassed by having to defend the same thing, remember, this is -- due order of pleadings means this has to have been filed at first; and so, in other words, you can't go for two years on the trial and then decide to file some transfer of

venue. This is just a rehearing of a venue that's been done once. It seems to me this is going to be complicated trying to figure out, you know, well, am I reconsidering this because it was legally incorrect or is this really different from what the first motion really said, gets into a lot of technical questions.

If the only concern is let's just not do things over and over, that's true of anything. You could file the same motion to compel three times, but we have got Civil Practice and Remedies Code Chapter 10. We have got all kinds of things we can do to punish people who just file things over and over, take up our time with frivolous rehearings, and it seems to me simpler -- unless I'm missing something, if the problem is just that people might do this over and over, we can put a stop to that without getting into a difficult analysis of am I doing this because it was legally incorrect or factually incorrect or because I just thought about it differently or because the law may have changed?

CHAIRMAN SOULES: Justice

Duncan.

HONORABLE SARAH DUNCAN: I would like to second Scott's comments. The case that we had -- and I don't know that the Supreme Court has denied leave to file. I know that a mandamus was filed against our court. The case that we had, there had never been a hearing. It had been set for hearing, and the trial judge decided to take it -- or just decided it.

I think the circumstances as to when it might be appropriate to reconsider an earlier ruling are beyond our ability to define, and I think it would be better for that reason to just let it develop as on a case by case basis. I can't -- I mean, it's like Alex said, my redraft is simply a redraft of what she sent me just to clarify it in my own mind. It's not a proposal in terms of the substance of the provisions. There may be people here who can define the universe of cases in which a trial judge should be permitted to reconsider an earlier ruling on venue. I can't do it.

CHAIRMAN SOULES: Rusty

McMains.

MR. McMAINS: There were reasons why the no rehearing provisions were in the rules based on the '82 changes in the statute that may or may not apply anymore because of the continued proliferation and complication of the venue practice which was attempted to be simplified in the '82 statute.

So the reason was quite simple, because there were two principal objectives of the '82 statute as articulated by Justice Pope and as presented to this committee, which has revisited the rules that were actually drafted by the administration of justice committee, as it was called at that time, because of the speed in which they needed to be coming into place.

One of them was that if the notion -- the change was that the case as a whole got transferred and so that we could keep it together, that one of the things and objectives that Justice Pope had was let's send the case to a place where it's supposed to be and let's not worry about sending defendants to different places to break up the

goddamn lawsuit, and that's what one of the functions of that was.

Now, because of the unitary notion that it affects the entire case, that the notion was that when somebody has challenged venue in the beginning and lost, then you leave it alone, and the price that the plaintiff paid for having made erroneous allegations was it's automatically reversible if it later comes out that there was anything false or whatever.

That was the legislative price basically that was exacted, is it's automatically reversible error if, in fact, on a review of the record it is determined that there wasn't a legitimate basis for that ruling at the time, and that was something that everybody, every defendant, whether they filed a motion to transfer or not, got the benefit of. So they didn't have to file any motions; and the plaintiff proceeded at his own peril; and that's the reason for it, was to get this out of the situation because the principal overall objective for this was to simplify venue determinations and get them over early in the case and move on with it, except in cases of

mandatory venue and those with worthy exclusions for them.

Now that the legislature has made that more difficult since -- and has basically -- and it appears clear to me now that the cases are going to get broken up. Now, they haven't changed the ability of the court to send the whole case, which is really what the thrust of the first statute was. They didn't change that.

To the extent you are dealing with a situation where defendant brings in another defendant for the precise purpose of asserting a change of venue that had not been timely asserted, not been properly asserted, I mean, you are not going to be able to prove that, but that's going to happen. It happens all the time now, and then they want to revisit the venue -- take this kind of language out, they will revisit the venue issue. They will bring people in for that purpose and then the court -- and this is not because courts necessarily are impressed with this, but it's because as the case gets more complicated, courts said, "A-ha, there is a way to get this

out of my courtroom."

HONORABLE SCOTT BRISTER: No.

MR. McMAINS: "I can send it elsewhere," and so the problem you have is that -- as I see it, is unless you basically say and are willing to take the position that the unitary notion of that a lawsuit by a single claimant or group of plaintiffs that are related against a group of defendants involving same, similar occurrences or transactions should be kept together to the extent possible and tried someplace where all of these things can be resolved, if you want to take that out and you just go back to, well, we will go helter-skelter wherever anybody wants to send us, let's look at what each person has done to protect his rights. That's what you want to do, take out the rehearing stuff.

But if you want to keep it as a unitary concept, there is a reason for why you should not have to be fighting venue at every single step of the way, because of the problems of you're talking about taking a lawsuit that is maturing and moving it or having opportunities

to move it at various different stages when, of course, you also -- and like in San Antonio, the other thing is you have different judges that hear things every time you go back to have a new hearing, unless you get a special judge appointed.

So it may not -- you know, it's fine for you to say that I can deal with repetitive motions, but there is a lot of jurisdictions that they are heard by different people. They are heard by a visiting judge, and a visiting judge may come out totally different from somebody else, and then you go back to the other judge, and you come up with it different.

Venue is not that important if there is proper venue there. It just isn't that big a deal, and that was the reason that the statute was changed in the first place, and all we are doing is elevating it to make it an incredibly complicated transaction.

CHAIRMAN SOULES: Justice Duncan, and then I will get to Bill.

HONORABLE SARAH DUNCAN: I'm going to change my mind. If we don't have

this subdivision at all, we have taken the limitations away from further motions and rehearings that we have now and we don't incorporate the statutory nonwaiver provision.

So what I would propose as an alternative on my redraft is to leave the first part. I would retitle it, "Further Motions and Reconsiderations." The first sentence, "Prevents further motions unless," and then the (a) and the (b) are the statutory nonwaiver provisions, and then end this subdivision right before the next (a), (b), and (c). Take out the word "if" and put a period after "transfer."

I think what that would do is leave intact what we have now, but incorporate the statutory nonwaiver provision, but we would also have the sentence, "Nothing in this subdivision precludes the trial court from reconsidering the denial of a motion to transfer." All that says is that nothing in this subdivision precludes it, not that it might not be precluded otherwise. That's my offer.

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: Well, I raised my hand before Justice Duncan spoke, and that was too complicated for me to deal with right this second; but in the overall context in terms of the larger issue, before May 1983 we did have a finality principle that operated with respect to venue rulings under the former plea of privilege practice. That was connected up with the idea of an interlocutory appeal. When the interlocutory appeal went away, that finality principle has at least gone below the surface, if, in fact, it has not been eliminated altogether.

Second, it seems to me to be a bad idea to leave the venue issue in controversy throughout the entire lawsuit on policy grounds, because although it might be a good idea to reconsider it, there is a lot of down side to reconsidering it, and a particular trial judge might not feel the need to be protected from a lot of motions because he or she would overrule them or deal with them relatively quickly, but then there are complaints about how those motions were dealt with. It just seems sensible to me to bring

this matter to some sort of a conclusion during the pretrial phase of the case.

However, once you get the standard of review from the Ruiz vs. Conoco case, you end up with the situation being a little bit different from what the defense Bar might have thought about if venue is improper, the error will be reversible, because, as I understand Ruiz, the procedure could operate like this: The plaintiff could plead that a particular product was purchased in Collin County. The defendant in the motion to transfer denied those venue facts.

The plaintiff makes prima facie proof by affidavit that the saw was purchased in Collin County, and if it turns out at the trial on the merits that all of the evidence shows that the saw was, in fact, purchased in Dallas County rather than Collin County, well, there is still probative evidence to support the trial court's, you know, ruling, whatever the trial court does, transfer it to Dallas County or keep it in Collin County under those circumstances is supportable because there will be, you know, evidence in the record,

either the prima facie proof evidence to sustain the plaintiff's position or the evidence at trial to sustain the opposite position.

So the Supreme Court has basically concluded that the prime facie proof, even if wrong, in some larger sense will be good enough to sustain venue in the county identified in the prima facie proof. So if I'm a trial judge, I'm thinking, Well, that's good, because now I have ruled on the basis of the prima facie proof that venue is proper, and I'm not going to be reversed for making that right ruling.

As the case goes on, it turns out in discovery or otherwise that, well, maybe that affidavit was wrong, as I'm reading our current rule as it stands right now, it just says, you know, "motion for rehearing" rather than "no rehearing." The trial judge can, you know, reconsider that ruling, but there is not some sort of a strong incentive to do so, and I guess what I'm saying by the time I get through with it, I don't necessarily see that there is anything that particularly needs

fixing.

My last comment, though, is when we did draft this Rule 87 dealing with additional parties joined and rehearing, we probably would have put in here something about fraudulent joinder, except for the fact that the Court passed the rule before we finished drafting it because of the short time frame. We probably would have put that idea in here somewhere, and it's not in here, and it may be somewhere in the case law. So for whatever it's worth, those are, you know, all the considerations that are in my head in trying to figure out what to do with this.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Yeah. This is -- there seems to me there is no area that I need more power to rehear than this, because on any other motion it is not automatically reversible on appeal. This one is. Forget about whether equity or justice or what the result was. If you are wrong, you are wasting your time.

PROFESSOR DORSANEO: But you're

not wrong if you relied upon the prima facie proof.

HONORABLE SCOTT BRISTER: But you yourself have said -- unless that's fraudulent.

PROFESSOR DORSANEO: No. No. I don't read Ruiz that way at all.

HONORABLE SCOTT BRISTER: Well, the cases so far don't suggest to me that if the plaintiff -- all the plaintiff has to do is swear, perjury, anything else be damned, if I swear it was Collin County then that's going to be it, even if at trial the plaintiff admits, "I lied in the affidavit. Really it's all Dallas County"; and that's not going to be -- I guarantee you that's reversed automatically on appeal, and under the current rule I can't repair it.

We go through the whole trial and the whole appeal, everybody knowing it's going to be reversed and go back to Dallas and can't do anything about it, and that's why cases like Judge Duncan's and another one in Houston say, "It says no rehearing, but frankly, we don't care. We are allowing a rehearing," because

that's just too egregious on something that's automatically reversible to make everybody go through the trial and then get it reversed when we all know it's going to happen. Send it somewhere else. No area needs rehearings like this one.

No. 2, motions to transfer venue are very rare because despite all the complaining about the legislature, it's really broad where the plaintiff can -- and it's pretty clear where the plaintiff can sue, and on the vast majority of cases it ain't a big deal. So I'm not going to be covered up by rehearings on this. It doesn't arise in two percent of the cases, one percent, that you have a motion to transfer venue that has any basis to it that you have to fool around with, and so this is not going to be a big covering up us judges with it.

And, No. 3, the deal about defendants manipulating venue by joining a third party, they have got to get leave of court to do that, and so there is another way for me to keep the case from getting more complicated. Oh, they are adding all these third party

defendants. I don't want any more. I'm going to send it to somewhere else, which is motion to add third parties denied. If it's just a frivolous thing that's not a necessary party, if this is just something to complicate the case, motion for leave denied.

You can't just add all of those people whenever you want to. They have got to do that with my leave, and I can decide whether this is somebody -- and if it's somebody that we have to have, a necessary party, and it's somebody who is going to make venue somewhere else then under all rules of justice, fairness, and the Constitution that party ought to be in and the case ought to be wherever they have got a right to have it be, but that's a decision that can be made case by case.

I think once you start down the road of trying to say, well, okay, you can revisit if it looks like a really bad, fraudulent situation of venue, but not if it's just wrong venue, that's what's going to take up my time, because then I'm going to have to have extensive hearings, close calls, and make

wrong guesses that get reversed after we have tried the whole case and automatically transferred and automatically undone because I'm trying to make this fine distinction between when I can and when I can't rehear it rather than just some abusive discretion that the judge do the right thing generally on this deal.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: With regards to the joinder of defendants, false under Chapter 33 in the tort reform thing. The defendants can bring in anybody that they think caused the action as opposed to they did. They are entitled to bring them in. They are entitled to submission. There is nothing you can do to keep them out, and there is nothing you can do to keep them from bringing them in at any time you want to under those provisions, and that is absolutely bogus to take the position that you have got some amount of ability to control who the defendants are able to bring in or for what reason.

HONORABLE SCOTT BRISTER: Randy, there is a stream of cases on that,

Rusty, that say I do, and I do it all the time, and I am not reversed.

MR. McMAINS: Not under the tort reform statute there aren't.

HONORABLE SCOTT BRISTER: You may list them in the comparative question as a third party, but you don't have to join them to get their name in the complaint.

MR. McMAINS: That's not the way the procedure works now under the statutes.

HONORABLE SCOTT BRISTER: That's the way it works in Harris County.

MR. McMAINS: Well, why don't you read the statute occasionally?

Second, if he thinks that the motions to transfer aren't big deals, it's because he doesn't practice south of the Nueces.

HONORABLE SCOTT BRISTER: That's true.

MR. McMAINS: And everybody south of the Nueces, that is the No. 1 thing that appears every time in every lawsuit. It doesn't matter. They come kicking and screaming there or anywhere near the border of

Louisiana.

MR. LOW: Yeah.

MR. McMAINS: In Buddy's context. It is a big deal in a lot of places, and one of the reasons that it was so concentrated on and focused on by the legislature and one of the center pieces of the tort reform legislation, it is a big deal, and the idea that you -- and there are lots of visiting judges making determinations of one sort or another in South Texas and all over the state, and the idea that you just go wait until you find a judge that might be sympathetic to you until we can bring this issue up again, all it is is keeping an open wound open, and I am not suggesting that there aren't some circumstances -- and I disagreed with the Houston case when it came out that said that the no rehearing rule meant that you couldn't rehear something that everybody conceded was wrong.

What we were dealing with was no motion for rehearing, and we are not attempting to say that the court didn't have the power to change its mind at some point on its own, but

we were trying as much as we could to discourage anybody from keeping and coming back and bringing those issues up again, that there was going to be or needed to be some kind of closure; but with regards to the issue of what happens if you lie on the affidavit, the whole reasoning for that and the whole trade-off was automatic reversible error. That's why. What they wanted to do was to get rid of the evidentiary hearings.

That's the purpose of the statutes in '82, is to get rid of evidentiary hearings, don't have credibility calls. You get it based on affidavits, make the decisions on affidavits, and if those decisions proved later on to be wrong or based on false affidavit, the plaintiff paid the price. That was the reason for that aspect of it, and that's what the trade-off was, but if you made the proof properly in terms of form and content then you got to keep the case there, but whether or not you were going to keep your judgment depended on whether or not you lied in order to do it, and that was the trade-off that they got.

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: It's possible that you could take Ruiz and say that if the allegation is shown at trial to not only have been mistaken about where the matter was purchased but that it was fraudulent, it's possible to draw the conclusion that that former prima facie proof would have no probative value in the appellate process, but the only thing that Judge Brister said that, you know, really impressed me on the need for some sort of additional ability to, you know backtrack, is this notion of the, you know, fraudulent prima facie proof, and that was the example that you gave, and I would be willing to go -- you know, to go that far if we need to even state that at this point, but it would even, frankly, seem to me that under Chapter 10 of the Civil Practice and Remedies Code that the court could transfer the case if it turned out that the venue papers were, you know, fraudulent.

HONORABLE SCOTT BRISTER: How could I do that?

PROFESSOR DORSANEO: Well,

let's say you have a case -- I did have this kind of a problem one time where it seemed to me in representing a defendant that the pleadings and prima facie proof made by plaintiffs couldn't possibly be right about where a particular heater was purchased, from what Sears store, and the venue matters had already been determined. So I made a motion under Rule 13 challenging the propriety of those allegations in the prima facie proof; and the appropriate sanction it seemed to me, well, if my motion would be granted, would be a transfer; and we had a hearing on all of that; and since it did, in fact, look like the heater wasn't purchased in Marshall, the matter got resolved by agreement; but it's conceivable it could have been resolved by an order transferring the case that wouldn't have run afoul of anything.

MR. LOW: Luke?

CHAIRMAN SOULES: Buddy Low.

MR. LOW: What about some provision that the trial judge -- we do have things where the trial judge on their own motion wouldn't have -- the other party

couldn't file a motion or something, but the trial judge on his own motion may reconsider.

HONORABLE SCOTT BRISTER: Or with leave of court. You can't reconsider except -- file a motion to reconsider except with leave of court or something like that.

MR. LOW: Or I wouldn't even -- I mean, I would suggest just the trial judge, and then if the trial judge doesn't want to hear anymore, and they are going to keep suggesting, "Well, you ought to," I don't want to hear that anymore, and you leave it up to the court, but the judge could on his own motion reconsider if deemed appropriate, because we do face -- in Beaumont, you file a case in Beaumont, and you are going to get a motion to transfer. It's automatically in the computer.

MR. MARKS: Why is that, Buddy?

MR. LOW: I never figured it out.

CHAIRMAN SOULES: And there are places where it is really common, Judge Brister. You know, we are on the upper edge of South Texas and --

HONORABLE SCOTT BRISTER: And there is some reason --

CHAIRMAN SOULES: -- we get dragged down there occasionally, and we as a matter of routine file a motion to transfer venue because if we don't get out of that county and we get hit, we don't want to have to notify our carriers because we stayed down there when somebody in retrospect goes back nit-picking and said, "Here was a possible way to transfer a venue out of that county, and you didn't take it out," and now we are off to lawyers swearing about whether that's a good or bad basis and so forth, so they are in almost every case.

I have been reading the rule and looking at the cases that we have annotated, Bill and I, and I can't find a prohibition on rehearing of venue motion, and I don't believe there is one.

HONORABLE SCOTT BRISTER: Oh, sure.

CHAIRMAN SOULES: It says, "No further motion shall" -- "No further motion shall be considered."

PROFESSOR ALBRIGHT: Well, that's --

CHAIRMAN SOULES: It doesn't say you can't reconsider the original motion. That's in the rule. That's what's in and what's not in the rule.

PROFESSOR ALBRIGHT: In the original version of the rule it was entitled, "No rehearing." And, I think, wasn't there a Marcia Anthony case?

HONORABLE SCOTT BRISTER: Yeah. There has been three cases, two from Houston and one in Judge Duncan's case in San Antonio, and two out of three say we can't have a rehearing, but all three address the problem that the rule says there can't be a reahearing. So all three cases concede the rule says there can't be a rehearing.

CHAIRMAN SOULES: Find me the words. Find me the words.

HONORABLE SCOTT BRISTER: Sure.

CHAIRMAN SOULES: They are not in the rule.

PROFESSOR ALBRIGHT: That was under the original version of the rule. Now

the name of the rule has changed, and I think the San Antonio case may be the only one since the name of the rule has changed.

CHAIRMAN SOULES: Buddy Low, while he's looking.

MR. LOW: Regardless of what you call something, you look at the substance of it to see what it is, and motion for rehearing on it is really a further motion, another motion to transfer venue. I mean, it doesn't say "rehearing," but you look at a motion and the substance of the motion to determine what it is, and a motion for rehearing is truly a motion to transfer venue.

CHAIRMAN SOULES: It's, "No further motion to transfer."

MR. LOW: Right.

CHAIRMAN SOULES: "No further motion to transfer shall be considered."

MR. LOW: Right. And that would be -- you already filed one motion. Now you don't call it a motion to transfer. You just call it a motion for rehearing, but it is a further -- the substance of it is to transfer venue.

CHAIRMAN SOULES: Is it new grounds or the same old grounds?

HONORABLE SCOTT BRISTER: Assume it's a new party.

CHAIRMAN SOULES: That's --

MR. LOW: No. I'm just stopping with that language. I can see how they can say that even though it's not specifically stated.

CHAIRMAN SOULES: I mean, we can complicate this with new parties.

HONORABLE SCOTT BRISTER: Yeah.

MR. LOW: Yeah.

CHAIRMAN SOULES: But we are talking in terms of a motion for reconsideration, you have got to be talking about a motion that was filed at some point in time when there were a finite number of parties. There it is. That's the one we are talking about. Not something that comes later because --

HONORABLE SCOTT BRISTER: Well, I have never gotten a motion for rehearing where they didn't raise something new. I mean, most -- I know the appellate courts get

motions for rehearing that all raise the same thing they already said the first time, but, you know, considering the fact they got to come down for oral hearing and all this stuff and just say, "We want you to reconsider based on what we already said," we don't have time to fool around with that. So they are always going to come up with some new argument, and what if it's right? What if it's right? It's reverse -- this is automatic reversible error. I have got to undo it.

CHAIRMAN SOULES: I haven't seen a case that says it's automatic reversible error to --

HONORABLE SCOTT BRISTER: If I'm wrong?

CHAIRMAN SOULES: If the plaintiff -- let me see. If the judge in ruling on a motion to transfer can only look at the motion to transfer records, which is limited, and then the trial record turns out to show that that proof was wrong, other than the Texarkana court has any court ruled that the court has to look to the rest of the record before it can be upheld for holding

venue where venue was proven by the venue record?

HONORABLE SCOTT BRISTER: Well, a lot haven't ruled.

CHAIRMAN SOULES: What?

HONORABLE SCOTT BRISTER: I mean, it's an open question.

PROFESSOR DORSANEO: Well, Ruiz is clear on this. Ruiz says that if the trial judge rules correctly on the basis of the prima facie proof, the trial judge's ruling is not reversible.

PROFESSOR ALBRIGHT: Unless there is conclusive evidence to the contrary.

PROFESSOR DORSANEO: Well, how can there be conclusive evidence to the contrary if there is evidence both ways?

PROFESSOR ALBRIGHT: Exactly, but why did they put it in there in the first place?

CHAIRMAN SOULES: And then the Supreme Court has held in one case that it was proper for the judge to reconsider his ruling transferring venue. That's the HCA case. Of course, that's where the judge said, "I made a

mistake. I didn't mean to sign the order," but in that case after the case had been transferred the transferee court was going forward. The transferor court said, "Wait a minute. I didn't mean to do that."

Rescinded, the granting of the transfer. The transferee court wanted to go forward, and the Supreme Court issued a writ of mandamus he couldn't go forward. Judge Homer Salinas couldn't go forward, the transferee court, because the trial judge in the -- the transferring trial judge, transferor trial judge, changed his ruling and got the case back during his plenary power.

HONORABLE SCOTT BRISTER: Didn't that case go off on the fact, though, that they hadn't actually sent the file down to the new county yet?

CHAIRMAN SOULES: Well, he still -- whatever the case, it wasn't she, the judge ruled and then changed his ruling, so he did reconsider.

HONORABLE SCOTT BRISTER: Yeah. Well, that's what I mean, but there is the two saying you can and one saying you can't.

CHAIRMAN SOULES: This is a Supreme Court case.

MR. McMAINS: Yeah. That's the Supreme Court. That's the only Supreme Court opinion on it.

CHAIRMAN SOULES: Well, I don't know. I just wanted to get the cases out because we are not really in that much of a vacuum. We may be in some confusion, but not in that much of a vacuum about what a rule says and what some courts have said it says.

MR. SALES: I just -- I'm all for the finality issue. I mean, I think it's good to try to resolve this upfront, but I'm troubled by, you know, the fraud issue. I mean, I just don't think if an affidavit or a venue fact is fraudulent that the court is hamstrung to just accept it, knowing it's wrong, and putting parties to trial and somebody benefiting because of it, and then after all of this the court of appeals may or may not reverse it. It seems like a colossal waste, and I think that at least in that limited circumstance I think a court has got to have some discretion to review that.

CHAIRMAN SOULES: A court has the power to say that you lied on your affidavit. I've got a -- "I'm coming down on Chapter 10, or you can voluntarily nonsuit, and if you have got limitations, you can authorize me to transfer your case, but those -- one of those things is fixing to happen. Your choice. I'm going to dismiss your case under Chapter 10. You can nonsuit it, or you can agree I can transfer it, but you lied on your affidavit. I'm not going to take it out on your client unless you force me to."

PROFESSOR DORSANEO: Sounds familiar.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I'm having real trouble understanding why a court should not have the power to revisit --

CHAIRMAN SOULES: I think it does.

MR. MARKS: -- a denial of a transfer order under any circumstances.

CHAIRMAN SOULES: You mean even on a new motion to transfer?

MR. MARKS: Well, now, I don't know about that, but on a motion for rehearing or any other reason why he ought to rehear it, either on his own hook or because somebody asked him to rehear it. Now, to amend a motion to transfer, maybe there should be additional grounds there, like fraud or something like that, but if the court wants to revisit his decision, why shouldn't he be allowed to do that? I mean, am I missing something here?

CHAIRMAN SOULES: The main policy is to get venue established and get on with the case. So that's why --

MR. MARKS: Well, and that's turned out to be pretty devastating in a lot of circumstances, Luke, since 1982, and that's why we have this new statute.

CHAIRMAN SOULES: I'm not arguing against reconsidering the original motion, but whenever you look at the due order rule and that sort of thing this is supposed to happen early and be done with, and the parties have their chance 45 days, maybe longer. Some cases have held that you need to

permit discovery before this is ruled on because it's important, and you are taking -- da-da-da-da-da-da, but get it up here, get it done. Let the parties scream and holler about what they need to do before it's heard. It's heard. It's over.

Now, encapsulate that as a venue record and never change it and that motion is the venue motion, and unless it's amended before it's heard, that's it, whatever is there at the hearing, and then if it turns out that the judge -- light bulb comes on and he says, "That whole thing I was wrong about at the time with what was before me," I think the judge can change his ruling, but nothing can be added after the ruling to change -- to make the trial judge wrong about the trial judge's ruling at the time. Therefore, it's not reversible, and that's where I think the scheme is going.

MR. MARKS: Well, I think you're probably right, but what I'm hearing around here, people are saying the judge does not have the right to do that.

CHAIRMAN SOULES: Well, the

Supreme Court said he did in one set of circumstances.

HONORABLE SCOTT BRISTER: Well, you know, I mean, and you've got --

CHAIRMAN SOULES: Justice Duncan says he does.

HONORABLE SCOTT BRISTER: Cases change a lot, too. You know, I mean, special appearances get granted, summary judgments get granted, parties come and go; and, you know, the idea of the legislature with the forum nonconvenience is -- you know, I mean, the deal is we are supposed to balance the "Is this fair place" -- you know, plaintiff is supposed to have a choice within certain bounds, is this a fair place to try the case, and just as defendants manipulate venue, the fact of the matter is mostly plaintiffs manipulate venue.

And the reason there are so many cases filed in the Valley to transfer venue is because plaintiffs want to get and will sometimes go to incredible stretches to get cases in the Valley, and so this is not, you know, this side or that side manipulating.

It's the games stuff that's going on, is the thing that gets us into the Wall Street Journal that the legislature is responding to, that we need to respond to; and the concept that, well, at some point in time it's frozen, we are going to decide this, and then no matter what happens, no matter what comes out in the truth-seeking process, we are got going to reconsider fairness anymore is contrary to that.

And I disagree with the idea, well, the plaintiff pays the price of going through three years in the Valley pretrial that in the 3 percent of cases -- in case this is one of the 3 percent of the cases that actually go to trial and one of the 20 percent that are actually -- maybe it's higher in the Valley, that actually get appealed, and then it gets reversed then the plaintiff has paid the price. I would say 98 percent of the -- the defendant who had a right not to be sued there has paid the price.

CHAIRMAN SOULES: Well, the transfer of venue it seems to me affects three things. It affects the convenience of the

place for the parties. It affects the identity of the judge who will try the case and the jury pool, the latter probably being the most important of all to people, but it doesn't change where the case is developed up to whenever it gets transferred, and I want to throw this into the mix while we are trying to debate this.

This idea about you have to have a hearing on the motion to transfer venue before you do anything else or you waive it, in a multi-party case that is just crazy. I mean, it's crazy to try to do it. Things are going on. These other parties are playing. I have got a motion to transfer venue. They are fighting about discovery. I can't say anything, or if I was there and didn't say anything, what happened?

And so you have got this what I will call craziness already in the situation. Sometimes you have emergency things that are coming up in a two-party case, and I'm afraid to do anything about it as a defendant because if I do that, I waive my venue motion, and I have got to wait 45 days for a hearing, and they

are already doing this on the 10th day. What in the world can I do?

Those things are already present, but also, we can't give an opportunity for much development, special appearance, motion for summary judgment, something that could change the mix of the parties, and either -- if it were possible for the parties to move or for the trial -- I don't think there is any discretion about this even with the trial judge. If the trial judge hears something and I'm there, he can't even say, "We can hear your motion to transfer venue later" because once I step into the breach, it doesn't even matter whether I have got the court's permission to be in the breach. I'm out on my motion to transfer venue.

Could we help this issue by writing that you don't have to have a hearing on the motion to transfer venue at any time? You don't waive it for failure to have a hearing and then let the formation of the case in these complicated situations maybe resolve before the motion to transfer is heard. Bill Dorsaneo.

And that's not in the rule. That's just case law that says you waive it.

PROFESSOR ALBRIGHT: Because I'm looking at the statute, and I think the statute only says you have to file the motion. It doesn't say anything about when you have to hear it.

CHAIRMAN SOULES: That's case law.

PROFESSOR DORSANEO: Well, the due order concept, you know, coming from the before time when all motions and pleas had to be made in due order always embraced the idea that it not only had to be filed, but it had to be determined.

CHAIRMAN SOULES: Yeah. The idea was you go forward in the case.

PROFESSOR DORSANEO: But there is no reason why we would have -- there is no reason why that makes any sense.

CHAIRMAN SOULES: It doesn't make sense.

PROFESSOR DORSANEO: For special appearance motions or motions to transfer, and probably the only reason that

it's still that way is because it is in the case law. You know, one really wonders whether people forgot about the determination part when the rules get changed. Why not let the judge just determine the order like in most systems?

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Well, but when we passed this rule, when we passed the rules relating to venue and have revisited them on numerous times since then, we specifically considered the notion that the hearing needed to be presented and determined, and once determined -- and that had to be done before trial and that the burden was upon the defendant to get that determination made. Those were all things that were consciously decided. We debated for a number of different meetings.

They were changes in what the practice used to be under the old venue practice. They were changes that were warranted, we thought, by virtue of the statute change, because we eliminated it being a presumed right of the

defendant and a personal plea of privilege and making it prima facie so that if there was no hearing plaintiff loses. It got transferred. It was the plaintiff who had to go forward with the hearing.

And that's -- although there were obviously waiver options that were available then, too, if there wasn't due order of pleading, but once you did what you had to do to assert a plea of privilege, that was it, and at that point the plaintiff was the one who had to go forward and suffered all of the burdens subsequent to that. The statute changed that, and our rules changed it, too, and said, no, it's the defendant's burden. If he wants to resist where the motion -- where the case is pending then he needs to go forward with that.

Now, the issues of who has the burden of proof and exactly how that's met and the fact that we are doing it with affidavits, whether the evidentiary -- you know, plenary hearings, those were all decisions made in '82 as well by the legislature, and those haven't changed, and we are talking about affidavits. We can't

call people to testify in your ordinary venue hearing.

CHAIRMAN SOULES: Depositions.

MR. McMAINS: Yes. But you are talking about affidavits and documentary testimony. I mean, all of these -- the whole notion of why we changed in '82 was this was such a big deal in the Texas practice. I was brought up at Fulbright before a lot of people in this room's time, I'm sure, and some people contemporaneous, in which that was on our forms; and, by God, that's the first thing we did, was file a plea of privilege. It didn't matter how squarely you were able -- that venue belonged where it was that you were at, where you were.

You still filed one because you had a 50/50 chance of the plaintiff screwing up in some manner, and you had -- this was another possibility of delay, and it was also a way that you could do free discovery because you had an evidentiary hearing, and he would have to put his plaintiff on the stand, and you would get to talk to them a long time before they ever had any preparation for exactly what

was going on. You did it for a lot of other reasons.

CHAIRMAN SOULES: Let me modify and say that -- for this possibility. If there is not -- one fix of this would be to say there is not a time when it has to be heard. The other would be to say there is a time when it has to be heard, but the judge either on the judge's own motion or motion of a party may delay that hearing and conduct other proceedings without the movant waiving his transfer motion.

HONORABLE SCOTT BRISTER: See, if that's what you're saying, that --

CHAIRMAN SOULES: Would you oppose the second way, approach to this? Judge Brister.

HONORABLE SCOTT BRISTER: That makes some sense because, you know, the problem, you know, usually if you have got a fraudulent added party or something like that, the problem is I can't do the summary judgment to get them out and then do the transfer of venue with things the right way. If you are suggesting I could -- and, you know, the

defendant knows they are going to say this -- you know, adding George Bush as a party so you can get the case into Travis County is fraudulent, and we are going to file a motion for summary judgment on it, and that's the motion to transfer venue stage, and let's say, okay, if I can say, "I'm going to decide that summary judgment first and then we are going to have our hearing on transfer of venue," I think that would take care of my problem.

CHAIRMAN SOULES: Discussion?

HONORABLE SCOTT BRISTER: Which would not have to be a change of when you have to move. You would still need to move first. You need to know venue is either up in the air or it's not, but it doesn't have to be determined first. We can do some special appearances first before we address the venue question. I think that would take care of a lot of the problem.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I think if you did that, picking up on what was earlier said about not wanting to continue developing --

continuing to develop evidence on the motion past the early stages in the case, I would still think there would have to be some sort of statement in the amendment that you file the motion, and you cannot add anything new to the motion if the hearing is deferred.

In other words, I would want to prevent the situation where you filed the motion, just file a holding action, and then you keep supplementing it and amending it, because that would defeat the whole concept that we talked about earlier about locking it into a certain period.

CHAIRMAN SOULES: Who's here on Alex's committee? I ran past the time that she had to leave, and Sarah's here, and Rusty is here, and Elaine. Elaine, will you take a run at writing up something that would address the point that we are just making?

Is there a consensus that we at least permit the trial judge on his own motion or on a motion of a party to delay the hearing on motion to transfer venue, during which time the movant will not be deemed to have waived the motion to transfer venue by participating

in other proceedings? Is there any opposition to that?

PROFESSOR DORSANEO: Well, what about special appearances, too, special appearance motions? Why don't we just re-examine our due order concept altogether in light of what we have already started to think about doing in terms of embracing something like Federal Rule 12?

CHAIRMAN SOULES: Let me try venue first. Any opposition to that?

Elaine, will you take a crack at writing that?

PROFESSOR CARLSON: Sure.

CHAIRMAN SOULES: And also put in something that meets Paul's point there that it can't be amended. I don't know how that will fly, but at least it will be before us for discussion.

HONORABLE SCOTT BRISTER: Yeah. I don't think you want just to be able to file a one-page motion to transfer venue on any grounds that turned up because then that will be filed in every case.

MR. GOLD: Then you continue to

supplement as time goes on.

HONORABLE SCOTT BRISTER: Right.

CHAIRMAN SOULES: Well, write us something that motion to transfer venue pleadings close at some point, I guess, and after that it's just a matter of how the parties want to deal with the issue. You might also -- I guess it would begin with the principle that it has to be heard first unless, because right now if you want to learn that, you have got to go either through some hard lessons of ignorance or go to the case law. So if you will give that a run, we will take a look at it next time.

Okay. Since Alex is out I don't want to continue on her report until she gets back. Let's go to 18a, Judge Brister. Or 18, I guess it is now.

HONORABLE SCOTT BRISTER: Right. You should have the -- let's see. It's the letter -- front page is a letter from me to Luke dated January 24th, I believe, and then attached is a redlined copy of the -- showing the changes from the version I

proposed at our January meeting. Let me just summarize generally and then point out a few things because I think a lot of this incorporates what we voted on at our last meeting.

The grounds for disqualification have not changed, even though we shortened it or moved some of -- made it gender neutral and that kind of stuff, but the grounds for disqualification are the same as they have always been under the rule. The grounds for recusal are the same, except that in item (b)(7) we dropped the concept of that the judge has to know about the financial interest.

We voted on that last time that, you know, the problem is it doesn't look less unsavory if the judge's family benefits from the ruling just because the judge says he doesn't know about it. No. 2, it makes the judge a necessary witness at the motion for recusal hearing with quizzing what did the judge know and when did he or she know it, that it would be better just for that judge to get off the case. We have got plenty of other

judges can hear the case.

And then (8) we expanded the spouse or related party witness from the first degree to the third degree so that the judge's brother can't be brought in or sister as local counsel. Those are the only two changes the rule would make as far as grounds for recusal.

MR. McMAINS: Judge?

HONORABLE SCOTT BRISTER: Yeah.

MR. McMAINS: What about the underlying portions in (4)?

HONORABLE SCOTT BRISTER: That was Richard Orsinger. Where -- naturally, he's not here. That was -- my proposal in the earlier rule had been "gained prior to filing." This is trying to -- current rule says, "has personal knowledge of disputed evidentiary facts concerning the proceeding," and, of course, the problem is on any kind of motion to compel I always have personal knowledge of what happened in the proceeding.

MR. McMAINS: Well, the problem I had --

HONORABLE SCOTT BRISTER: So my idea was to try to -- and that I think came

from Richard, that it's the dispute between the parties that I have knowledge of rather than the what happened in court in the hearing.

MR. McMAINS: Right. The problem I have, though, with the way you have now changed this, it says, "The judge has personal knowledge of material evidentiary facts raised in the dispute between the parties" as opposed to "disputed evidentiary facts." Well, for instance, if you have got a husband and wife in a divorce case, it's material that they are married, and you know that, and you may know them independently, but you are not entitled to recuse. You don't have to recuse for that.

CHAIRMAN SOULES: Let's leave in "disputed." Any objection to that?

HONORABLE SCOTT BRISTER: Make it "disputed." That's fine.

CHAIRMAN SOULES: "Disputed material evidentiary facts." No opposition --

HONORABLE SCOTT BRISTER: So leave in "material," but make it "disputed material"?

CHAIRMAN SOULES: Yes, sir. No objection. Okay.

HONORABLE SCOTT BRISTER: That's fine. Anything else on the grounds?

(C), we had the long discussion last time and finally voted to drop "cure." The current rule is that if the judge doesn't know about it and gets deeply involved in the case then if the judge sells the stock, the judge can keep the case; and, again, that requires the judge to be the witness at the recusal hearing with all the problems that's going to raise about antagonism; and plus, it's just -- you know, the judge owns property that's going to be affected by the water rights and, you know, sells it to a friend or, you know, relative beyond the third degree then it's okay as long as the judge gets deep into the case before you disclose that. With so many perverse incentives it would be better just to say -- or the proposal, that's the change there. If it's discovered, nothing is undone. No rulings, prior rulings, are undone. Just it goes to a different judge.

MR. McMAINS: Did we vote on

that?

HONORABLE SCOTT BRISTER: Yes.

CHAIRMAN SOULES: Yeah.

MR. McMAINS: Luke, my only concern, I don't have a problem with the no cure. I mean, I think there is a problem with being able to cure it. I do have a problem with the no waiver. I mean, we have been in cases sometimes where judges -- maybe in the heat of battle somebody may file such a motion or the press may get a hold of something. It really bothers me if all the parties to a complex case that's deep into it agree for the judge to proceed.

HONORABLE SCOTT BRISTER: Oh, no. You can waive still. Ground for recusal may be waived, if fully disclosed on the record.

MR. McMAINS: Yeah, but disqualification cannot be.

CHAIRMAN SOULES: Well, it can't be waived anyway because that's constitutional.

HONORABLE SCOTT BRISTER: It's never been.

CHAIRMAN SOULES: What's in (a) now are just the constitutional grounds. The reach -- the rule as it stands right now at least arguably reaches beyond constitutional disqualification.

HONORABLE SCOTT BRISTER: But it always has.

CHAIRMAN SOULES: And it always has. What's in (a)(1), (2), and (3) here does not go beyond constitutional disqualification.

HONORABLE SCOTT BRISTER: Well, (a)(2) and (3) -- no. (A)(1) and (3) do go beyond the Constitution, but as we voted last time, they have always gone beyond the Constitution, and it doesn't make -- nothing wrong with the rule being a little bit stricter than the statute.

CHAIRMAN SOULES: Okay. Okay. So (a)(1), (2), and (3), Rusty, can't be waived, but that's not the --

MR. McMAINS: Well, I guess the problem I have is that it's real difficult to distinguish between -- let's suppose that nobody moves for disqualification but they move for recusal in terms of the judge's

interest in the subject matter, because that is what generally you were talking about in the cure area. I mean, I don't know of any circumstance where you are dealing with an economic interest, assuming it's a direct opportunity, that doesn't fit within the ground for disqualification under (2). So I'm not sure you could ever cure constitutionally.

HONORABLE SCOTT BRISTER: Well, financial interest of a child, a child's -- judge's child is going to get a bunch of money out of the thing would not be disqualified, but it would be recusable.

MR. McMAINS: You don't think he's a fiduciary?

HONORABLE SCOTT BRISTER: Not if it's an adult child. Right?

MR. MEADOWS: Well, what does (7) do with regard to the judge's -- Exxon is a party, and the judge's spouse owns 200 shares of Exxon stock. Do they have to recuse?

MR. MARKS: Recuse.

MR. MEADOWS: The outcome of the case would not substantially affect Exxon

or the spouse's economic or financial interest in Exxon.

CHAIRMAN SOULES: Financial interest is defined in Canon 8 of the Code of Judicial Conduct.

MR. McMAINS: It might be in this rule, too.

CHAIRMAN SOULES: And we will have to find that. We did find it last time and thought it was adequate.

HONORABLE SCOTT BRISTER: Yeah. The current rule that's a problem because it's -- well, current rule is if it's spouse, minor child, living in the household with a financial interest in the subject matter then you are recused, or any other interest that could be substantially affected.

So as I read the current rule, if there is an interest, even if it's not going to be substantially affected, if it's a minor child in the house or the spouse, you are recused. So to that degree it's not a change. Now, this would apply, I guess, to child who is an adult with a financial interest in the matter; and, you know, you can make an argument that's

going too far; but, again, our discussion last time, not to repeat it all, but we have got lots of judges that can take over these cases. Judges have a duty under the ethics code to know about these things, and it just looks -- the alternative is you have to get into what the judge knew and when did he know it, and we are supposed to resist being witnesses in these things for obvious reasons.

The main changes were all in the procedure. I've inserted on (1) the language from the subcommittee's prior draft. I did not recall on (2) that we agreed on a time limit when the judge must sign the order. I think we just left it as "promptly," but I will defer if anybody else remembers differently. Then (3) was the change the subcommittee had that if it's biased prejudices that you are wanting to get the judge recused, the case doesn't stop. It keeps going. If it's any other ground then the case does stop.

Then we put in the new time limits. The hearing has to start within ten days, and the decision has to be made within 20 days

thereafter or it's automatically granted, and the rest is unchanged.

CHAIRMAN SOULES: Looks pretty much what we voted on. Anybody disagree? All right. This is what we voted on, and it stands approved, and we will send it to the Court.

HONORABLE SCOTT BRISTER: That's it.

CHAIRMAN SOULES: Okay. Joe Latting on motions in limine.

MR. LATTING: You should have this one-page draft just like this. We have a couple of letters in the agenda that are at pages 572 through 574, and they raise a question that we did not address in the rule draft, and that is when motions in limine need to be heard. There is a suggestion that they should be required to be filed seven days early, and we didn't put that in the draft because until we get an expression of the committee's feeling on that I didn't know what to put in.

My personal feeling is that it's difficult, and I know that there are a number

of certainly local rules that require or court-required motions in limine to be filed at certain times before the trial, but my experience has been that any time something that's really a bona fide candidate for a motion in limine comes up, the trial judge is not going to say, "Well, this is incurable," --

HONORABLE SCOTT BRISTER: "It's too late."

MR. LATTING: -- "and highly prejudicial, but you should have filed it seven days ago." I just think that doesn't comport with reality, so I left it out.

CHAIRMAN SOULES: Joe, let me interrupt you just a minute. We have got a record here on disqualification that I think is incorrect, and it's going to create some problems for people that are trying to litigate disqualification. If we look at the Constitution it says, "No judge shall sit in a case wherein he may be interested."

All right. We talked about that in (2), individually or as a fiduciary. I don't think that expands the Constitution. "Or whether

either of the parties may be connected with him either by affinity or consanguinity within such degree as may be prescribed by law." That's No. (3), and we by law prescribe it the third degree, so that doesn't expand the Constitution.

And then (r), "when he shall have been counsel in the case." Well, counsel in the case as far as disqualification and many, many other concepts means if you or your partner were counsel, you're counsel, and we say that. "If the judge formerly acted as counsel in a matter or practiced law with someone while they acted as counsel in a matter," and I don't think that expands, a judge in the case.

And the problem here is that a trial judge rules that somebody is disqualified under Rule 18 and then it becomes a debate on whether the trial orders are void or not void and then you get into a debate about whether 18 is broader than the Constitution, and if it is, are we in some of those nuances where it's broader and then the prior orders are not void, or are they, and I think that 18(a), this proposed 18(a)(1), (2), and (3) is

foursquare with what Article 11 -- Article 5, Section 11, of the Constitution says, and I think our record ought to be clear on that one way or the other.

Does anybody disagree with what I just said, that 18(a), this proposed Rule 18, subsection (a) and its sub-subsections (1), (2), and (3), are foursquare on the constitutional disqualification?

All right. There is no disagreement from the Supreme Court Advisory Committee that that's correct. Okay. It will stand that way then so far as our record is concerned.

Okay. I'm sorry, Joe, to interrupt you, but I thought we should fix that. Thank you.

MR. LATTING: That's okay. I notice that in the draft we talked about judges and court, and I was asking Judge Guittard which way we decided to go, are we supposed to talk about the judge or the court, and it seems like we wanted to talk about the --

CHAIRMAN SOULES: Supreme Court likes to call it the court, so I guess we use the court.

MR. LATTING: Okay. Well, that's a minor stylistic change that can be made without really any comment, and so that's really all I have to say. There is the rule, and I would invite comment about it.

CHAIRMAN SOULES: Let's take a chance to look at this. Let's take about ten minutes, if you will, give the court reporter a break. Be back by ten after.

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

CHAIRMAN SOULES: Okay, Joe. Proceed.

MR. LATTING: You had invited people to take a look at the draft of the motion in limine. There are two things that have come up during my discussions at the break, and one is that Scott Brister had mentioned to me that he thinks that -- or he would not be opposed to stating something in here to the effect, if we haven't already stated it, that these voluminous motions in limine are to be strongly discouraged, and the other issue that was raised about -- not more

important, but on a more substantive note is by John Marks, which is not addressed here.

In fact, it's almost -- well, it's addressed sort of negatively in paragraph (5), but John's comment, and I will let both of them speak for themselves, but it is basically to the effect that once you present something to the court and the court has a fair opportunity to rule on the issue, it should not have to be the issue of further offer or objection in order to make an appellate record.

MR. LOW: That's McCardle. Is McCardle still the rule?

MR. LATTING: And I think paragraph (5) states what McCardle is, doesn't it, more or less? I believe I have stated it correctly, but John raises the issue, and I would agree with him, that once you raise a matter before the court and you say, "Judge, we think this should be out of evidence. It should not come in." The other side, says, "No. Here's why it should come in."

MR. LOW: Well, one of the reasons I think for McCardle is because that

sometimes after the court has heard more, you know, has a little more knowledge of the case that they may change their ruling. I mean, you know, might give the court another, you know, chance.

CHAIRMAN SOULES: I think you are going to severely limit the utility of a motion in limine if you go John's way because if I'm a trial judge, I'm not going to sustain any motions in limine because I don't know enough about the case. I'm going to wait, and I'm going to -- if a ruling on a motion in limine means that the evidence has been excluded from trial and I don't have a chance to decide at trial whether to let it in or let it out, keep it in or keep it out, don't even bring me a motion in limine unless it has to do with some sensational stuff that obviously is going to never be in the trial, but a motion in limine only gets a ruling before you offer that or mention it. You come see me, and let's talk.

That's fine. I can do that as a trial judge on a lot of things. I could see something that's on the edge or I think it's

over the edge or I'm not sure, but I want to hear about it.

MR. LATTING: I'm with you, by the way. I just raise the issue.

CHAIRMAN SOULES: Okay. John, of course, wants to speak back to that.

MR. MARKS: First of all, one of the things that the Court is looking at, like I guess every court in the country is looking at, and that is streamlining jury trials. One of the things that bogs down a jury trial is objection after objection after objection. One good way to take care of that is deal with objections before trial and deal with it in such a way that you don't have to keep standing up objecting to something that's been overruled already, and you don't have to stand and object to something that's being allowed -- you know, that's being sustained.

And we're all here in the process of making a lot of changes in a lot of respects, and that's one thing that, you know, you could spend a week going through the evidence in front of the judge and get a lot of this done. Once you get in front of the jury you are

going to save maybe two or three or four days, and I think it's something that we need to look at, if for no other reason than for that purpose.

CHAIRMAN SOULES: Okay.

MR. LATTING: Scott Brister mentioned that one way to handle that is by a signed pretrial order that you could offer and have those things done, and I'm sure not opposed to streamlining trials, but I think Luke's point is very well taken. I think we are going to discourage the granting of motions in limine if it's tantamount to a ruling that the evidence is inadmissible. I don't think anybody really wants to do that.

MR. LOW: And most trial judges can control that by -- you know, they will argue it pretty good there and then you will say, "Well, Judge, may I approach the bench?" "Well, yes," and most of them will say, "Well, is there anything new?"

"No." Well, you know, "same ruling," you know, and I guess the judge -- because if you did, I mean, even if you put "no objection" then they could again ask to -- are you going

to allow a motion to rehear? Are they going to say, "Well, I would like again..."

So how can you -- you know, they could file a motion that the court rehear that or again. So that would bog it down.

MR. MARKS: Well, I'm more -- all right. I'm more concerned about the overruling of the motion in limine paragraph and a lawyer having to stand up time and time again to protect his record, even though the court has looked at that and made a decision and ruled on it, but here you have got the lawyer having to stand up every time that issue comes up, and in a lot of trials, you know, it comes up over and over.

With the sustaining of one, I think that's a different situation altogether because you do have to go up to the court. You have to go talk to the court, and say, "I want to put this in and here are the reasons why I think." But with an overruling then you are forcing some lawyer to have to stand up and protect his record when maybe he shouldn't have to.

MR. LOW: Generally, John, the

first time like the issue of (a) comes up, "Your Honor, I object to that for reasons we have discussed and so forth and the matters relating thereto as it develops, and may I have a running objection to that?" And the judge says, "Yes."

MR. MARKS: Yeah, but sometimes that doesn't protect you.

MR. LOW: Well, I think if you're right on the first one it would.

HONORABLE SCOTT BRISTER: All of the CLE courses tell us not to grant standing objections and tell you not to ask for them. They are dangerous, and they do all of these terrible things. So I have had lawyers who I have offered a running objection to when they refuse to ask for one. "No, I'm afraid I'm going to waive error if I don't."

MR. LOW: Then let him hang himself.

CHAIRMAN SOULES: Okay. Joe, what do you recommend?

MR. LATTING: Well, I notice that in (1), (2) and (4) that I changed "judge" to "court." It says "trial judges" in

No. (4), and I think we could just make that "courts." "Courts are directed to overrule," but I don't think it needs to say "trial courts."

And I guess I would like an expression from the committee on what -- or we either need to decide what to do or decide not to do anything about when motions in limine ought to be filed and how that should work with local rules, as I have mentioned, that I think we have certain -- I know that there are local rules around that say they have to be filed so many days before trial, and I don't like that myself because I don't know how that works when you come up with something that's prejudicial. It seems like to me you have to file one. Do we want to address that or just not take that on?

CHAIRMAN SOULES: This would be, obviously, a new rule. Motion in limine is mentioned one time in the rules in some obscure place, and there is no explanation about what it is or what you do about it. The word is in there somewhere, and I can't remember what place it is.

MR. LATTING: I never can remember how to spell it until I look it up.

CHAIRMAN SOULES: So this is a a new rule offering, and are you asking first for us to decide whether or not we even want a motion in limine rule? I'm going to clarify what it is you want.

MR. LATTING: Yes. And I think we should have one, and I thought that the committee said earlier that the sense was that we ought to have a rule covering it, and so I would propose that we have this rule or something like it. I move the adoption of this rule, I suppose, is what I mean to do.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I was going to say, with regard to motion in limine, and I apologize if it's already been covered, but with Daubert and Robinson now the definition of what a motion in limine is may mean some retooling; and with regard to timing, if Robinson, a Robinson challenge, were legitimately something that should be taken up in a motion in limine, maybe there should be some consideration to having motions in

limine, including Robinson hearings, heard a sufficient amount of time before trial so that you don't wind up in a situation where you are having Robinson hearings, you know, the Friday before trial or even during trial.

CHAIRMAN SOULES: Or after trial, several years later.

MR. GOLD: Yeah.

CHAIRMAN SOULES: You read Pat Maloney's case, I guess.

MR. GOLD: No, I haven't seen that one yet.

CHAIRMAN SOULES: A doctor wasn't qualified to testify that a back belt would prevent injury, and --

MR. GOLD: Oh.

CHAIRMAN SOULES: -- the co-worker wasn't qualified. Because the doctor didn't know anything about back belts, and the co-worker who used back belts wasn't qualified either because he didn't know anything about back injuries. Reversed, rendered, no evidence.

MR. GOLD: Of course, that one they didn't even challenge under a Robinson

consideration in that one. They just -- yeah.

CHAIRMAN SOULES: Well, the Supreme Court challenged it on that basis.

MR. GOLD: I know. I would kind of liked to finesse it before trial.

MR. LATTING: Luke, I was going to respond to what Paul says, and I agree with what you're saying, and I would want the same thing. It seems to me that rather than have that in a general motion in limine rule, though, which is going to cover all cases going to trial, that that can be handled under the pretrial order rule. That's what I would suggest a lawyer do, say, "We need to get this out of the way. A month before the trial I want to have a pretrial order that covers this," and that way we don't have to write a rule that's much more complex than it would need to be in 95 percent of the time or 95 percent of the cases.

MR. GOLD: Right.

MR. LATTING: I think you would be safe under Rule 166.

MR. GOLD: I just find a little bit of difficulty right now because all the

judges have standardized docket control orders trying to plug in Daubert and summary judgment hearings. It's like there is a computer resistance to that right now.

MR. LATTING: I can understand.

CHAIRMAN SOULES: Okay. Mark Sales.

MR. SALES: I was going to say that maybe, you know, it doesn't need to be in black and white, but maybe there ought to be some kind of -- since it's sort of -- the language in here is sort of subjective anyway about what people are being encouraged to do, maybe you could have an additional paragraph that, you know, where possible it should be encouraged that they be filed prior to trial, but that doesn't necessarily remove the possibility of something coming up during trial, and yet still give some direction to the trial court that this is something you probably shouldn't wait 'til the last minute to do.

MR. LATTING: Well, I don't think that's unreasonable. I think I would come down on the other side of that just on

the theory that that's going to take care of itself. If I'm worried about a motion in limine being filed against me, I can always, it seems to me, argue about the inappropriateness of the time it was filed, and it's not going to be granted anyway unless there is material that's probably likely not admissible and incurably harmful. What do you think about that, Scott?

HONORABLE SCOTT BRISTER: I would propose we don't get into when it should be filed just because there is -- that's so much a personal preference of the judges. I know we have got 25 different -- we've got some of my colleagues that want it all filed six months before trial, some one month before trial. I don't want them filed at all. I want them just brought to the pretrial conference, which is usually a week before trial. So I'm afraid if you put anything in, you're going to get resistance from the judges who have a personal preference they don't like to do it that way.

But I am in favor of a rule, especially the parts in this one that direct that it's

not just for everything in the Rules of Evidence. There is no reason to put in, "Don't mention insurance," in every motion in limine. We all know what the rules are on that, and there is no reason to have an order in limine saying, "Don't do that," unless you are planning on holding the attorney in contempt for violating the court order, which never happens.

MR. MARKS: It does happen.

HONORABLE SCOTT BRISTER: Well, it doesn't happen much. I bet it wasn't affirmed on appeal. There has never been a case of an attorney held in contempt that got affirmed on appeal that I have seen. They are all reversed.

CHAIRMAN SOULES: All right. Any further discussion on this problem?

HONORABLE SCOTT BRISTER: I do think we need to work on some of the language, putting it in the form like the other rules. You know, most of our rules have a little phrase saying what each paragraph is about, some which's that should be that's and stuff like that, and I would volunteer to work with

Joe on some of that form stuff.

MR. LATTING: Okay. Why don't we clean up that?

CHAIRMAN SOULES: Okay. Other than that any further discussion on this rule? Do we want to get a rewrite before we do a final vote on it, or do we want to vote it up or down now?

HONORABLE SCOTT BRISTER: Well, we probably need some direction on what the committee wants to do as to whether and when it preserves error or doesn't. This, I think Joe's paragraph (5) here preserves current practice, which is it doesn't preserve anything.

CHAIRMAN SOULES: All right. And John Marks wants that changed to say that no further objection to preserve error is necessary if the motion in limine is overruled. Okay. So we will vote for (5) versus Marks. Paragraph (5), if that helps.

MR. MARKS: Versus Marks? Thanks a lot.

CHAIRMAN SOULES: Versus Marks' motion. Or I don't care how we take it.

HONORABLE SCOTT BRISTER: Let me say in support of it, you know, there are a few cases that say the judge -- you don't have to reoffer it again if the judge signed a Rule 166 order, and there are some circumstances where I have had a hearing on it. I have decided what I want to do on this expert, and it does just take up time to offer it all and make a record all at trial, and we might just say -- you might be able to say in this, just add some language, say, you know, "But the court may make reviewable rulings pursuant to Rule 166 pretrial conference orders."

MR. SALES: Are we talking about a difference between a motion in limine or really just a motion to exclude the evidence, I mean, which sounds like an absolute bar to bringing it up, and you don't need to do anything else? I mean, it's like a Robinson ruling. This expert is not coming on. You don't get to put him on and then you've got to stand up and object.

HONORABLE SCOTT BRISTER: Yeah. But, I mean, there is no motion to exclude evidence rule in the rule book. What is it?

You either object at trial or you do a pretrial order or a motion in limine.

MR. SALES: Most of the Robinson -- I just picked it because that's the one that's obvious, is it usually is in the form of a motion to exclude or tied to a summary judgment motion, and to me that's, you know, an objection on evidence, though, that's been sustained. I don't know that you would have to stand up again and object at trial if they tried to offer that particular opinion or not.

HONORABLE SCOTT BRISTER: Well, the key is going to be and the difference in them is where is the -- what can the appellate court look at on appeal to know what was done, why it was done, whether it was right or wrong, or whether anybody was harmed; and so, you know, motion in limine doesn't have a lot of affidavits, I don't think even has to be made on the record; and so it's going to be pretty hard on a motion in limine to know what was done and who was harmed and how.

At trial everybody knows what kind of record you've got to make. Pretrial

conference I don't guess has to be on the record, but you have to have an order setting out what the court did and why, but that may not allow enough for the appellate court to look at to review in some circumstances.

MR. MARKS: That's why I suggested that we only address the overruling of paragraphs in a motion rather than the sustaining because lawyers probably, if something is being kept out, they want to be sure and make a record of it, make sure that they have got everything in that they wanted in; but in terms of overruling, that's to me a different thing altogether.

MR. LATTING: May I ask -- address a question?

CHAIRMAN SOULES: Okay. Joe Latting.

MR. LATTING: Here's the problem I have with that. Let's say what we were talking about before. You file a motion in limine preventing the plaintiff from introducing the fact that there were -- there was marijuana found under the plaintiff's car seat, and that motion is overruled, and

because the trial judge at the time he hears the argument on the motion is of the opinion that it may very well be relevant, he just has to hear more. So he's not ready to decide that it's not so prejudicial, or just in his discretion he says, "I'm going to overrule your motion." Is that, as far as you're concerned, off that to be tantamount, that all you have to do in order to preserve error for letting evidence of marijuana in in that trial? That doesn't seem like it gives the trial court fair notice to do that.

MR. MARKS: Well, I just think that on this whole issue of discussing evidentiary matters prior to trial needs to be dealt with. Maybe motion in limine is not the way, but if you incorporate it into a pretrial order and you do have a full disposition of the issue at the pretrial conference and the court makes an order, enters an order after that, then that ought to stand.

MR. LATTING: I agree with you. I just think the person --

MR. MARKS: So if we refer to -- as Judge Brister was saying, if we refer

to the pretrial order provisions in the rules here, that may take care of it.

CHAIRMAN SOULES: Paul Gold.

MR. LATTING: I don't have any objection to that.

MR. GOLD: I think it's a real significant point in procedure because there are several cases. One is Clark vs. Trailways that talks about a court finding that an expert wasn't timely identified or properly identified and striking that expert pretrial, and the Supreme Court holds that even though the trial court may have done that pretrial that still is inconsequential to whether that expert can testify at trial if no objection is timely raised.

Same thing with request for admissions. If you have request for admissions and you offer them at trial and no one objects to the offer of controverting evidence, it comes in. So I've got a problem -- I understand the issue with the experts, but on a Robinson issue you can have a situation where an expert was found by a court not to have proper qualifications and just right there, just on

the qualifications, before the expert even espouses their opinions, the expert is disqualified.

Well, is there going to be a procedure whereby a bill of exceptions can be made at the hearing about what the expert would have said?

MR. MARKS: Well, that was my point, Paul, is that I think it would apply more to the overruling than to the sustaining of the motions in limine or the exclusion of evidence. If evidence is excluded, I think it would be very difficult to cover everything preliminarily in a motion in limine hearing or in a pretrial conference so that you would need to go forward and be allowed to make your bill.

MR. GOLD: See, most of the times -- and one of the problems I was having with listening to Joe's discussion about the motion in limine, very few of the trial courts I have been in trial in front of in a motion in limine have said, "Okay, I'm going to keep this out." It's just, "Approach the bench and we will talk about it then when it's, you

know, right," you know, and "We will make a decision then." So I have been in very few situations where stuff before the evidence came on was excluded, except in a motion for summary judgment or maybe in a Robinson.

MR. MARKS: Well, that's why I'm talking about the overruling of motions in limine rather than the granting of it.

MR. GOLD: Okay.

MR. MARKS: And the whole point and the whole reason that I raised it is that there is another movement ongoing in order to streamline jury trials because jurors are getting sick of having to spend weeks and weeks and weeks in a jury trial.

And one way this could be done is to make more or meatier rulings, m-e-a-t-i-e-r rulings, with respect to some of these evidentiary issues before you ever get in front of the jury so that those issues aren't dealt with at that time that have been previously dealt with, and everybody understands that the court's rulings protect you with respect to those issues, so you are not standing up on your feet and raising the

same issues you did in the pretrial conference or whatever.

CHAIRMAN SOULES: All right. This is motion in limine. Let's just get a show of hands. How many believe that a ruling on a motion in limine should preserve error in any circumstances first? Let's just take a consensus of that.

Those who think it should? One. Those who think it should not? 11.

11 to 1, no. So you're going to have to come someplace besides motion in limine.

MR. MARKS: Well, I don't think we addressed whether the motion in limine should preserve error on the overruling of a paragraph.

CHAIRMAN SOULES: All right. Take a vote there. How many feel it should? Show by hands. Two. How many feel it should not? Nine to two defeated. No.

So what next do you need, Joe, for your guidance?

MR. LATTING: Well, I think we ought to go ahead and vote this motion up or down just because we have taken the time we

have to discuss it, and I think if the substance of it is in general acceptable to the committee, I think if they will refer it to me and Judge Brister we can clean up the style of it and get it back and pass it without a lot of further talk at the next time rather than opening it all up again, just to vary our practice.

CHAIRMAN SOULES: Those in favor show by hands. Ten.

Those opposed? Ten for, none opposed.

Okay. It's referred then, Joe, to you and Judge Brister for edit, and we will look at it next time.

MR. LATTING: And anyone else who would like to contribute to that, please let us know.

CHAIRMAN SOULES: Anyone who wants to participate let Joe know and get involved. Okay.

MR. LATTING: Bill Dorsaneo wants to be involved in that.

CHAIRMAN SOULES: Good. Bill, Judge Brister, and Joe are the team at present. Anyone else can volunteer by

contacting Joe Latting.

Okay. Paul Gold on the conflict between 168 and 703.

MR. GOLD: I looked at that letter, and for the life of me I can't discern what the conflict really is. As I understand what this person is concerned about, it is that he is concerned that someone will be able to get into evidence and before the jury interrogatory answers of an individual who is no longer in the lawsuit; hence, the interrogatory answers would be hearsay. They would be able to get them into evidence and before the jury by having an expert witness say that they relied upon them and then have that expert witness read them to the jury.

If my understanding of that situation is right, I don't think you need to rewrite any of the rules. I don't think that an expert witness presently, even if the material that they are relying upon is something customarily relied upon by experts, can read that to the jury if it's hearsay over a hearsay objection. They can rely upon it, but they can't over objection breathe life into a hearsay item.

So whether the answer to interrogatory is a hearsay document or not because the party is no longer in the lawsuit seems like such an arcane point to have to rewrite the rules about that I can't see it being an issue. It seems like this is something that came up in one case, and the person wanted to rewrite the rules to address it, but I can't see it being that large of a problem myself. I may have missed the mark completely. I had a hard time following it.

CHAIRMAN SOULES: The second sentence of 703 says, "If what the expert relies upon," as he put it, "is what experts in this particular field form their opinions or inferences on the subject, then it need not be admissible in evidence." It doesn't make it admissible in evidence.

MR. GOLD: Right. Some people interpreted Birchfield vs. Hall as saying that you can take all sorts of hearsay, feed it to an expert, and the expert can espouse this hearsay to the jury. They can't, and I forget what case it is. There is a case, I believe out of Texarkana, that says that you can't do

that. I think that what the subtlety is, is that they can rely upon it.

They can say, "I have relied upon these documents in forming my opinion, and my opinion is this based upon these," but they can't read it to the jury unless, I suppose, you could establish it as a learned treatise, but I don't think that you could establish an answer to an interrogatory as a learned treatise to make it an exception to the hearsay rule to allow the expert to read it to the jury. That's my understanding.

MR. McMAINS: What you're saying is the problem is with this judge, this ruling, and this case.

MR. GOLD: I think it's sort of a unique situation because the answer to interrogatory that they were relying upon was the answer of a former party, and he was saying, well, you know, you can use the interrogatory against that party. If that party were here, you could read it, but since that party isn't here, that answer to interrogatory is hearsay, and it shouldn't come before the jury.

MR. MARKS: Luke?

CHAIRMAN SOULES: John Marks.

MR. MARKS: I agree with what you're saying, Paul; but I'm not so sure that it's really clear from reading the rule that that's the law; and if there's only the Texarkana case at this point deciding it, it's kind of up in the air. It may not hurt to change the rule so everybody understands that though you can rely upon -- an expert can rely upon hearsay, the expert can't get up and regurgitate the hearsay that he's relying on, and I don't think that's clear in there.

MR. GOLD: I may be mistaken about whether it's a Texarkana case. I know that I have seen some case. I thought it was out of Texarkana, saying that the holding of Birchfield or one of the holdings in Birchfield does not mean that an expert can be fed all of this hearsay, and they take the stand and read this hearsay to the jury.

They can just say, "I relied upon these things in forming my opinion and my opinion is this." Now, crafty, artful attorneys may be able to elicit what the hearsay is to the jury

in some way, but that was my understanding, and if the rule isn't clear, maybe the rule does need to be made clearer on that point.

MR. MARKS: That's it. I'm not sure if the rule is clear.

CHAIRMAN SOULES: Mark Sales.

MR. SALES: It's really more of a 705 problem, and I think it is a problem that people use experts as a conduit to get in otherwise inadmissible evidence.

705 says, "The expert may in any event disclose on direct exam or be required on cross to disclose the underlying facts or data," and I think that people do use experts to get in stuff they might not otherwise get into evidence or before a jury. Maybe it's an authentic -- I don't know what the different problems could be.

I know the State Bar committee several years ago actually studied this. I think there was actually a proposal, and if I'm not mistaken, there was a Federal -- the Federal rule on this does deal with it where it's really up to the cross-examiner to open it up. If the cross-examiner decides he wants to go

in and show that this is bogus, he can do that; but on direct examination you can't get it in there; and we may want to take a look at that because I think that there is a loophole there if you want to try to run stuff through.

MR. LOW: Yeah. That came to us under 705 once, Luke. What Mark says is correct.

MR. SALES: I'm not sure I wasn't on this committee at the time, but there was a recommendation, and it sort of followed the Federal rule on that, if I'm not mistaken, and there may have even been a -- I think there was even a question, because there is a criminal rule, actually, the Criminal Rules of Evidence, that deal with that issue as well, and I believe there is even a balancing test that would allow that sort of stuff to come in, if I'm not mistaken.

MR. LOW: The Texarkana case, the McDowell case, does say what Paul said. There is no absolute right to do that. It goes off by mark that, you know, you can say what you relied on, but you can't just give all the details of it unless you are required

to by the court or the other side goes into it and, you know --

MR. SALES: There is some conflicting cases on this and the question about absolute right, if they go off on an absolute right or whether it's discretionary, but it's really a 705 problem.

CHAIRMAN SOULES: And we voted this down? Did we take this same idea through the committee before?

MR. LOW: No. It seems to me what happened was it was referred back to interrogatory. You know, we thought it was a question of whether the interrogatories, you know, be admitted against a party, and I think it went back to 168, I think is what the evidence committee decided.

MR. SALES: We have -- I'm sure I could find the old -- and this has probably been two or three years ago, the recommendation, and forward it to Buddy, but that may be something that ought to be looked at.

MR. LOW: The Texarkana court said, "We conclude that the better judicial

position is to not allow the affirmative admission of otherwise inadmissible matters merely because such matters happen to be underlying data upon which an expert relies."

CHAIRMAN SOULES: That's McDowell?

MR. LOW: Yeah.

CHAIRMAN SOULES: Well, same holding out of Amarillo in this Beavers case.

MR. SALES: There are some cases on the other side of that, too, and I don't -- I remember we looked at this. There are some that they did allow, and --

CHAIRMAN SOULES: Well, here is the situation, and Richard's not here --

MR. GOLD: I've got a hearing I've got to get back to. If this is submitted to a committee or anything, I would be happy to work on it.

CHAIRMAN SOULES: Thank you.

Here is Decker vs. Hatfield. Orsinger is not here to talk for the family lawyers, but it said, "The trial court did not err in overruling the hearsay objection to the expert's testimony concerning interviews with

the child." Maybe that's an important place for the hearsay to be allowed in the court's discretion.

MR. MARKS: Aren't there statutes on that?

CHAIRMAN SOULES: I have no idea.

MR. MARKS: I think there are.

MR. SALES: You're talking about in the family law area? There may be.

I remember this, and this has been three years ago; and we had done a -- there is a report somewhere, and I forget who all served on it, but that reviewed all the cases at that time; and there are some that go both ways on this; and I think our deal was, you know, that there should be some discretion; but, you know, and I would just have to go back and look at what it was, but that as a general practice it ought to not be allowed. You just can't just use an expert as a conduit to get it in.

MR. LOW: Because interrogatories are admissible by 168 only against the party.

MR. SALES: I mean, the issue I'm talking about is broader than interrogatories, though. But, I mean, it's the deal where the accident reconstructionist says, "Well, the guy wasn't at fault because some unidentified witness said the light was red," you know, and do they get to tell the jury that or not.

MR. MARKS: That's the problem right there.

MR. SALES: And that's where it comes up.

MR. LATTING: Luke?

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: My sense is that that's the better rule, the McDowell, and I think we ought to expand to that; that is, I think this committee ought to endorse that. If there is a split in the cases, I think we ought to address this because it's an important issue, and I would agree with what Mark said. Maybe we could have sort of a soft-sided, soft-edged prohibition against an expert being able to speak hearsay on which he relied if it's not otherwise admissible,

except in unusual and compelling circumstances, something like that.

Otherwise, you just show it to your expert and say, "Did you read this report? What did it say?"

CHAIRMAN SOULES: It says, "Under the Federal rules an expert could read into evidence interrogatory answers of a nonadverse party." So he recommends that 168 be amended to say, "The answers may be used to the extent they satisfy the Rules of Evidence." And if we don't want to go as far as the Federal rule, if interrogatory answers would be otherwise admissible under 703 then 703 controls their admissibility.

This doesn't seem to say anything that's not inherent in the law right now anyway, what he's asking us to do.

MR. SALES: Luke, if you look at 705 of the Criminal Rules of Evidence, there's a pretty good -- it's much more broad than what the 705 in the civil rules are, and it's got a balancing test with limiting instructions. It says, for instance, "When the underlying facts or data would be

inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger they will be used for an improper purpose outweighs their values, explanation, or support."

It contemplates that, at least in the criminal rule, people are using it this way, but there is a way for the court to balance the interests and then exclude it because it's just simply being used as a conduit, not to explain or support why the expert came to the opinion that he did.

MR. LATTING: Does it address the issue of a limiting instruction?

MR. SALES: Yes. It says, "If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request."

MR. LATTING: Well, that sounds like to me what we ought to do in the civil rules.

CHAIRMAN SOULES: Let me have just a minute to see where the difference is

here. This 705 --

MR. SALES: It's on 261, page 261.

CHAIRMAN SOULES: Well, 705 of the criminal rules has three paragraphs that civil 705 doesn't have. The first paragraph of civil 705 is pretty close to what 705(a) of criminal is.

MR. SALES: Actually, I bet -- well, obviously if we had the merged rules, it's going to be in there, because this was kept as part of in criminal cases, but I believe Lee pointed out the very first time that our committee submitted the unified rules, we actually had our proposal in there that merged both of these things.

MR. LOW: We merged them by special rules.

MR. SALES: Right.

CHAIRMAN SOULES: All right. So --

MR. SALES: So in the rules, the unified rules, this part of Criminal Rule 705 is there. It just says -- it's under part (b) as "Special Rules in Criminal Cases." So

you have that in the unified rules, but it's only dealing with the criminal cases right now, and then part (a) is the same for both.

CHAIRMAN SOULES: Buddy, let me assign this to your committee to determine whether or not there should be a difference in the unified rules between civil and criminal in 705. I think a careful reading of paragraph (b), (c), and (d) of the criminal rules is necessary to think this through. It may take care of the whole issue.

MR. LOW: All right. Because what we did is just -- we didn't try to do a lot of substantive changes other than what came. So we tried to merge by not changing, but your suggestion is well taken.

CHAIRMAN SOULES: Well, here criminal may have a better mousetrap on this, and if it helps to fix what this man is concerned about and we don't see any problem with it on the civil side, maybe we ought to do it. Could you-all look at that and report back next time, and that will give us a, I guess, a chance to -- that's a pretty minor change as far as the Supreme Court

assimilating what we are offering if we decide to offer it.

Anything further on this? Okay. So we are going to put, Holly, on the agenda for next time Buddy is going to report on whether 705 civil should have criminal 705(b), (c) and (d) or equivalent. Okay. That's about all we can do on this, don't you think, today?

Okay. Next is Judge Brister on 174, Rule of Civil Procedure 174.

HONORABLE SCOTT BRISTER: This is my letter to Luke dated February 2nd, 1997. In the agenda you will see on page 2 of that there were proposals from the court rules committee, TADC, TMA, AIA, TCGL, TCC, State Bar committee on administration of justice, et cetera. So I have just put on that sheet the different rules because I think they set out the issues.

Let me just highlight the differences. At the top of that second page is the current Rule 174(b), 174, Rule 174 is consolidation and separate trial. So 174(a) just deals with consolidation, and I've left it out, and 174(b) is separate trials. Has everybody got

this?

CHAIRMAN SOULES: This is in the second supplement on page 354.

HONORABLE SCOTT BRISTER: Has everybody got my January 2nd letter? Is that out or not out?

MR. MARKS: February 2nd or January?

HONORABLE SCOTT BRISTER: I'm sorry. February 2nd.

MS. LANGE: It's not out.

HONORABLE SCOTT BRISTER: Not out?

It might be better to take this up later when everybody has got a copy to look at. It's only three pages.

CHAIRMAN SOULES: Let me see. I'm not sure that it made its way to us, Judge. Do we have it?

MS. DUDERSTADT: Do you have one?

HONORABLE SCOTT BRISTER: Yeah.

MS. DUDERSTADT: I will get copies made.

HONORABLE SCOTT BRISTER: Let's

take it up later when everybody can look at copies, because it will take awhile to sift through it.

CHAIRMAN SOULES: All right. Let's go to David Jackson on 188.

MR. JACKSON: Last time we talked about Rule 188 and a couple of letters that we had received that we hadn't addressed on 188. I called Bonnie about this rule, and we talked about it a lot. There are some things in here that apparently didn't get taken out in 1971 when they took out commission requirements on all the rules. Commission requirements stayed in this rule. Other language stayed in the rule.

I called Bill Dorsaneo, and he gave me a lot of information on why some of this stuff is in here. We went through and took out all the stuff that had to do with commissions and tried to word this where at least a lawyer needing to take a deposition in a foreign jurisdiction didn't have to start out jumping hurdles here that don't even exist anymore and could at least get to the jurisdiction he's headed for and find out what the requirements

are there and then start meeting those requirements.

So the three things it does, it takes out the requirements for getting a commission. All you have to do is get out a proper notice. You can hire anybody there to take the deposition that's qualified in that jurisdiction to take a deposition, regardless of their qualifications in Texas, or you can hire someone who's qualified to take a deposition in Texas, and they can perform the same acts in that foreign jurisdiction that they can perform in Texas such as swearing the witness, taking the deposition, certifying to it, and filing it.

And the other thing it does, and one of the letters was asking about, was the filing of the deposition. This rule requires you to file the deposition with the clerk, and those depositions long ago since the clerks won't take them. So they get bogged down in the process with the court reporter in Idaho trying to figure out what to do with this deposition that he's just taken, and now the rules tell him he's got to file it with the

clerk, and the clerk won't take it.

So we have basically adopted the proposed discovery rules on time limits and all the other provisions that are required in the discovery limits, filing, certification, that all of those be followed the same way in this rule. So the court reporter in Idaho would have to do the same things to that deposition that a court reporter in Texas would have to do to the deposition.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I have one or two comments about this subdivision (a). If you will look at the comment that I drafted a couple of pages down the line, it seemed to me when I looked at the Civil Practice and Remedies Code and the Government Code provisions concerning who can take oral depositions particularly that I came out with kind of an unsatisfying conclusion that Civil Practice and Remedies Code Section 20.001 employs some information but does not, I don't believe, say anything about certified shorthand reporters taking depositions in

another state or outside the United States.

I went and looked at the certified shorthand reporter statute. Although it's not an easy statute to master, it appears to concern shorthand reporting in this state and depositions conducted in this state, you know, rather than in another state or outside the United States. So when you look at our statutes what basis would a Texas certified shorthand reporter have for taking a deposition in another state or outside the United States, and my conclusion is only a commission, if a commission authorized the shorthand reporter to do that, and that's kind of why probably commission is still in Rule 188.

So it seemed to me why don't we just do what we did before with Rule 201, and that is to kind of increase the ability of certified shorthand reporters to do what they do without statutory change, and this subdivision (a) authorizes persons who qualify as certified shorthand reporters in Texas under Government Code Section 52.021 to take depositions in other states and outside the United States.

That's a big change.

Now, you don't have to take David with you. Okay. You can use a person authorized to administer oaths and to take a deposition under the law of the place in which the deposition is taken or under the law of the state of Texas as if the deposition was taken and conducted in the state of Texas, and that's kind of my input on how to make this whole thing easier and make everybody involved happy.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: How does this fit in with our rule changes we made on the telephone deposition, or does it?

MR. JACKSON: I wouldn't think it had any effect on it. I mean, you obviously want to hire a court reporter there with the witness to take the deposition.

MR. McMAINS: That's what I'm wondering, is whether or not that's required in the telephone rules --

MR. JACKSON: No.

MR. McMAINS: -- or whether

it's even discussed.

MR. JACKSON: It's not discussed.

MR. McMAINS: So what I'm wondering is, when we say on this, it says, "Whenever the deposition is to be taken in a sister state or foreign country," do we mean to say then that the reporter needs to be -- that the deposition is taken where the witness is and not where the folks are asking the questions?

MR. JACKSON: No. We had a big debate about that issue on the subcommittee about telephone depositions, and soon we will be taking depositions by videoconference.

MR. McMAINS: Right.

MR. JACKSON: And in that instance it's going to be a lot easier for the court reporter to be in the room where all the lawyers are and have the witness just on the monitor, and if you have got a poor court reporter sitting next to a witness on a monitor trying to figure out in another room who all is objecting in that room when only one person is on camera, it's going to be an

impossible situation for the court reporter sitting with the witness.

MR. McMAINS: All I'm saying is that somewhere between where we authorize taking depositions by telephone and this rule, which appears to suggest that there is only one place a deposition is taken, we need to figure out where the reporter needs to be. I mean, because it seems -- I'm just not sure whether or not our current rules authorize us to take a telephone deposition with the reporter sitting in Texas.

MR. JACKSON: I think you wind up getting into problems swearing the witness over the phone.

MR. McMAINS: Over the phone.

MR. BABCOCK: Yeah. That's what I'm thinking about.

MR. LOW: But by agreement we have done it.

MR. McMAINS: Oh, sure. I understand. But not all lawsuits are as agreeable as yours, Buddy.

CHAIRMAN SOULES: The court reporter doesn't have to swear the witness,

either. Anyone authorized to administer oaths can swear the witness. So you can have the witness sworn on the monitor by whoever can administer an oath in Nicaragua and get that on the camera.

MR. JACKSON: This rule really addresses two animals. One is a sister state deposition, which is a relatively easy problem to solve, but the tough problem is when you really get into the foreign jurisdictions and they have rules that you can go to jail for swearing a witness, and so the court reporter really needs to be careful about what he's trying to do going to some of these countries to take a deposition.

CHAIRMAN SOULES: Maybe we could put that in here, "The court reporter shall not have to go to jail." Or the lawyers, either, huh?

MR. BABCOCK: Take care of everybody.

CHAIRMAN SOULES: Anybody else -- does anybody see anything? Rusty, do you have any recommendations for change to this that would address your concern?

MR. McMAINS: I mean, I don't have the rules regarding the telephone depositions in front of me. I just was -- I mean, when I read this, it says, "Depositions in Foreign Jurisdictions" at the top, and then it says, "In General" and says, "Whenever the deposition, written or oral, of any person is to be taken in a sister state or a foreign country, such deposition may be taken" -- and then it has notice.

"Before a person authorized to administer oaths"; and so all I'm saying, it seems to me to infer that if you are going to take the deposition of someone in someplace else, that the reporter needs to be there; and I'm just not sure that that's really what we want to require, given particularly the advent of the new technology where you are going to be able to videoconference somebody and swear them right there on the screen; and as David says, it makes more sense for the reporter to be here than there in terms of being able to identify who all the lawyers are and who -- because there are more people asking questions than there are answering.

MR. LATTING: Well, let's fix that.

MR. McMAINS: I mean, I don't know that it's a problem. It just looks like that this rule assumes that the deposition is taking place where the witness is and that's where the person that's doing the recording ought to be, and that isn't necessarily what's going on now, and it seems to me we should provide it for what actually is going on.

CHAIRMAN SOULES: Let me try to shift some words, see if this is a start. Where we say "of any person," move that over to after "is to be taken."

So it says, "Whenever the deposition, written or oral, is to be taken of a person located in a sister state," so we are getting the witnesses there. Not the deposition was there, the witness is there, and then see how that may be scrubbed through, but we are really talking about taking the deposition of a witness located someplace, not the deposition located someplace, because the deposition may be located all over the world on the teleconference.

MR. YELENOSKY: Of course, we need to take into account the possibility of a clone now as well.

CHAIRMAN SOULES: That's a sheepish thought.

MR. BABCOCK: Can we move to strike that from the record, please?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, in our current rules our deposition by telephone subdivision is just stuck in "Non-stenographic Recording, Deposition by Telephone"; and probably it should go in this rule, although I suppose we could take a deposition by telephone within Texas; but I think your point is a good one; and we probably should deal with a deposition by telephone specifically in this depositions in sister states/foreign jurisdiction provision; and we could take another stab at that, couldn't we, David?

MR. JACKSON: Sure.

PROFESSOR DORSANEO: And the rule says now in our current rule book -- it's, you know, modeled on the then-existing

Federal rule, and I don't know whether the Federal rule has been changed since then. My inclination is to think they may have. It just says, "A deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions" and that beyond that it doesn't say anything, and this Rule 188 now doesn't say anything about --

MR. McMAINS: Well, the fact is if you take that rule and you put it with this rule, it means that when you are ever taking the deposition of a deponent out of state the reporter has got to be there.

PROFESSOR DORSANEO: Which is what I would have thought it would have meant, without regard to telephones.

MR. McMAINS: Which is probably what it does mean, but it just seems to me that doesn't make a lot of sense now, given the additional technology with regards to the videoconferencing and whatever where you can pretty well verify the witness is there answering the questions, and it makes a lot more sense for him to be where you can hear the questions then.

PROFESSOR DORSANEO: This Rule 188 assumed that it's not going to be done by telephone because at the time it was put in here we didn't have any deposition by telephone.

MR. McMAINS: Right.

CHAIRMAN SOULES: Okay. So it needs to be then worked to accommodate video teleconferencing.

MR. LOW: Luke, could I raise one other question?

CHAIRMAN SOULES: Yes, of course. Buddy Low.

MR. LOW: It talks in terms of letters or some document from a foreign court. What if it were pursuant to a signed agreement by the parties? This person is available, and we all agree, and the lawyer signed an agreement. You know, you don't go through the --

MR. LATTING: Embassy.

MR. LOW: Yeah. Or something. And he's going to be there and -- I'm sorry.

CHAIRMAN SOULES: Have we preserved the rule in the discovery rules that

the parties can agree to anything?

PROFESSOR DORSANEO: Yes.

MR. JACKSON: Well, but this one is different than that. I used a Law Review article that you sent me done by Mr. Bishop that goes into the problems with agreeing to this. Some jurisdictions will not allow you to take depositions in their country, so you can't agree to do that. You can't agree to go there and do it. You can't agree to go there and practice law.

MR. LOW: The lawyer then better know where it --

MR. LATTING: For example, Germany, you can't -- I happen to know very personally you cannot take a deposition in Germany without getting a vote of the Bundestag.

MR. JACKSON: You try to get the witness to agree to go over to Austria.

MR. LATTING: You do. You get them to go to Belgium.

MR. JACKSON: Yeah.

MR. MARKS: But if you take a telephone deposition --

MR. LOW: Yeah. That's what I'm contemplating.

CHAIRMAN SOULES: Well, I don't know whether we can reconcile the foreign law conflicts with what we are trying to do.

MR. JACKSON: Yeah.

CHAIRMAN SOULES: I think we just have to deal with those on an ad hoc basis.

MR. LATTING: Well, I like your idea. I mean, let's do the best we can do, and then let the Germans worry about Germany.

CHAIRMAN SOULES: Well, of course, that's what we're about here.

MR. LOW: Unless prohibited, by agreement of parties unless prohibited by law.

MR. LATTING: Let's say that. Let's just say we can do it, and let them do what they are big enough to do.

MR. JACKSON: Well, the paragraph (3) covers that. It says, "pursuant to the means and terms of any applicable treaty or convention," so if you can't do it because of a treaty or convention, you can't do it, and that's why that's in there.

MR. LATTING: Well, let me ask you this: What if we have a lawsuit against each otherm, and we want to take the deposition of a guy in Cologne, and we agree we can do it. We hook it up. We take it. Now it turns out that is apparently illegal under the Hague Convention. Is that going to be -- can he keep that deposition out of evidence on the basis of the Hague Convention if we have agreed we can put it in?

MR. JACKSON: Your witness doesn't have to show up.

MR. LATTING: Well, we can't make him show up anyway. That's a nonissue.

MR. BABCOCK: Well, but why did he agree to it to begin with?

MR. LOW: But what I'm talking about is, there's some way to get around -- I mean, say it's in England. Some way to get around -- we have got a telephone deposition, and this guy is going to be there. He's ready, just sitting there ready to testify, and we don't want to go through getting something from them. We are all here. We are on the phone. He's going to be there. Do we

have to get letters out of the English court or something? Do we have to go through the English court?

CHAIRMAN SOULES: Okay. Answer your question. Do you?

MR. LOW: I don't know.

CHAIRMAN SOULES: Does anybody else know?

HONORABLE C. A. GUITTARD: If you agreed to it, how can you object?

MR. LATTING: Well, we ought not to have to is my point, and we ought to be able to agree to anything we want to and use it if there is an agreement.

MR. LOW: Right. But it doesn't say that.

CHAIRMAN SOULES: Just a minute. Okay. Buddy, go ahead.

MR. LOW: I'm sorry. It doesn't say where they are talking about. It says, "Pursuant to the means and terms applicable" or "pursuant to letters rogatory" or "pursuant to agreement of the parties' signed agreement" or something. I'm just raising that question.

PROFESSOR DORSANEO: It seems to me the U.S. Supreme Court said that you could use the procedures under the Federal rules in lieu of or in addition to what's provided for in a treaty in a case involving a conflict between the treaty and operation under the Federal rules. 98 percent --

MR. SALES: That only works as to parties, though. That's your problem.

CHAIRMAN SOULES: Mark Sales.

MR. SALES: Yeah. That's the Aerospace Yow case. And, you know, if you are dealing with a party, you know, the court's got -- and they are before the court, you can go around all of that and just use the rules of evidence or procedure or whatever. It's where you have got a non-party fact witness and you are trying to get it and then the question turns on whether is he cooperative or noncooperative. If he's cooperative and you want to do it by agreement then there is no problem.

PROFESSOR DORSANEO: That is Aerospace Yow.

MR. SALES: If the witness

says, "I'm not going to voluntarily do it" then you are stuck with having to go through the letter rogatory process because that's your only way.

MR. LOW: No. I understand. What I'm saying, here it looks like we can't do it by agreement. I mean, it just --

MR. SALES: If you have no agreement then the only way you are going to be able to get that witness to show up is to go through the process.

CHAIRMAN SOULES: I think if you have got a Rule 11 agreement in a state court, that the judge is going to enforce a Rule 11 agreement and not going be too worried about the Bundestag.

MR. LOW: But lawyers reading that --

MR. LATTING: I agree, but we ought to make it clear in the rule so that lawyers reading -- we ought to make it clear so that lawyers opening this rule book can see, "Oh, we don't have to go through any of that. We can just agree to take the guy's deposition" and do it.

CHAIRMAN SOULES: All right. Chip Babcock.

MR. BABCOCK: Buddy's point, though, is that you have got three methods of doing it, and it doesn't include in a No. 4, which would say, "by agreement."

PROFESSOR DORSANEO: This rule was drafted before --

CHAIRMAN SOULES: Chip Babcock has the floor. Timeout. Chip Babcock has the floor.

MR. BABCOCK: And following up on Joe's hypothetical and taking it one step further, suppose the parties agree and the witness appears for whatever reason, goes through the process, and then comes into court later and says -- even though he's a non-party and says, "King's X. This was an illegal deposition under the law of the country I live in and I don't want my testimony used in any proceeding in the United States." That's the only wrinkle that I can see could screw up your Subpart No. (4), "by agreement," and I don't know if we ought to worry about that or not.

CHAIRMAN SOULES: John Marks.

MR. MARKS: He would have to come into a Texas court, wouldn't he, and make that statement?

MR. BABCOCK: Sure, he would.

MR. MARKS: And in Texas that deposition would be legal.

MR. BABCOCK: Well, are we asking a Texas court to allow something that's illegal under the law of the country where the choice of law rule --

MR. MARKS: He agreed --

CHAIRMAN SOULES: Just a minute, John.

MR. BABCOCK: -- would say their law applies?

CHAIRMAN SOULES: One at a time. We are trying to get a record here. Go ahead, Chip, your question.

MR. BABCOCK: Yeah. Are we asking a Texas judge to enforce or basically violate a foreign country's law when that country's law applies? Because on the issue of a non-party witness their law might very well apply, and it may be so out there we

don't even need to worry about it, but that's what Joe's hypothetical was raising in my mind.

CHAIRMAN SOULES: David Jackson.

MR. JACKSON: We have also presupposed in this that we are going to do it by telephone and they can't get to us. This is just a new thing that's come up today. This rule was originally written for people that go off and take these depositions, and I don't think two lawyers can agree to go to another country and do something illegal, and that's what you would be doing if you went to certain countries and took a deposition.

MR. BABCOCK: That's true.

CHAIRMAN SOULES: All right. So what is the consensus here? We put in something that accommodates agreement and leave this question of illegality in some jurisdiction to the --

MR. MARKS: Further proceedings.

CHAIRMAN SOULES: -- one in 100 million cases that it may arise in? Is that

all right?

MR. LOW: I would move to put the fourth category in there, the agreement category.

MR. LATTING: Second that.

MR. BABCOCK: I second that.

CHAIRMAN SOULES: Any objection to that?

Okay. Agreement, we need to put something in there by agreement, about agreeing to do this; and anybody object to what I said, that we are really talking about in the very first part of this taking a deposition of a witness that's located in a foreign state?

MR. LATTING: No. That's a good idea.

CHAIRMAN SOULES: All right. That's okay. Any objection?

No objection to that. What else do we need to give input to David on? David.

MR. JACKSON: Do you want by agreement of all parties and the witness or just all parties?

MR. LOW: The witness better be

agreeable.

CHAIRMAN SOULES: I would say all parties.

MR. LATTING: I would say all parties.

MR. BABCOCK: Yeah. All parties.

CHAIRMAN SOULES: If the witness shows up, we don't have to ask him whether he's agreed to be there. Just he's there --

MR. LATTING: That will just give him ideas.

CHAIRMAN SOULES: -- whether he's agreed to or not. That's what I'm thinking. Just give them ideas or don't give them ideas. All right. Those who think it's just by agreement of the parties?

MR. HAMILTON: What's the agreement going to have, agreement to place and manner or --

MR. LOW: Rule 11.

CHAIRMAN SOULES: Enough agreement to get it admissible.

MR. LOW: Yeah. Agreement as

to the procedure and, you know, a Rule 11 agreement. If a lawyer doesn't know how to draw up an agreement so it would be admissible, he's in trouble anyway.

CHAIRMAN SOULES: Rusty, you had your hand up.

MR. McMAINS: Well, you were saying what else did we need to do, and the thing is when you make your change then this one doesn't talk about the site of the deposition but the non-stenographic rule does, and the situs of deposition is where the witness is. So it still doesn't address the issue of whether or not we are going to try and figure out how to let the people be deposed by -- with the reporter not being there.

CHAIRMAN SOULES: The situs of -- I didn't follow you. You said the situs of the deposition --

MR. McMAINS: Well, the situs. The situs of the deposition under the non-stenographic -- the only rule we have dealing with telephone says the reporter needs to be there.

CHAIRMAN SOULES: And some adjustment can be made to that, right?

MR. JACKSON: I think it has been adjusted.

PROFESSOR DORSANEO: Well, yes, we ought to put that in here, and I would suggest we look to see what proposals or changes have been made at the Federal level because this was a new thing that was adopted at the Federal level, and no doubt the location thing has more to do with where the court reporter is supposed to be than it has to do with where the witness is supposed to be; and I, frankly, unless the court reporters tell me otherwise, don't necessarily think the court reporter needs to physically be right there with the witness.

MR. JACKSON: I don't either, and especially in a teleconference. We have had teleconferencing in our office for about eight years now, and it is always better to be where all the lawyers are.

CHAIRMAN SOULES: This is two-way teleconferencing?

MR. JACKSON: Right.

CHAIRMAN SOULES: So that a lawyer who wants to ask a question of the witness about a document can put that in front of the witness on a video screen wherever remotely situated?

MR. JACKSON: Right.

PROFESSOR DORSANEO: So what that means is that the original Federal idea that we copied probably was a mistaken idea. What you're saying is you need to be where the lawyers are and not where the witness is.

MR. JACKSON: To write it. Now, for swearing in the witness and that sort of thing, it's a different deal, but to write it, to be able to understand who's saying what, you are better off being live in the room with the most parties.

MR. BABCOCK: Yeah.

CHAIRMAN SOULES: The only idea I had was should we require that the witness be sworn by a person authorized to administer oaths where the witness is situated? Have you really got the witness under oath otherwise? I don't know the answer to that.

MR. McMAINS: It would seem to

me that if it's -- and I guess this is a question of whether or not there is a conflict of jurisdictional assertion of power between the states. It is -- are we authorized to write a rule that says we can punish people for perjury if they have an oath administered by us over the phones?

I mean, if our rule says that we can do that, that this is a proper procedure here; therefore, that person shouldn't be subject to being punished by our court and our rules.

Now, is that an attempt that is unconstitutional at the United States constitutional level of an assertion of extraterritorial jurisdiction? Isn't that what the real issue is?

CHAIRMAN SOULES: Lee is just reminding me of something that we have already passed on. We have passed on this in the discovery rules that we already passed. We say the witness has to be sworn by somebody authorized to administer oaths in the jurisdiction where the witness is situated, but the court reporter can take the testimony whereever.

MR. LATTING: Let's eat.

CHAIRMAN SOULES: Okay. Anything further on this by way of input for the rewrite? Chip Babcock.

MR. BABCOCK: Yeah. One thing, whoever is rewriting this, you know, it is not an either-or situation where the witness is in one spot and all the lawyers are in the other. Oftentimes, in fact, mostly, if it's a witness, say, of a representative of a company in a foreign state, the defense lawyer will be there with the witness, and the plaintiff's lawyer will be back in Texas. I took one of those last week.

PROFESSOR DORSANEO: Boondoggle.

MR. BABCOCK: I don't want to put that in the record, but --

CHAIRMAN SOULES: So we don't want to foreclose that accommodation.

MR. SALES: Luke, I just wanted to just clarify I understood this by agreement of all parties. Are we saying that if one party says, "I have got a fact witness. He's a cooperative guy, and he's willing to do

this," and one party objects, I have got to then go through the letter rogatory process? I just want to make sure that we are not saying that. I don't think that's what the intent is, right?

MR. BABCOCK: No.

CHAIRMAN SOULES: Do we authorize the trial judge in the court where the case is pending to order this process?

MR. JACKSON: Wouldn't it be done just through a motion to quash if somebody didn't want to do the deposition?

MR. BABCOCK: Yeah.

MR. JACKSON: And you would just file a motion to quash.

CHAIRMAN SOULES: If our only accommodation of this multi-venue deposition is by agreement then if you don't agree, where is the trial judge's authority? Say "by agreement or order of the court."

MR. LOW: If you don't agree, you've got to follow one of the other three methods.

MR. LATTING: Why don't we do that, Luke, just say "by agreement or order of

the court"?

CHAIRMAN SOULES: Any problem with that?

MR. LATTING: No. That's a good idea.

CHAIRMAN SOULES: The judge can make somebody, in effect, agree.

MR. SALES: I just don't think if you have got a cooperative fact witness, and somebody just doesn't want to get that -- force you to go through -- and I tell you, you know, letters of commission, letters of rogatory, for some countries that's a meaningless tool. You could never get it served. You could never get the witness.

CHAIRMAN SOULES: Okay. "Agreement or order of the court."

MR. LOW: Yeah.

CHAIRMAN SOULES: Anything else?

PROFESSOR DORSANEO: You would never have to use a letter of rogatory. You could always use the notice. You don't have to get to the letter of request, letter of rogatory under this draft. You could just

always use the notice if you don't have an agreement, like normal.

CHAIRMAN SOULES: Under the way this is drafted now?

PROFESSOR DORSANEO: Uh-huh. Yeah.

MR. JACKSON: Yeah. You file a motion to quash if you didn't like the notice.

MR. BABCOCK: Right.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: Yeah. David, one thing, I'm certain that I'm being overcautious, but when you say, "The deposition must be taken in that jurisdiction under the Texas rules for discovery regarding time limits, conduct," et cetera, you are not saying, are you, or you do not intend to say that this rule is intended to override the rule of privilege that may apply in that foreign state?

For example, it's just an area I deal with a lot, there are states that have what are called shield laws which shield reporters from having to reveal certain information, and some of those states are absolute shield laws,

absolute privileges, and we don't have that in this state. This is not intended to override that. If I have got a guy in New Jersey who's being deposed, he still has his rights under the New Jersey privilege statutes, doesn't he?

MR. JACKSON: Well, this was intended to just say you have got to do it under the rules that we have drafted here in Texas. The time limits still apply. Your three hours, your 50 hours, all of those things still apply.

MR. BABCOCK: Right.

CHAIRMAN SOULES: Don't we have a 3M case or something case out of the Supreme Court?

PROFESSOR CARLSON: Ford Motor vs. Lincoln.

CHAIRMAN SOULES: Ford, Ford Motor and Lincoln. Okay. Anything else on this before we go to lunch? All hands are up. Who else wants to speak?

All right. Lunch is at the back of the room. Let's take 30 minutes. Be back here by five minutes after 1:00 o'clock.

(At this time there was a

recess, and the proceedings continued as reflected in the next volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 7, 1997, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,098.75.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 11th day of March, 1997.

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