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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 7, 1997

(AFTERNOON SESSION)

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Taken before William F. Wolfe, Certified Court Reporter and Notary Public in Travis County for the State of Texas, on the 7th day of March, A.D. 1997, between the hours 1:15 o'clock p.m. and 5:30 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

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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CHAIRMAN SOULES: Okay. Let's get on the record. This is 188, and this is David's project along with Mark and Bill and any others. Let's go to 188 and get any further instructions here. Carl.

MR. HAMILTON: On Page 1, the highlighted portion says "on notice as provided in Rule (current Rule 200)," and so forth, "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 there." Does that mean we get a choice?

What if the procedures for taking the deposition, time elements and so forth are different in the two jurisdictions? How do we tell which jurisdiction applies? Is that what that's intended to do, David, is give a choice?

MR. JACKSON: No. The way I thought this would be worked is that you complied with their rules first, as far as who can do it, the court reporter or the person authorized to do it. And then if you didn't do it that way, then you could do it under the

Texas rules and take your own court reporter and do that. But it's the ability to take it.

MR. HAMILTON: But it seems to me that the phrase that's talking about "under the laws of" applies to the taking of the deposition and not just the person that's authorized to.

MR. JACKSON: Well, but that could stretch into that Hague Evidence Convention rules too. You just can't ignore those rules under the Hague Evidence Convention that say in some jurisdictions it's illegal to take it. So if you're doing it under the rules of, say, Germany and it's illegal to take a deposition, then you don't get to the Texas rules.

MR. HAMILTON: Well, let's just say you're doing it under the laws of Louisiana and they only give you two hours and Texas gives you unlimited hours.

CHAIRMAN SOULES: Carl, let me see if I can fix this for you. Go down to the fifth line of the shaded area where it says "under the law" and insert "a person authorized" before that. Now, does that help

you?

MR. HAMILTON: Yeah, if that's all we're attempting to do.

CHAIRMAN SOULES: That's all we're talking about. We're describing the person.

MR. HAMILTON: Okay. The next thing I have is on letters rogatory. I know the old rule says this, but most letters rogatory have to come from a judge, from one judge to another judge, and I just question whether any foreign judge is going to pay much attention to a letter rogatory from a clerk, because historically, and at least I think by federal statute or maybe it's just common law, it's from one judge to another.

CHAIRMAN SOULES: Does anybody know that?

PROFESSOR DORSANEO: Well, the tradition started out, you know, judge to judge. And I don't know why we drafted it to deal with clerks unless we just didn't want to bother the judge.

CHAIRMAN SOULES: Bonnie, did you have something in mind on that?

MS. WOLBRUECK: No, sir. But the present rule says that the clerk issues the letter rogatory presently.

MR. HAMILTON: That's just the present rule. I don't know how long that's been there. I didn't know if that's something we wanted to fix.

CHAIRMAN SOULES: What should we do?

MR. HAMILTON: Well, Bill said earlier he didn't think that we would get to that, you know, if you did it on the notice provision. But I can conceive of a situation where the notice provision might not be appropriate or recognized or something and you would have to go to the letters rogatory.

PROFESSOR DORSANEO: Well, you may need the assistance of the local judge if the deponent doesn't want to be deposed.

MR. BABCOCK: Why don't you put in there "by application of the clerk of the court or the court," so that the person trying to get the testimony has the alternative.

PROFESSOR DORSANEO: Why not just say "the court"?

CHAIRMAN SOULES: That's fine with me.

MR. HAMILTON: That's what I would say, "the court," instead of "the clerk," because it really needs to come from the judge.

MR. MARKS: Well, would we have to change another rule then?

MS. WOLBRUECK: No, I don't think so.

MR. HAMILTON: On Page 3, the first paragraph there, the highlighted portion where it says, "The deposition must be taken in that jurisdiction under Texas rules for discovery," and so forth, conduct, signature and certificate of the officer, I'm not sure exactly how that works.

We took a deposition in California recently where it was not taken pursuant to any agreement that an unsigned copy could be used. The witness has failed to go sign the deposition, and the court reporters out there by law are prohibited from releasing the deposition or even filing it in the court unless every lawyer who was present at the

deposition signs an authorization for them to release it. So I'm not sure how this would fit that situation, if this is an attempt to say to California you've got to follow our rules on this or I'm not going to do it.

MR. JACKSON: Is it a Texas case?

MR. HAMILTON: Yeah, it's a Texas case.

CHAIRMAN SOULES: You can't get a copy of the transcript?

MR. HAMILTON: We have copies, but they won't release the original, and the court reporter won't certify it unless all the lawyers sign off on it agreeing that they can release the unsigned copy and certify it.

MR. JACKSON: That's crazy.

MR. MARKS: Can you take your own court reporter out there?

MR. HAMILTON: I suppose you could, yeah.

MR. MARKS: Would that be a problem?

CHAIRMAN SOULES: If it's San Diego or Napa Valley, David probably won't

care.

MR. McMAINS: What if David goes out there and steals it from the court reporter?

MR. JACKSON: It seems like you all could agree to substitute a copy.

MR. HAMILTON: Well, we haven't gotten to that stage yet, but we probably can. I just didn't know whether this was --

MR. JACKSON: This is exactly why this was put in there, because one of the people who wrote in said they had a problem with the court reporter refusing to give it to anybody but the clerk, because this 188 says that it has to be filed with the clerk, and the clerk doesn't want it. So we just incorporated all of our rules for signing and filing. What you should be able to do when you get this rule is send them a copy of our Texas rules and say, "This is how we want you to do our deposition in our lawsuit from Texas."

MR. HAMILTON: I guess it doesn't hurt to leave it in there. I'm not not sure that another state will recognize it,

but it's worth a try anyway. They tell me that there's a law that prohibits them from doing that in California.

MR. LOW: But then you would come back to this court and file a motion that our procedures be followed and a copy could be substituted, so you have to come back to this court for help. Let him keep his original and don't pay his bill.

MR. MARKS: Yeah. Tell him our procedure doesn't allow us to pay the bill unless we get the original deposition.

CHAIRMAN SOULES: Our concept, though, is that before a copy can be used it has to have the court reporter's certificate on it. That's what the hang-up is. They've got copies, but they don't have a copy with the court reporter's certificate on it. And I suppose some judge could cut you some slack, but the rule is pretty plain on that in 205.

MR. SALES: It seems that part (e) here takes care of that anyway.

CHAIRMAN SOULES: Where is that? Oh, (e) on 188.

MR. JACKSON: That's for

letters rogatory and letters of request.

CHAIRMAN SOULES: All right. What else, Carl?

MR. HAMILTON: That's all I have.

CHAIRMAN SOULES: Okay. Anything else's on 188? The committee will continue to write and work on that for us. David, it's in your custody, this assignment.

Let's go back to Alex with venue. Are you ready?

PROFESSOR ALBRIGHT: I'm ready, but I'm not sure where we are.

CHAIRMAN SOULES: Okay. Neither am I. Let me see.

PROFESSOR ALBRIGHT: Did we finish with Rule 86?

CHAIRMAN SOULES: Where is that? I'm trying to get to that. Here we go.

PROFESSOR ALBRIGHT: As I heard, Rule 86 got sent back to the committee. Is that correct?

CHAIRMAN SOULES: Is that what we did?

MR. McMAINS: Well, we quit

basically after you left.

HON. SCOTT A. BRISTER: Well, we decided to try to fix the Paragraph 10 problem by addressing the more general problem of whether the judge can reserve ruling on the motion to transfer venue and rule on other things first, and it wouldn't be a waiver to do other things first.

MR. McMAINS: Yeah. We kind of jumped past this problem, is what we did.

PROFESSOR ALBRIGHT: Then we'll just continue to address it after a redraft. Do we want to take a sense of the Committee on how you want to deal with fraudulent --

MR. McMAINS: What did we vote on doing, Luke?

CHAIRMAN SOULES: Okay. As sort of a larger way to accommodate a number of the things that we've been talking about, Elaine, in your absence, and of course, obviously you all have to work together on this, is going to take on the work of the committee. There was no dissent from writing something that does -- that the court on its own motion or on motion of either party can

delay ruling on a motion to transfer venue, and that delay will not cause any waiver of the movant's motion if the movant thereafter participates in any proceedings in the case. This will allow the trial judge in a more complicated situation, which is pretty much what we were talking about, several different variations of complications, to make a decision to put the hearing on the motion down the line and rule on a motion for summary judgment or things that might come up that would demonstrate fraudulent joinders.

Now, Paul Gold asked that additional writing be appended to that, which Elaine and you will do, that there will be a cutoff on amending the motion as a subpoint, but that is the motion, no matter what happens after that, so that it's not ever changing and evolving. Now, how the committee will ultimately respond to that particular part of it, I don't know, but we wanted to look at it.

And then, let's see, there was another piece of it. Oh, that since the compulsion to hear today is driven by waiver if you don't here it first, there's really no rule that

says when it is to be heard, so there would be a time for the hearing on the motion to transfer venue set in the rule or something to make that happen, so that unless it's extended by order of the court it would be heard still up towards the front of the case. Now, that would hopefully create an environment in which these extraordinary circumstances could be perceived and dealt with by the parties and the judge on an ad hoc basis in a particular case.

And when we finish that, I think the only piece of that to which there was any perhaps dissent was a piece that Paul had in there about closing the motion at some point. So that's going to obviously be written for us to look at, and then we stopped. And that's the only thing we did really after you left here.

PROFESSOR ALBRIGHT: Well, maybe what we should do is take all this back to the committee and consider this Section 10 together with that.

CHAIRMAN SOULES: Speak up.

PROFESSOR ALBRIGHT: Maybe we should take all of this back to the

subcommittee and reconsider Section 10 with that and then bring that back to the Committee in May. Then we could move on to Rule 257 right now.

CHAIRMAN SOULES: All right. Is that acceptable to everyone? No dissent.

Buddy, did you want to say something? Buddy Low.

MR. LOW: Can I make one suggestion? You mentioned without waiver by participating in any proceeding, but I think you probably need to add "seeking or obtaining relief," because that's the same thing they really -- or affirmative relief is the thing that they really worry about, and they say, well, "participating" may be sitting in on a deposition. I think you might consider that included.

CHAIRMAN SOULES: Did you get that, Alex? Participating in any proceeding or seeking or obtaining or resisting affirmative relief, something like that. It's going to take a little bit of research to pick up the waiver cases where if you do this and you're out, to be sure that whatever the

courts say throw you out is no longer a basis for waiver of the motion. Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: I just have one question, and I should have been involved in this conference yesterday, but in this March 6, '97, draft on the last page of this proposed Paragraph 11, why does it say in the draft, "The motion need not specifically deny pleaded venue facts"? I can see why you wouldn't need to seek transfer to another specified county of proper venue, but why wouldn't you in this motion deny venue facts too?

PROFESSOR ALBRIGHT: This was the language that was approved from January. And the reason it's in there is because it was all part of the discussion that a defendant who is objecting to joinder of a party should not have to specifically deny anything and should not have to ask that a case be transferred anywhere. They should just be able to go in and say, "You're not a plaintiff who can join in this case."

PROFESSOR DORSANEO: Well, I'd

have to go back and read that transcript. But does that make sense in the context of an additional plaintiff who is asserting not that they need to be there because it's essential to their rights, but that they can be there because venue is proper?

PROFESSOR ALBRIGHT: I'm not sure it does make sense. I think you're right. But I guess this is included in there because of subcommittee discussions and discussions here, so it just kind of evolved. But I think it's a good idea to reconsider it.

CHAIRMAN SOULES: I had another question about Paragraph 11 that starts off "If a plaintiff." Does "plaintiff" include cross-plaintiffs -- well, not cross-plaintiffs, I guess -- well, maybe cross-plaintiffs. Cross-plaintiffs and third-party plaintiffs?

PROFESSOR ALBRIGHT: What's a third-party plaintiff?

CHAIRMAN SOULES: A defendant who tries to bring in a third party.

PROFESSOR ALBRIGHT: Okay. Well, then the defendant is saying --

CHAIRMAN SOULES: The third-party plaintiff -- the third-party defendant wants to challenge venue.

MR. McMAINS: The statute --

PROFESSOR ALBRIGHT: That would be under statutory venue.

PROFESSOR CARLSON: Doesn't the statute say venue in the main suit controls?

MR. McMAINS: They have a right to sue them if they're in there under this venue statute.

CHAIRMAN SOULES: If the claims are joinable, right?

MR. MARKS: Do you have a copy of the code?

PROFESSOR DORSANEO: The statute has some other weird stuff in that new amendment about the subject matter of the action. I don't understand what the legislature thought the rules provide.

CHAIRMAN SOULES: It basically sets, I think, the same standard as for a cross-action under the Rules of Civil Procedure.

PROFESSOR ALBRIGHT: 15.062

says venue of the main action shall establish venue of a counterclaim, cross-claim or third-party claim properly joined under the Texas Rules of Civil Procedure and any applicable statute.

PROFESSOR DORSANEO: But then look at (b).

PROFESSOR ALBRIGHT: If an original defendant properly joins a third-party defendant, venue shall be proper for a claim arising out of the same transaction, occurrence or series of transactions or occurrences by the plaintiff against the third-party defendant if the claim arises out of the subject matter of the plaintiff's claim against the original defendant.

CHAIRMAN SOULES: It's actually the cross-action standard. It's the old rule of civil procedure cross-action standard.

MR. McMAINS: If it's appropriate to bring them in in a cross-action or to bring the claim in a cross-action, then they've got venue in the main action.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: It's the

same as multiple defendants.

MR. McMAINS: Well, that's so there are no venue issues on the new PRP procedure, the potentially responsible parties.

CHAIRMAN SOULES: Let me see if this works, and this is a real-live case: We've got plaintiffs who have sued two defendants. One of the defendants has filed a cross-action, we say unrelated to plaintiff's claim, and we filed a motion to transfer venue, sever and transfer venue, because if it doesn't belong in the case, we're entitled to transfer venue. So as a co-defendant, we are moving to transfer venue of a co-defendant's cross-action. Is that accommodated by the words in this Paragraph 11?

PROFESSOR ALBRIGHT: This would not be -- that situation would not come under Paragraph 11.

CHAIRMAN SOULES: I don't know if we've got a rule to fix it, which brings up another really interesting point, and that is, how do we get transferred before we get severed? If we ask for severance first, have

we asked for affirmative relief and waived venue? No answer, unless this other thing we talked about makes it through the wickets.

PROFESSOR ALBRIGHT: Are you saying if you have a motion to transfer alleging that it's not properly joined?

CHAIRMAN SOULES: Right.

PROFESSOR ALBRIGHT: It's not addressed under the current rules, but people deal with it. I think it's best not to deal with it specifically under these rules.

CHAIRMAN SOULES: It's pretty painful dealing with it without any rules, but okay, maybe it's too complicated.

Okay. Anything else on 86? If a party is entitled to a transfer -- well, that's transfer of venue of a claim that's in a case, which is another problem.

MR. McMAINS: Luke, did we ever resolve -- because I think we stopped talking about it. We went to this discussion about the waiver when we were in the issue of whether or not there should be any language in there prohibiting rehearing. And then we talked about broadening the ability to

postpone and not waive and whatever, but it sounded like kind of as a way back-door not having to permit rehearings. But I'm not sure, did we ever really determine if we want to keep what we had more or less on the no motions for rehearing? Do we want to -- I mean, since we're going to have to redraft it, or are we going just abandoning changing that to accommodate Judge Brister's concern and Sarah Duncan's concerns?

CHAIRMAN SOULES: We would have to write the law that there either is or there is not a right to rehearing, because that's not decided and it's not in the rule. If Paul's ideas is consummated, there would be a time when the motion closed, which would suggest that no motion after that or amended motion could be filed, no further motion could be filed.

MR. McMAINS: There's no further provision in our current rules for amending a motion to transfer. I mean, if you do it wrong, you do it wrong, and usually you lose. So you don't get a chance to fix those anyway.

CHAIRMAN SOULES: And I'm not resistant to the idea. I'm just saying if we're going to decide rehearing or no rehearing, we're writing on a clean slate.

MR. McMAINS: But our current rule says what it says.

CHAIRMAN SOULES: It says no further motion.

MR. McMAINS: And I'm agreeing with you. I'm not disagreeing with that. The question is, was it your sense that we were leaving that in this rule? That's what I was trying to figure out.

CHAIRMAN SOULES: I thought so, particularly if Paul's idea carries. If Paul's idea carries, then there would be a motion, a closed motion at some point, and there would be no further motion.

Am I missing your point? Ask your question again.

MR. McMAINS: The only thing I'm getting at is, I don't think as a Committee we ever voted one way or the other on the issue of do we want to say that the trial -- I mean, is there anything we want to

do to fix this rule to either intimate to the judge that he has the power to do something, if he's made a mistake, to change his mind?

CHAIRMAN SOULES: To rehear?

MR. McMAINS: On rehearing. Or do we take the position that that's something the court is going to have to decide based on the current language, which we're not going to change to accommodate anybody?

CHAIRMAN SOULES: I think we ought to say to make it clear or to clarify it, I don't know if it would make it clear, what is it, current 86 says no motion -- I tried to mark it. Let me see. No further motions to transfer shall be considered, but this shall not preclude rehearing of the original motion, or something to that effect.

MR. McMAINS: Well, again, the problem we have is, which we didn't discuss, were only just barely getting into, was because of the change in the statute we now have -- there now are abilities of later added parties to file motions that was very clear that they didn't have the right to file under the old statute. I mean, the old statute was

intended to basically say you decided this early in the case and you move on. The new statute clearly says that if you're a newly added party you can file a motion, particularly on the inconvenience grounds, and make the challenge.

What we've done is limited the ability to file that motion to grounds that have not been asserted before, but I don't think there's any way that you can't at least allow that further consideration given the statute, do you? Isn't that right?

PROFESSOR ALBRIGHT: That's the way I thought about it.

CHAIRMAN SOULES: The new defendant can't raise grounds previously asserted by another defendant; is that what this says?

MR. McMAINS: That's what it currently says.

PROFESSOR ALBRIGHT: Another way is you could just -- Sarah Duncan and I talked about it, that perhaps a defendant could argue if that defendant waived my right to transfer on grounds that that defendant has

asserted in a previous motion, the reason they waived it, they got that motion overruled, is because they're incompetent, and so I have a right to assert any grounds that I want to assert in a later motion. And so we have -- Sarah and I throw our hands up and just allow anything alternative, which is on Page 4 of the March 4th draft.

CHAIRMAN SOULES: That makes more sense to me. I mean, this is a plaintiff adding somebody. If the plaintiff adds somebody that's got the right program --

PROFESSOR ALBRIGHT: What this one does on Page 4 --

CHAIRMAN SOULES: -- to defeat venue, they're in trouble.

PROFESSOR ALBRIGHT: -- on Page 4, it says the court may consider any timely motion filed after ruling on the prior motion, and may reconsider any previously overruled motion.

MR. McMAINS: That's too broad.

CHAIRMAN SOULES: I think it ought to be by a new party.

PROFESSOR ALBRIGHT: Well, it

was intended to be limited. It was intended to mean that when a new party comes in, they can file any motion to transfer before they answer on any grounds that they want to and then get the court to consider it. And the court can reconsider any previously timely filed motion.

CHAIRMAN SOULES: But the old parties can't file a new motion.

PROFESSOR ALBRIGHT: The old parties cannot file a new motion.

CHAIRMAN SOULES: That sounds smart to me. I don't know how you -- let's debate it.

PROFESSOR ALBRIGHT: And this on Page 4, I kind of -- I wrote this very quickly after Sarah and I said, hey, maybe we'll just throw it all out, and I did not spend much time on this. So if this is where we want to go with it, it needs some more careful drafting.

CHAIRMAN SOULES: Well, that subsequent situation could make it where the judge really feels like the judge has to transfer the case, and then you sit there and

try a case? That seems to me to answer several of the concerns I heard around the table, but let's get everybody involved here.

Does anybody object to that scheme, then, where plaintiff adds a new defendant; the new defendant can raise any challenge to venue that the new defendant wants to raise; the judge hears that; that also triggers the opportunity for the judge to reconsider -- if the judge doesn't already have the power -- to reconsider motions, but the parties that have already had their shot at venue can't take a new shot themselves? Is anything wrong with that? Does anybody see anything wrong with that? Rusty.

MR. McMAINS: Wait a minute, when you say "reconsider," that's inconsistent, I thought, with the idea you said that the party, if they tried their venue issue, lost, a new party comes in and all of a sudden that reinvigorates that motion? So you kind of like never have any reason to hear a motion to transfer until you finally got through adding everybody, because it just reinvigorates the issue and carries it along

with the case.

CHAIRMAN SOULES: Well, that gets back to -- here are my differences: You don't believe that the trial judge can rehear an original motion for transfer that's been overruled. I think the judge can already in these rules.

MR. McMAINS: I'm not saying it can't rehear it. Again, we were talking about --

CHAIRMAN SOULES: Rehear or reconsider.

MR. McMAINS: We're not supposed to be filing motions for that purpose. I don't think we have any disagreement on that.

CHAIRMAN SOULES: Well, yes, that's what I'm saying, that if the judge can reconsider, it's within his plenary power to go back and say, "Now that I've seen your motion, I think that motion is probably good too, so I'll go with it, even though I overruled that motion originally, because I'm within my plenary power and the Supreme Court has got a case that says I can do it at least

in some circumstances."

MR. SALES: You would almost have to have that power, because then you'd have the anomalous situation where some defendants are out and some are in on the same ground. I mean, I don't think you want to do that and split a case.

MR. McMAINS: You can do that under the current rules. The judge has the power to send the case anywhere he wants to.

If I file a lawsuit against a defendant that I've had in there for a year and we've been doing everything and then that defendant adds another defendant on a cross-action claiming that he's the one really responsible, and you do that under Chapter 33 and the tort reform garbage on PRPs, and then I have so much time regardless of the statute of limitations once they're added, the statute of limitations is basically told for me, and I can bring those parties into that lawsuit, and now they're saying, "Oh, okay. Well, we're going to file a motion to transfer and we're going to get the transfer." Okay. So even though this party never filed a motion in the

first place, that's what this procedure would allow you to do, and that's silly.

CHAIRMAN SOULES: That's right.

MR. McMAINS: I mean, if I'm a plaintiff, I didn't want this other party in there in the first place. It's the legislature that had them in there, and now that person is going to be able to screw up the venue as to everybody? We don't have to, because the judge can send that person away to another county and talk to the first ones and say, "We'll go ahead and try that lawsuit first."

CHAIRMAN SOULES: Anyone else? Mark Sales.

MR. SALES: I was just going to add, that's for the third-party situation. What about when you join another defendant, though, the plaintiff?

MR. McMAINS: That's not just a third party, because when they bring somebody in, that activates my right to sue them. I have a very short period of time in which to sue them once they appear, even though I didn't sue them initially. And if that

defendant is going to take the position they're the one that's responsible, then I have to sue them pretty quickly assuming that they do that late in the game when limitations is otherwise run or is about to run.

PROFESSOR ALBRIGHT: So Rusty, aren't you saying in that situation that new defendant is going to argue convenience and justice transfer, right, because there aren't any --

MR. McMAINS: No, I'm saying that --

PROFESSOR ALBRIGHT: Because venue is proper as to that defendant under the statute.

MR. McMAINS: That's right. That's what I believe, except --

PROFESSOR ALBRIGHT: So the only argument they would have for transfer is convenience and justice.

MR. McMAINS: Not under yours. Suppose they want to take the position that the original venue was not good even though it was not challenged. Okay. Under the non-waiver provisions, then the party that's

brought in says, "Wait a minute, even though he didn't ever challenge venue, didn't ever file a motion to transfer, I want to contest venue because this guy" --

PROFESSOR ALBRIGHT: Well, you lost that in the legislature. There's nothing we can do about that now.

MR. McMAINS: I didn't lose anything. I don't know what you're talking about.

PROFESSOR ALBRIGHT: Well, the legislature has said that that new defendant has a right to bring a venue challenge.

MR. McMAINS: Correct, as to him. The legislature did not say that it affects the other parties.

PROFESSOR ALBRIGHT: Okay.

MR. McMAINS: That's what you're talking about. The legislature does not say that it affects the party who didn't make the motion. It the judge has always had the power to sever. Nobody is suggesting that you're waiving their rights, you know, but that doesn't mean to say that it reactivates a defendant who did waive his right.

PROFESSOR ALBRIGHT: So I guess what we're saying is that we want to give the power to the judge to transfer the entire case, and you're saying the judge should not have that power? Is that right?

MR. McMAINS: I guess, in the final analysis. I don't know.

CHAIRMAN SOULES: Well, that's an ineffective --

MR. MARKS: I got lost here someplace. Let's say I bring in a third-party defendant. That gives you the right as a plaintiff to sue that person directly. Now, that third-party defendant does not have the right to challenge the venue?

PROFESSOR ALBRIGHT: They do.

MR. MARKS: They do have the right?

MR. McMAINS: Yeah, they do have the right. The question is whether or not you should have the right.

PROFESSOR ALBRIGHT: So the third-party defendant files a motion to transfer venue and there has never been a motion to transfer venue in that case.

MR. McMAINS: Right.

PROFESSOR ALBRIGHT: Well, no, under the rule we're talking about, there would have have been a previous motion to transfer because you're reconsidering it.

CHAIRMAN SOULES: Not necessarily. You would have to have one to reconsider it, but if you don't have one, you've still got a motion, the new party's motion.

PROFESSOR ALBRIGHT: You still have a motion to transfer. The issue Rusty is --

MR. McMAINS: That's actually a different or an additional issue, whether or not --

PROFESSOR ALBRIGHT: The point that Rusty is raising is when this third-party defendant files a motion to transfer venue and the judge grants it, should the judge transfer the whole case or only the case as to this third-party defendant that has the successful motion. I would think that we would want to encourage the whole case to be transferred. I can understand why Rusty doesn't want the

whole case transferred, but --

MR. McMAINS: Well, it's not an issue of what I want or don't want. It's an issue of the statute says that a party cannot waive for any other party. It doesn't say that it reactivates; that it basically unwaives through another party. That's a much broader interpretation of what the statutory language is to suggest that because we are giving rights to somebody that's brought in, new certain rights that he never asserted, that maybe haven't been asserted by anybody before, and say, "I don't lose because that person has lost," to protect his rights, that's fine. That's what the statute says. There's nothing, however, in the statute that then says that not only that, you have resurrected his otherwise waived rights.

CHAIRMAN SOULES: That's not in the statute, so that's new policy, if it's made, but it's not in conflict with the policy that's already been made. Buddy Low.

MR. LOW: Luke, it looks like to me that, first of all, we can't do anything that would restrict the judge's power to

change his ruling, to just rehear something on his own. The only thing I know he can't do is he can't withdraw the granting of a summary motion he granted in the middle of trial. But other than that, he can change his judgment within his plenary power. So really it looks like all we're looking at is what motions a person should file and when and what is the effect of not filing them. Is that -- am I wrong?

CHAIRMAN SOULES: Essentially I think that's right.

MR. LOW: I understand where we're going then.

CHAIRMAN SOULES: And I guess there are as many angles to this as somebody can consider, because you're talking about multiple parties, and anytime you talk about multiple parties, you've got all these permutations and combinations that people an come up with. You can write a simple rule, or you can write one that tries to deal with all these permutations and combinations, or we could have no rule and just try to somehow get it ironed out.

What we were talking about, I'm not necessarily espousing it, and I sort of said I thought it was fine, but it doesn't make any difference what I think. What we were talking about, and maybe it's a way to get the discussion going, if we want to talk about this at all, is the only reason I'm reiterating it, is that when a new party is added, should that party be permitted to raise every venue challenge that that party could have raised if it had been the original defendant. And that's A. B, should the judge, if that sort of a motion is filed, be permitted to rehear or reconsider a previously filed motion of another defendant that's been overruled? And then the other one is should the judge be able to transfer the case as to the original defendant as well as the newly added defendant when only the newly added defendant challenges venue and the original defendant never did?

Now, I think that summarizes the circumstances that we've come up with so far. Does anybody want to talk about that?

MR. SALES: Isn't A that they

have an absolute right under the statute now, though? I mean, that's not anything we can change, right?

PROFESSOR DORSANEO: Well, it depends on how you read the statute. I'm not reading it the way you all are reading it, period.

MR. SALES: Well, if you make the assumption that they have an absolute right to raise any ground if they're brought into the suit, then you're going to end up with an anomalous result that maybe the judge is going to throw that one out on venue on the very same issues that he kept the first one in on. I don't think you want that result.

The more difficult one is where the guy never raised it to begin with, kind of like waived it almost. I think that's a trickier question.

CHAIRMAN SOULES: I don't think it's unprecedented in the case law to have a judge caught in a situation where he's got venue as to one defendant but he's got to transfer it as to another, but it's exactly the same event because one party took

advantage of their procedural rights and another party filed to take advantage of their procedural rights.

MR. SALES: It's just a waiver.

CHAIRMAN SOULES: It has happened. It's kind of silly, but it has happened. And this is one way to, I guess, address that, and maybe there's a way to keep that from happening again, unless the judge wants to keep the first case.

MR. SALES: If the guy waived it, I mean, it's sort of like a waiver argument. If he never raised it, didn't bother to raise it and the time period is gone, you know, I can see that. I mean, that's a legitimate waiver. You know, you assume he knew what you were doing, but that shouldn't necessarily preclude the other guy who has an absolute right under the statute to challenge it.

CHAIRMAN SOULES: Well, the plaintiff has got a choice. The plaintiff doesn't have to add that new defendant in this case. The plaintiff could sue that same second defendant in the same county as the

first case, see how the venue motion goes, and then move to consolidate.

Now, Rusty did put an angle on his example there which would not permit that, because he had a situation where there was a third-party action that revised the statute. So his only choice would be to bring that claim in the original action, but he hasn't done it yet. Take your chances if he does it now.

MR. LOW: But Luke, wouldn't it depend on who -- in other words, the party -- if a defendant brings somebody in and does not file a motion, a venue motion, then I can see where they shouldn't be allowed to rely on somebody else's motion or after that point file a motion on their own.

CHAIRMAN SOULES: This says the judge --

MR. LOW: I know. Well, it's hard to tell the judge what he can't do. I've discovered that long ago and quit doing it. And so then the next question is Rusty's question, where I see also a difference there, where they bring him in, and then Rusty has to

bring them, you know, in, and then that should renew it if they are the initiating party. But I think if the plaintiff is the initiating party in bringing a new person in, then it ought to be fair game. He can consider it. So I considered two situations one way, and when the plaintiff takes the action on his own, then I think everybody in there ought to have a right to challenge venue.

CHAIRMAN SOULES: Well, every one of these situations has to do with the plaintiff making a claim against a party that had not yet been sued by the plaintiff.

MR. LOW: No. But he might do it merely to be the first one, or he may be the second one where a co-defendant brought them in. So he's not the initiating party to get that person before the court. If he's the initiating person to get that person before the court, then it ought to be fair game. He ought to consider that, and everybody else can come back in and all the dogs fight in one pack.

CHAIRMAN SOULES: Could I get some help on this one, which has come up a

couple of times as well: If the original defendant third-parties a person responsible, is the plaintiff compelled to bring their action against that third party in that action, or can they sue that third party --

MR. McMAINS: Well, again, this all deals with limitations.

CHAIRMAN SOULES: Forget limitations. Let's leave that on the side.

MR. McMAINS: Well, under the statute, if the plaintiff wants to sue them, they're supposed to sue them there. Now, if they're barred from suing them because of limitations but they're brought in within a period of limitations by the defendant, you've got so much time in which you can sue them anyway, even though you could not otherwise bring the action anywhere else. That's the way the statute is talking. It doesn't actually say, "You can't file suit elsewhere against these people," but implicitly the notion is, well, you didn't bring them in or weren't going to bring them in or weren't going to sue them at all. It's the defendant who sued them. And if they're going to sue

them, then they have to be somebody who qualifies as a potentially responsible party, and that means they have to sue them within limitations.

CHAIRMAN SOULES: My question, though, is if plaintiff sues defendant, defendant joins a PRP, must the plaintiff -- is the plaintiff precluded from ever suing PRP unless the defendant sues PRP in that original action?

MR. McMAINS: The statute says that. But I think clearly, if you were to go to trial in that situation, I don't -- I think, yes, you're barred by rule, you know. It's res judicata. You're estoppeled by rule. It's a claim you could have asserted because it's in the case.

CHAIRMAN SOULES: Well, you can assert a cross-action too, but you're not required to under Supreme Court authority.

MR. McMAINS: Yeah. But the difference is that a claim in a PRP situation is a claim that they're liable to the plaintiff. They're making that claim. That defendant is making that claim, and that is

going to be adjudicated in that lawsuit.

CHAIRMAN SOULES: You're probably right.

MR. McMAINS: I don't think there is any right to sue them somewhere else just because they did that, would be my guess.

CHAIRMAN SOULES: Okay. Does -- Bill says he hopes you're wrong, just so the record is at least confused or unclear on exactly what the consequence of that might be. Does anybody have any suggestions? Should we just drop it? Go forward with it? What do you want to do, Alex?

PROFESSOR ALBRIGHT: Can I ask Bill to say what he thinks the statute says? I get the impression that Bill thinks we're misinterpreting the statute and maybe we should go in another direction.

PROFESSOR DORSANEO: Well, I think in context the statute was meant to deal with the --

CHAIRMAN SOULES: What provision of the statute is it?

PROFESSOR DORSANEO: 15.0641.

MR. HAMILTON: And 15.062.

PROFESSOR ALBRIGHT: It was meant to deal with the waiver situation, but it says "including waiver."

PROFESSOR DORSANEO: It was meant to deal with former -- when it was conceptualized, no doubt it was meant to deal with former 15.061, which provided, you know, if the court has venue, then. But the first thing that happened in this change is that for multiple defendants, plaintiff has to establish proper venue against the defendant, so that's kind of one fix to this former 15.061 problem. And this separate 15.0641 thing looks to me like it ends up being, you know, just overkill because of what's already provided in the multiple-defendants section.

But where I think the interpretive problem that I was commenting on is in the beginning part, in a suit in which two or more defendants are joined. And I think that's language which is quite possible to mean originally joined rather than subsequent joinder.

PROFESSOR ALBRIGHT: Even if a plaintiff adds --

PROFESSOR DORSANEO: Well, I think that it's not at least clear that it means throughout the lawsuit plaintiff adding additional people, and I would certainly be willing to argue, you know, based upon an interpretation of similar language in the statutes, for example, involving aggregation of amounts in controversy, which begins essentially the same way, that this is talking about two or more defendants joined in the original pleadings, you know, rather than even addressing this subsequent matter.

MR. McMAINS: What does the rest of the sentence say? When two or more defendants are joined, what?

PROFESSOR DORSANEO: "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 defendant to properly challenge venue."

Now, to me the straightforward thing that it was directed toward was the original lawsuit issue where you would sue one friendly

defendant and one unfriendly defendant and one of them would waive venue rights. Then you say to the other one, "Your motion to transfer is no good because the court has venue."

PROFESSOR ALBRIGHT: But Bill, you would have the same problem as the Taco Bell case when they waited to join Taco Bell until after venue was determined.

PROFESSOR DORSANEO: Well, it might cover, you know, multiple -- it might cover the subsequently joined thing. I just don't necessarily think that it does.

MR. HAMILTON: Well, I think that's what it was for, to keep from joining a known defendant that can be sued in that county which is not the real target defendant, have the venue established, and then later join the real defendant which otherwise could not have been sued in the county.

MR. McMAINS: If you're suing -- if you -- the problem is that under the statute even now, if you properly sue that defendant, even though he may not be your principal target, he may only have $10,000 worth of insurance in a million-dollar case,

but you may then sue all the other defendants and you have venue as to all of them. And the question is, why should you have to relitigate that issue later on when the target is added, if that's what happens later on? You know, if that happens to be done in that sequence or whatever, why should you be entitled to redo that issue?

MR. HAMILTON: Well, that later added defendant may want to challenge venue on various grounds, inconvenience, unfairness.

MR. McMAINS: I'm not disagreeing that inconvenience or can't get a fair trial are issues that are different.

MR. HAMILTON: Well, why must it be a mandatory venue situation?

CHAIRMAN SOULES: A plaintiff's lawyer who really has a products case tells his friendly San Antonio doctor, "I'm going to sue you in Eagle Pass for this event." Then I'm going to add the products manufacturer -- you're going to waive venue. Then I'm going to add the products manufacturer, and don't worry, someday, somewhere down the line I'm cutting you loose, but that's the deal. I'll

cut you loose, but you don't challenge venue.

Well, it seems to me like 15.0641 takes care of that products manufacturer. That products manufacturer has a right to challenge venue in Eagle Pass, if they have a basis to challenge venue in Eagle Pass.

MR. McMAINS: But the basis of it is that the doctor wasn't properly joined in the first place.

CHAIRMAN SOULES: Wasn't properly joined in the first place. Well, if the doctor was properly joined in the first place, we don't have venue problems. It's over.

MR. McMAINS: And that's what I'm getting at, is that the fix that you originally endorsed reinvigorates the issues that are in terms of the propriety of that doctor in the first place. I mean, if you sue him in San Antonio and that's where he lives and he's properly joined, that ought to be the end of it. You ought not to have to keep raising this issue regardless of who keeps being added.

CHAIRMAN SOULES: Well, let me

step through it. The judge revisits venue as to the doctor, and the doctor is still in San Antonio and the surgery still occurred in San Antonio, and this new person had an absolute right to be elsewhere except for the fact that the doctor is in San Antonio and he's a proper defendant in a proper venue, so it doesn't take much to get rid of that problem.

MR. McMAINS: Well, it does if in fact -- you know, it can on the second end of the spectrum if in fact the target defendant or products defendant comes in and says, "I want to move for inconvenience purposes," and if that activates the trial judge's ability to send it to a place that -- it was properly brought in the first place, and he just says, "Well, it's inconvenient to that defendant, so I'm going to send everybody over to East Texas."

CHAIRMAN SOULES: Well, can't the judge do that under these rules right now? Plaintiff adds a new party. It's inconvenient to that party. It's clear that party is the big party. The judge looks, and

it's inconvenient.

MR. McMAINS: I don't think the statute says that.

CHAIRMAN SOULES: The first joined defendant is not stuck on inconvenience by not raising it early; isn't that right? The inconvenience piece of venue change can be raised at any time.

PROFESSOR DORSANEO: No. It has to be raised in due order.

MR. McMAINS: Yeah. That's not right.

CHAIRMAN SOULES: I'm thinking about prejudice.

MR. McMAINS: Yes. And that's different. 257 is different.

PROFESSOR ALBRIGHT: It may be that the statute doesn't compel the judge to transfer the whole case, but the judge can sever it and transfer part of it. But I think the judge would also have the right to transfer the whole case if the judge wanted to transfer the whole case.

CHAIRMAN SOULES: Where is that? That's another thing I've been trying

to come through here. In 15.063 it talks about "transferring the action," and I don't know what an "action" is, unless it could be the case. It could be a claim. Can the judge split parties up under 15.063 when one party raises a valid motion to transfer issue timely? Does anybody know the answer to that?

PROFESSOR DORSANEO: The statute is --

MR. McMAINS: Well, clearly they can -- you know, the judge can transfer as to some and not others, because that's actually what a lot of the intervention/ joinder stuff is all about.

CHAIRMAN SOULES: Certainly by way of intervention you are right. There's no doubt about it.

PROFESSOR DORSANEO: The former law on this subject, which was not codified in 1983, was that the court would look at the action in a multiple-defendant case, let's say, typically where one defendant had not made a plea of privilege and another defendant did make a plea of privilege, let's say, under the old general rule, and decide whether the

action was a joint action under a series of venue cases that had kind of an odd formula, whether the action was severable for venue purposes under this odd formula, and it would transfer the whole case if it was a venue-joint action type of case. And if it was a venue-severable type of case, then it would split it up.

Now, those cases don't make any sense to a modern proceduralist because what they say doesn't make sense in English. More recent cases trying to make sense of that would say, well, if the claims are interwoven in a really complicated sense, then the court could transfer the whole action rather than split it up.

15.061 had a provision at its end that dealt with this a little bit, and it's otherwise, I don't think, dealt with in here. And it's still like -- well, read those old cases and see what you think.

CHAIRMAN SOULES: So under 15.0641, if Defendant A waives venue, that doesn't waive it for Defendant B, new Defendant B or any Defendant B. And if

Defendant B challenges venue and if 15.063 says the action goes, that means that Defendant 1, who did nothing to protect his venue rights, goes with Defendant B to the new venue.

PROFESSOR DORSANEO: But there's a lot of reason not to believe much of what 15.063 says. It's probably the worst piece in the whole venue legislation.

PROFESSOR CARLSON: Luke, I really think the cases -- and I don't know, Bill, if you agree -- leave the discretion with the trial court in a severance issue. I don't think a transfer of the entire case is compelled, although I think that's the norm.

PROFESSOR ALBRIGHT: Part of the purpose of the 1982 venue was to keep the whole lawsuit together, if possible, right?

PROFESSOR CARLSON: Once upon a time.

MR. McMAINS: Yes. But part of the purpose of the tort reform statute was to split the damn thing up.

PROFESSOR DORSANEO: The part that kept it together was 15.061, the part

that's now gone.

MR. McMAINS: Right.

MR. MARKS: That says something, doesn't it?

CHAIRMAN SOULES: All right. Well, are we doing anything here?

PROFESSOR ALBRIGHT: Let's just say I have a lot of direction to take.

CHAIRMAN SOULES: What?

PROFESSOR ALBRIGHT: I have a lot of direction to take.

MR. MARKS: A lot of directions.

PROFESSOR ALBRIGHT: Yeah.

PROFESSOR DORSANEO: I think the sentence that Alex drafted at the end of the proposal that she presented to begin with, without regard to what the statute means, is a good starting point, saying the court can reconsider under some circumstances and the first circumstance that, you know, it was a legally incorrect determination, you know, that kind of makes sense to me; that a judge ought to be able to recognize that he or she made a mistake and correct it before it gets

corrected on appeal.

Now, the dismissal of a party, I don't like that one. And as I tried to say clumsily this morning, that I like the idea of people getting reconsidered if what they did is fraudulent or maybe meets some lesser modern standard that would be the equivalent of, you know, a frivolous pleading standard, you know.

If somebody did like what happened in the case that I described, well, they ought to perhaps get reconsidered. But it's possible that just a general reconsideration would be okay, although I have resistance to that. I don't like that for some reason that I can't fully articulate, except that I suspect that there will be a lot of requests to reconsider that are themselves games. So I would suggest that Alex go back and work on that sentence and see if it --

PROFESSOR ALBRIGHT: And see if I can solve all of these problems that we've talked about?

MR. McMAINS: In one sentence.

PROFESSOR ALBRIGHT: I will be glad to try if we can then move on to

something else.

CHAIRMAN SOULES: If you're ready to move on, we're ready to move on. Do you have anything -- well, you've said it. You're ready to go. What do you want to go to now, Alex?

PROFESSOR ALBRIGHT: If anybody has anything else, I don't mean to cut off the debate.

CHAIRMAN SOULES: I meant if you're satisfied that you've got the issues up in the air, and that's probably about all we're going to accomplish on this today, we're obviously not going to try to write this in the Committee as a whole, then we're ready to go on.

PROFESSOR ALBRIGHT: Okay.

CHAIRMAN SOULES: What's next on your list?

PROFESSOR ALBRIGHT: Rule 257.

CHAIRMAN SOULES: Rule 257.

PROFESSOR ALBRIGHT: And I did not bring a red-lined draft because it was so different from the current rule that it really didn't make much sense. I forgot to bring my

rules today, but you might want to look at Rule 257, 258, 259, et cetera.

CHAIRMAN SOULES: Okay. Do we have those in the package?

PROFESSOR ALBRIGHT: Yes.

CHAIRMAN SOULES: Okay. Here it is. Thank you. New Rule 257, Draft 3/6/97?

PROFESSOR ALBRIGHT: Correct.

CHAIRMAN SOULES: One page. Has everybody got that? Okay. Alex, go forward.

PROFESSOR ALBRIGHT: What I did here was put all the rules together on motions to change venue for an unfair forum. I made it just a motion practice where the party, which could be any party, can file a motion to change venue. I said they can file it at any time but within a reasonable time after determining that grounds exist for the motion, just to put some kind of cutoff so that they know that they're going to file this motion when the lawsuit is first filed; that they can't wait until trial to do it.

I deleted the procedure that requires the

moving party to file their own affidavit and the affidavit of three credible witnesses and then have a controverting affidavit to put it in issue. I made it a verified pleading. I don't feel strongly about it being verified or not, and say that they set out the reasons that the party believes it cannot obtain a fair and impartial trial in the county of suit.

I've put in here that each party is entitled to 45 days' notice of hearing, which is the same amount of time they're entitled to notice of other venue hearings.

I said at the hearing that the court is to make a decision based on the evidence as "evidence" is defined in the special appearance hearing, so pleadings, stipulations, affidavits, discovery and oral testimony. If they want to bring oral testimony, they can, but they can do it on affidavit. Affidavits have to be filed for the movant 30 days before the hearing, responsive affidavits filed seven days before the hearing, and then a standard for affidavits that is from the special appearance

rule.

And then the standard for the court's decision, the court shall grant the motion upon finding that an impartial trial cannot be had in the county where the action is pending, and then "or for other sufficient cause" comes directly from the current statute. That gives the court a lot of discretion. I didn't know if you all wanted to leave that in there or take it out. I put it in there so that we could be sure to address whether we wanted to leave it in there or bring it out.

No. 4 allows for reasonable discovery.

No. 5 talks about transfer. The current rule has a hierarchy of counties to transfer the case to. You go to the adjoining county, if it's a proper county. If that's not a proper county, you go to the next adjoining county. I can't remember how it all worked. But what I said is that you can first transfer to any county of proper venue where an impartial trial can be heard. If there's no county of proper venue where an impartial trial can be had, then to any county where an impartial trial could be had or to a county to

which the parties agree. And in determining where the cause should be transferred, the court shall consider the convenience to the parties and witnesses and the interests of justice. So the court doesn't just simply choose any county. It at least maybe should have some relationship to convenience and justice.

So you might want to take a minute and look at that.

CHAIRMAN SOULES: Okay. Discussion. Is there any question? First, under the present motion to transfer venue rules, is there a time limit on when affidavits are to be filed before the hearing?

PROFESSOR ALBRIGHT: In the current Rule 86?

CHAIRMAN SOULES: 85 or 86.

PROFESSOR ALBRIGHT: Yes. It's the same, 30 days, seven days.

CHAIRMAN SOULES: 30 days and seven days.

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: All right.

Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I like every one of these changes. But I will say that in Union Carbide vs. Moye, I could not convince a majority of the Supreme Court that 15.063 and 15.064(a) did not apply to motion to change venue for unfair forum cases. And I hope I couldn't convince them because I was being a very poor advocate that day, because --

PROFESSOR ALBRIGHT: At least they didn't decide against you.

PROFESSOR DORSANEO: Pardon me?

PROFESSOR ALBRIGHT: They didn't decide against you.

PROFESSOR DORSANEO: No, they didn't. They decided on it in my -- not my favor, my client's favor -- on it for a different reason. But this draft has that problem. And 15.063 says that there is a due order of pleading principle applicable to a motion based on impartial trial cannot be had in the county in which the action is pending. And 15.064(a) does say the court shall determine venue questions without talking

about proper or improper venue from the pleadings and affidavits.

And I would be willing to go with this concept, but just the Committee ought to realize that there are some statutory arguments that are hard to deal with. Now, I had a reason why I couldn't -- I couldn't even get to first base with it. I couldn't even convince the Court that there was even an issue, okay, that these provisions require some interpretation, the statutory provisions.

CHAIRMAN SOULES: Is there a due order of pleading in the statute itself?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Where is that?

PROFESSOR DORSANEO: 15.063. And that's the section you were talking about a minute ago about transferring the action. That's a terrible section, because it says the due order rules apply to not just normal motions to transfer venue but to impartial trial and even to consent --

PROFESSOR ALBRIGHT: Which is crazy.

PROFESSOR DORSANEO: -- consent transfers. And it says there consent transfers when the written consent is filed at any time. So you have to file a due order motion to transfer in anticipation of maybe somebody will agree to transfer it later.

PROFESSOR ALBRIGHT: And in these, if you are in a county where you can't get a fair trial, you have a constitutional right to get a fair trial, so I would think you could argue that the Constitution allows you to file this motion regardless of what the statute says.

PROFESSOR DORSANEO: I bet that one would have gone over like a lead balloon. What do you bet?

PROFESSOR ALBRIGHT: I've always taken the position that the legislature was not talking about these motions, but there sure is an argument that they were.

CHAIRMAN SOULES: It sure looks like they were.

PROFESSOR DORSANEO: Professor, I fully expected to win that argument with the Court, but I couldn't convince -- I couldn't

get anybody to salute it.

PROFESSOR ALBRIGHT: Well, we have a different Court. The two that voted concurring, the two concurring opinions are still on the Court.

CHAIRMAN SOULES: All right. Let me put this issue out first. It may not take long. Is it settled that the Supreme Court cannot give remedies in venue issues beyond what this statute gives? The purpose of that question is, can we give a remedy later for an impartial trial problem, a remedy that is not in Chapter 15 but is created in the rules?

MR. McMAINS: The problem with that, the only problem with that, Luke, is the fact that 257 is in fact court-created law initially, and the entire notion of impartial trial stuff in the venue area was brought into Chapter 15 in 1982 where it did not have a statutory basis in the past. So in my judgment, from a legislative notion, to take the position that the statute did not attempt to deal with all venue issues is absolutely opposite of what the legislative history is.

It's just the opposite. It started out court created, and the legislature took it all over.

CHAIRMAN SOULES: Well, it was 1995. It's always been part legislative. Part legislative from 1995.

MR. McMAINS: Yes. But the point is that 257 is court made. There was nothing in 1995 about this change, and then all of a sudden the concept of what was in 257 was brought into the statute in the Civil Practice and Remedies Code in 15, so that the legislature did purport to deal with a subject that had previously been dealt with by the court. And to take the position that therefore we're entitled to -- because it started out in the court we're entitled to recreate it again, I think that is directly contrary to what's been going on, is all I'm saying.

CHAIRMAN SOULES: Well, to be more specific, and I think the answer is probably the same, 257 to date has no time in it. So if it got caught up in 15.063 with the time, can we liberalize the time for impartial trial compliance in the rule now by giving it

a time, which it didn't have before, or to say it specifically, that can be brought at any time? Is that going to run afoul of 15.063? Right now 257 doesn't say when it can be filed.

PROFESSOR DORSANEO: 86 does.

CHAIRMAN SOULES: And 15.063 says when it can be filed.

MR. McMAINS: What does 86 say?

PROFESSOR DORSANEO: When we drafted 86, what we tried to do was to erase 15.063 because it says --

CHAIRMAN SOULES: Enlarge 15.063.

PROFESSOR DORSANEO: Yeah. Well, improve.

MR. McMAINS: Fix.

PROFESSOR DORSANEO: Interpret. It says, "A motion to transfer venue because an impartial trial cannot be had in the county where the action is pending is governed by the provision of Rule 257," which was perhaps an inartful way of saying, "Go read 257, which doesn't have a time."

MR. McMAINS: Yeah, leave us

alone.

CHAIRMAN SOULES: What I'm suggesting is that we add a remedy that's not in the statute by providing a 257 transfer of venue at any time and say so.

MR. McMAINS: Well, now, one question I have is, if we're going to have some kind of time limits, shouldn't we -- rather than just leaving it kind of wide open, I mean, shouldn't there be a sufficient amount of time prior to trial before you can go ahead and assert this motion?

CHAIRMAN SOULES: Sure. I don't have a problem with that, whatever time that is. I'm trying to deal now with giving it a duration or having a window longer than 15.063 and saying so in 257, just that idea.

PROFESSOR DORSANEO: Unfair forum, impartial --

CHAIRMAN SOULES: I mean, this is a due process issue. Can't the court engraft a remedy or write a remedy that's not in the statute that provides due process to parties in civil litigation?

MR. MARKS: You mean without

dealing with it in a specific case?

CHAIRMAN SOULES: Yes, without doing it in a specific case.

PROFESSOR DORSANEO: One would think they clearly could do it if you made up some sort of standard that, you know, when it becomes clearer, when it becomes known, something like that, that you then can do it, you know. Like if the circumstances that would demonstrate that the forum is an unfair forum arise or are learned, you know, later, then you can move to transfer venue.

MR. MARKS: Well, are there cases on the books now dealing with that as a due process issue? And could you use those as authority for it?

PROFESSOR DORSANEO: There aren't many of these cases to begin with, and most of them are old.

CHAIRMAN SOULES: Well, Bill's suggestion to Alex is that we try to pick up a standard -- I'm going to see if there's anything under 257 -- that we try to pick up a standard to put into the rule. There's certainly no standard in the Texas Practice

and Remedies Code. How do you respond to that, Alex? Do you feel like that's doable?

PROFESSOR ALBRIGHT: Well, I'm not sure what the standard is. I'm not sure what you're trying -- you're trying to make it a constitutional issue?

CHAIRMAN SOULES: I'm trying to say when a party is faced with this level of prejudice, then this remedy is available as a matter of due process.

PROFESSOR ALBRIGHT: Or you could just say when a party cannot obtain a fair and impartial trial in the county where the action is pending -- when a party cannot obtain a fair and impartial trial in the county where the action is pending, the party may file a motion according to the provisions of this rule.

PROFESSOR DORSANEO: In my view, somebody ought to file the motion early if they know early that they can't get a fair trial in Dallas County. But if they don't know, then they shouldn't be tripped up by a due order rule.

MR. MARKS: Maybe you don't

know until the jury panel is out there in front of you.

CHAIRMAN SOULES: That's where this usually gets resolved. There are cases that say you carry this right to jury selection and you look them in the eye, and the trial judge decides whenever he hears -- isn't that right, Judge Brister? There's a case we've had --

HON. SCOTT A. BRISTER: That's the way we do it.

MR. ORSINGER: Well, in some instances it's going to be post-lawsuit publicity that's going to affect your venire, and that isn't going to happen until after the newspaper coverage for your lawsuit starts.

CHAIRMAN SOULES: If we look at the standards in 257 --

PROFESSOR DORSANEO: But in some instances you're going to know right from the beginning that you're not going to get a fair trial for this case here.

CHAIRMAN SOULES: Like one of these standards in current Rule 257: That there is a combination against him instigated

by influential persons by reason of which he cannot expect a fair and impartial trial. Now, my word, you discover that after a due order of pleadings and you can't get out? That's in the present rule, the combination against him in the county. And he can't get a fair trial there because of it. I mean, all of these except for -- well, (a) and (b) are pretty much at the level of due process in the current 257. The other one is there exists in the county so great a prejudice against him that he can't obtain it.

MR. HAMILTON: Well, 15.063 has another problem in that subdivision (3) under that which refers to written consent of the parties filed at any time. So that's totally inconsistent with the concept of due order pleadings that you have to file that motion concurrently with or before you file an answer.

CHAIRMAN SOULES: Yeah. But Harold Nix didn't want to leave that county, so they wouldn't agree. Harold Nix. That was your case, wasn't it? Moye? They wanted to stay in that East Texas county, Lone Star. I

mean, the plaintiffs, not Lone Star. Lone Star wanted out. So you couldn't get written consent of all parties. I see what you're saying.

MR. HAMILTON: I'm just saying that that third section sort of renders meaningless the due order pleading in the opening paragraph, because you can't file something at any time and also file it at the same time you file your answer.

PROFESSOR DORSANEO: But you could file your motion in anticipation of getting the written consent in the hope that you'll get the written consent at some later time. And it all makes sense, then, in English, although it doesn't make reasonable sense in practice. That ends up being a hard argument, Carl. It ends up being a hard argument that because the last part is silly, the second part shouldn't be taken literally.

MR. MARKS: Well, also it says if written consent is filed.

PROFESSOR DORSANEO: At any time.

MR. MARKS: At any time written

consent is filed.

CHAIRMAN SOULES: But that's only if you filed your motion.

MR. MARKS: Right, exactly. That's the point.

CHAIRMAN SOULES: Because filing a motion timely is before the colon, and after the colon one of the options you can have is if they all agree. I mean, it's -- anyway, why don't we try this, Alex: Work in at least (a) and (b) and maybe combine (c) and (d) of old 257 to say that -- or maybe just skip (c), and say in (d) for other sufficient due process cause to be determined by the court.

PROFESSOR ALBRIGHT: Well, I felt like the first three were all the inability to get a fair and impartial trial, and I don't see how using the language of (a), (b) and (c) helps anything.

PROFESSOR DORSANEO: But Luke is saying we can try to get around the statute that way.

CHAIRMAN SOULES: Well, I'm not trying to get around the statute. I'm trying

to recognize that there is a due process issue that the statute does not reach, and the court is obligated to provide due process.

And Bill, you might not have heard this because it kind of passed across this side of my table, but one way to buttress what is being done is to put a due process standard into 257.

PROFESSOR ALBRIGHT: Maybe what we need to do is look at the due process cases and see if there's any language in the due process cases that is different from an impartial trial which is in 15.063, maybe go more towards the fairness instead of the impartiality.

CHAIRMAN SOULES: That's a thought. Okay. Well, that will take some work. The idea is made and is on the table. Rusty.

MR. McMAINS: The cases under 257, prior to Nix's case that was decided, pretty well established that the function of the affidavits was to get you here and then you had to make the determination, but if you didn't have affidavits you didn't get a

hearing. This rule, the way it's now drawn, appears to say that they can consider the motion without regard to having affidavits.

PROFESSOR ALBRIGHT: The way I wrote this was to make this a motion like other motions. If you file a motion, then you join the issue, instead of going around the county to get the affidavits of three credible witnesses.

MR. McMAINS: But it was judge-made rules to begin with and then judge-made law with regard to those rules as to how you -- essentially of the idea that you don't just get to file a motion saying, "I can't get a fair trial in this county," all of a sudden at any time and it gives the judge the power to do something.

PROFESSOR ALBRIGHT: Well, this is judge-made procedure from pre-1941 and we've changed lots of procedures since then, so I'm just throwing out a new procedure.

MR. McMAINS: No, it wasn't. We changed it in 1983.

PROFESSOR ALBRIGHT: If you don't like it, vote against it.

MR. McMAINS: We rewrote 257 in 1983.

CHAIRMAN SOULES: Okay. We want to be very specific about the procedural changes. Alex has brought this forward to a more modern motion-type practice without a bunch of predicates filed with it. It could go either way. I don't care. The Committee can at least demonstrate a consensus on whether there should be affidavits and so forth.

Alex, what we're expressing here, of course, is the concern that to what extent is 15.063 preemptive of the judiciary's power to give litigants due process in an impartial environment. Okay?

PROFESSOR ALBRIGHT: I understand that.

CHAIRMAN SOULES: So we're saying it's not -- it goes as far as it goes, but it doesn't cover all of the waterfront, and the judiciary has an obligation to cover all the waterfront, so what this doesn't cover let's cover by a rule. And hopefully then that's not going to put the Court and the

legislature into conflict over who has the power to do what, because one is doing one thing, which is fine, and the other has to do its job too, which ought to be fine with the first. So that's where we're going forward.

Now, as far as the procedure is concerned, do we want to burden -- and I don't mean to use that word in a negative sense -- to burden the filing process with affidavits, or do we want to let it trigger it with the motion process or something like Alex has got? Can we debate that right now and give Alex some guidance on that?

Okay. Rusty, I take it you favor the affidavits in the process of filing?

MR. McMAINS: Well, actually she has a verification requirement of the motion, so she already crossed the threshold anyway, which of course, we don't have it verified anywhere else.

CHAIRMAN SOULES: Well, she has got that there, and she said she didn't know whether we would want to do it or not. So we've got an unsworn motion, a sworn motion, an unsworn motion with affidavits, a sworn

motion with affidavits. I guess we've got four different ways of doing this.

Let me see first if there's a consensus. How many feel that this should be triggered by the filing of an unsworn motion without affidavits? Unsworn motion without affidavits.

MR. HAMILTON: Are you eliminating evidence, oral evidence?

CHAIRMAN SOULES: No, no. This is just the filing that triggers the process.

MR. McMAINS: That gives you a hearing.

CHAIRMAN SOULES: That gets the process going.

One.

How many feel that it should be by sworn motion without affidavits? One.

How many feel it should be by unsworn motion with affidavits? 10.

How many feel it should be by sworn motion with affidavits? All right.

PROFESSOR DORSANEO: How many?

CHAIRMAN SOULES: There were 10 votes in favor of an unsworn motion with

affidavits, so that part of the old rule will be preserved.

PROFESSOR ALBRIGHT: So do you all want affidavits of three credible residents of the county or what?

CHAIRMAN SOULES: How many affidavits? By whom first.

MR. McMAINS: How about affidavits of three people who aren't credible residents?

CHAIRMAN SOULES: We already know there is going to be one, or maybe it's two, because I had it plural in the last question. I'll do it this way: Three, two, one.

How many people think it ought to be three affidavits? Two.

Two affidavits? Five.

One affidavit. Okay.

Now we're going to vote between two and one, because the threes lost.

How many think it ought to have one affidavit? Six.

How many think it should have two affidavits? Six.

Since it's tied, it will be no affidavits. I'll break the tie.

MR. ORSINGER: Luke, how about one credible and one not credible?

CHAIRMAN SOULES: Richard proposes one credible and one not credible.

All right. Two affidavits, then, I guess. I don't know. Write it two, and we'll see what more people say next time.

Now, do we want this credible?

MR. ORSINGER: How do you judge credible?

CHAIRMAN SOULES: Two affidavits. Two self-serving affidavits.

PROFESSOR ALBRIGHT: What do these affidavits have to say?

MR. MARKS: Well, you have credible when you've got four people as to each person that's giving an affidavit swearing that this is credible.

MR. ORSINGER: It's like authenticating a certified copy.

MR. McMAINS: But they don't have to be credible themselves?

MR. MARKS: No. They just have

to know about that person's reputation.

PROFESSOR ALBRIGHT: What do these affidavits have to say?

CHAIRMAN SOULES: Let me shorthand that and see if this is responsive: They have to be prima facie evidence supporting the grounds of the motion. Prima facie evidence supporting the grounds asserted in the motion.

MR. ORSINGER: Do they have to be residents of the county?

CHAIRMAN SOULES: No.

MR. McMAINS: Yes.

CHAIRMAN SOULES: Yes?

MR. McMAINS: Well, that is what the current rule is.

PROFESSOR ALBRIGHT: That's what the rule is, but I would --

CHAIRMAN SOULES: All right. Residents of the county, yes or no?

MR. ORSINGER: I don't know. That excludes experts that you hire that do surveys and come back and say, you know, "There's no way you can get a fair trial. We did a survey of 800 people." They would be

precluded.

CHAIRMAN SOULES: Okay.

MR. McMAINS: What if you have two affidavits and at least one of them should be a resident of the county?

MR. MARKS: Well, I mean, you could have two affidavits and then you could have the affidavit of somebody like that. It would be kind of icing on the cake, but I think it would be certainly evidentiary.

PROFESSOR DORSANEO: Well, if you can't get one county resident to say this is unfair, then that's pretty unfair.

MR. ORSINGER: Well, it depends on how unfair it is, because a lot of people are scared to sign these affidavits. I went through this process because I was involved in a divorce case against the county judge, and everybody told me that I couldn't get a fair trial there, but I couldn't get anybody willing to sign an affidavit that I couldn't get a fair trial there.

PROFESSOR DORSANEO: Well, you won't be able to get that judge -- he won't transfer it then anyway. It doesn't matter.

MR. ORSINGER: Well, we had the transfer hearing in his courtroom with a visiting judge who did move it to the next county.

CHAIRMAN SOULES: Okay. In the county or out of the county? Those who say the affidavits must be in county show by hands.

Out of county show by hands. Okay. There were no votes for in county and 10 to permit out of county, so there will be no restriction on the source of the residents. Where the persons making the affidavits must reside, there will be no limitation on that.

MR. MARKS: Luke.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I'm kind of going back a little bit, but it seems to me that in view of the due process and constitutional problem involved with this, we may want to think about not doing anything to the existing rule and leaving it like it is.

CHAIRMAN SOULES: Well, a lot of people think it's preempted by 15.063, and Bill couldn't get the Supreme Court to say

otherwise.

MR. MARKS: Okay.

CHAIRMAN SOULES: And it just can't be preempted. I think we need to come forward with something, but I don't know.

Who agrees with John that we should just do nothing and leave 257 on the books as it is? Does eveybody agree with that?

MR. HAMILTON: Can I say something else?

CHAIRMAN SOULES: Carl.

MR. HAMILTON: It seems to me that it can't be preempted in that if we provide in our write of the rules that these motions under 257 to 259 can be filed at any time, then that is in direct conflict with the statute. So the Supreme Court is going to have to decide is that language in the statute unconstitutional, and if so, and they say, then the rule will prevail. So why do we need to rewrite the rule?

CHAIRMAN SOULES: Other than the reason I gave earlier, I have nothing to add to it.

MR. MARKS: Well, it just seems

to me that if we're writing it in response to the changes in the law, we're conceding that 15.063 applies. And if we do that, then that ain't good.

CHAIRMAN SOULES: Okay. Anything else on that? Those who believe 257 should be rewritten along the lines of our discussion today show by hands. Nine.

Those who believe it should not be and it should be left alone. Two.

Nine to two it will be rewritten. Okay. Anything else on 257? Do you need anything else on this, Alex?

PROFESSOR ALBRIGHT: Well, the other thing I do that potentially conflicts with the statute is I say the court can hear oral testimony. In the Moye case, Union Carbide vs. Moye, Justices Gonzalez and Hecht discussed it. Both of them felt like that the court could hear oral testimony, but there is clearly an argument that you can't hear oral testimony.

CHAIRMAN SOULES: What's the argument that you cannot?

PROFESSOR ALBRIGHT: That under

15.064 in all venue hearings -- well, that's a different sentence -- the court shall determine venue questions from the pleadings and affidavits.

CHAIRMAN SOULES: Well, hopefully we'll fix that by saying this is a new due process area problem that we set the rules on, we, the Court, if the Court decides to go with this.

PROFESSOR ALBRIGHT: But this is not venue, this is due process.

MR. ORSINGER: It really isn't venue in the sense that the legislation was designed to treat a problem, in my view.

MR. MARKS: Is the Court going to want to deal with this issue outside the context of someone challenging it?

CHAIRMAN SOULES: I don't know. But by nine to two we want the Court to do so.

MR. MARKS: I'm just raising the question.

CHAIRMAN SOULES: I do not know. Okay. Anything else on 257? Okay. That will be on our agenda next time again.

Next.

HON. SCOTT A. BRISTER: Do you want to go to 174? I've got the copies out.

CHAIRMAN SOULES: Yes, sir. I'd like to do that right now. Thank you very much. This is 174.

HON. SCOTT A. BRISTER: Everybody should have the February 2, 1997, letter by now. Look at Page 2, probably would be best. It's just a rundown of the differences of the various proposals. The first is our rule, which is shorter than any of the others, unlike most of our rules. The second one is the federal rule, which has two differences from the state rule. On the second line, in addition to convenience and avoiding prejudice, you can do a separate trial for expedition, for purposes of expedition and economy. All of the other proposed drafts also suggest putting that into the state rule as well. I'm not sure why it was left out, if it was for any -- in any event, the other thing is that the federal rule has the tack-on about the seventh -- don't forget about the Seventh Amendment,

which I'm not sure who was about to forget it, but somebody apparently was about to forget about it or were afraid they were, and that's not in any of the other rules.

The Court Rules Committee draft, again, adds the "promote efficiency and economy," and then it adds on the fourth line, even though the state rule is completely broad, Iley vs. Hughes says it doesn't -- in personal injury accidents, you can't divide liability and damages into separate trials.

There's a lot of confusion in the cases between separate trials and bifurcation. We don't have any rule at all on bifurcation, although bifurcation is always cited. Bifurcation cases always cite to this rule. Technically, bifurcation is one jury, two parts of a trial. A separate trial is two trials, two juries.

MR. McMAINS: Maybe even one judge.

HON. SCOTT A. BRISTER: Right, so this as well as the two remaining. All the proposals we got suggest adding liability and damages can be at least bifurcated, and the

argument that they make is that Iley vs. Hughes was pre-comparative negligence.

The concern was, in personal injury actions, I know how to shorten this trial; let's just try the plaintiff's negligence first, and if we find the jury answers yes to plaintiff's negligence, end of the trial, because any kind of contributory negligence was a complete bar to the rest of the case. That's at least what they suggest as the reason that we no longer need to ban separating liability and damages parts of the trial, because we have comparative negligence now.

The Court Rules Committee adds this about prerequisite claims. Again, I think the current state rule is broad enough, but all the proposals add this, and several cases have allowed it under our current rule where, for instance, if you have a bill of review case you can have two separate trials. You can just say, look, we're just going to try the bill of review first, and then if the plaintiff wins on bill of review, then we'll do discovery and do a regular trial on the

rest of the case. But to make that explicit is a suggestion.

And the main difference in the last three proposals we have is the last line, when it should be by separate trial and when it should be simply by bifurcation. The Court Rules Committee draft was that where practicable it would be the same jury; you would bifurcate rather than separate the trials.

The TADC, et cetera, proposal says the court may allow the same jury to try both cases, completely discretionary either way. The State Bar Administration of Justice draft, the last line makes a presumption, actually makes it mandatory that it's bifurcation, not separate trial, unless the parties by written agreement specify otherwise.

So those are the issues. I didn't see any reason to come up with any new drafts. Those pretty much set them out. So it seems to me that, No. 1, whether to add this economy and efficiency in, which they all suggest doing, parallel with the federal rule. No. 2, whether to add language, make it explicit, contra Iley vs. Hughes that you can separate

liability and damages. No. 3, whether you separate -- we're talking about separating trials when we're doing that or bifurcation. And No. 4, whether to add language to make explicit what already appears to be the current law in the current rule that this can be prerequisite issues as well.

I would just say that in Harris County at least, bifurcating liability and damages is done all the time on long cases.

CHAIRMAN SOULES: In personal injury cases.

HON. SCOTT A. BRISTER: Michael Bryan 10 years ago, I know, on the first one of the Brio toxic cases, we tried liability, sent the jury out, yes, the home manufacturers, et cetera, are liable, and the case settled during the damages phase. All the multi-district litigation, big mass tort cases frequently suggest that as one possibility, getting the liability verdict, then going into the damages phase especially if you've got 100, 200 plaintiffs, because that takes a lot longer perhaps than liability does.

I know even in some cases, you know, one of my colleagues on asbestos cases tried -- what is it -- tried causation first, then liability, then damages. I'm not suggesting that's the best way to try asbestos cases. I'm just telling you this goes on every week in Harris County, so for what it's worth.

CHAIRMAN SOULES: Okay. I've got Iley vs. Hughes, same jury and prerequisite issue. What was the first one? I've only got 2, 3 and 4.

HON. SCOTT A. BRISTER: Adding as grounds to separate trials and bifurcation expedition and economy.

CHAIRMAN SOULES: Okay. Let me try and start with an easy one and then I think I'm going to take some of these backwards.

Prerequisite issues. Is anybody opposed to specifying that prerequisite issues can be tried separately? No objection, so that's done.

Next, I think same jury or not same jury may influence a decision on Iley vs. Hughes or no, so I'm going to take same jury first.

Same jury, (a), where practicable; (b), may allow -- whether that's different or not, I don't know; third, shall allow. The COAJ rule at the bottom makes it mandatory that the same jury try separate issues that are not severable. TADC, et cetera --

MR. MARKS: Doesn't the Court Rules Committee draft supersede the Administration of Justice draft?

CHAIRMAN SOULES: It doesn't make any difference. They're all good ideas. Let's talk about them.

HON. SCOTT A. BRISTER: They were all in the materials. I don't know what the information is.

CHAIRMAN SOULES: They're all good ideas, or maybe they're bad ideas, but --

MR. MARKS: -- they're all ideas.

CHAIRMAN SOULES: -- they're all ideas, so let's talk about them.

TADC says may allow the same jury, and then Court Rules says where practicable shall allow. Okay. Without getting into whether "allowed" is the right word or not, let's

talk about those three concepts. Who wants to start? Rusty.

PROFESSOR DORSANEO: You went by "prerequisite" so fast, I don't know what in the world that exactly means.

CHAIRMAN SOULES: It's try the bill of review before you retry the main case.

HON. SCOTT A. BRISTER: The ones mentioned in the materials were the bill of review, limitations, and due diligence on service, which is really part of limitations. In other words, something that's entirely different from any of the issues in the lawsuit.

MR. ORSINGER: Let me suggest also, the PJC 5 suggests on premarital agreements that the court may want to try a premarital agreement enforceability question before it tries the property division in a divorce, and that's often done around Texas. That is an example.

PROFESSOR DORSANEO: Well, I'm still not comfortable that that has any particular meaning except the meaning you want to assign to it.

CHAIRMAN SOULES: Does it do harm?

MR. McMAINS: Yes.

PROFESSOR DORSANEO: Well, I think it might, yes. I think you could say that liability is prerequisite to getting to damages. Then that gets back to malice is prerequisite to exemplary damages.

MR. ORSINGER: Or whether a condition precedent is prerequisite to a cause of action for a breach of contract.

MR. McMAINS: One of the problems is that it does involve duplicity frequently. You duplicate efforts by trying --

MR. ORSINGER: But we're not requiring it, right? We're just permitting it. All we're saying is --

MR. McMAINS: Well, I understand, but it's hard for me to see how you can justify on economy grounds trying the same issue repeatedly just hoping that the plaintiff is going to lose, which is basically what that amounts to.

HON. SCOTT A. BRISTER: Baker

vs. Goldsmith says under the current rule you can do it.

MR. McMAINS: Under a bill of review.

MR. ORSINGER: Wait a minute, all Baker vs. Goldsmith says is that you have to make a prima facie showing of a meritorious defense in a nonevidentiary hearing before a trial.

HON. SCOTT A. BRISTER: It goes on to describe the process thereafter, which includes that the court may want to consider bifurcating -- I mean, separating the trials under 174(b).

MR. ORSINGER: I don't have a problem that you might want to bifurcate the bill of review from the trial on the merits, but the Baker vs. Goldsmith pretrial hearing on a meritorious defense is really different from your subsequent trial.

HON. SCOTT A. BRISTER: Absolutely.

PROFESSOR DORSANEO: It's certainly not a broad concept that everything that could be considered prerequisite can be

tried separately earlier. That is a specific game plan for a specific type of litigation.

HON. SCOTT A. BRISTER: The funny thing about the rule is, of course, the rule as currently stated says you can divide it up just as many times and in as many slices as you want. That's what the words say. Now, Iley vs. Hughes says, of course, that doesn't mean liability versus damages.

On the other hand, other cases say, of course, that does mean limitations can be tried first if there's a serious limitations question before you do all the expensive discovery on this. You know, draw a rule that says the following 200 can be done separately and the following 300 can't, but that's going to be a mess.

CHAIRMAN SOULES: Okay.

HON. C. A. GUITTARD: I've got a question.

CHAIRMAN SOULES: Justice Guittard.

HON. C. A. GUITTARD: The standing, that may involve fact issues, and sometimes it may be more convenient to

establish the standing, yes or no, before you go into, say, for instance, a will contest.

While we're working on this too --

CHAIRMAN SOULES: Is that a jury question, standing?

HON. C. A. GUITTARD: Could be.

CHAIRMAN SOULES: Could be. Okay.

HON. C. A. GUITTARD: Could be. For instance, I recall a case where there was agreement between the parties that was alleged to have had the result that one of the parties didn't have the standing to contest a will, and that was defended on facts that had to be --

CHAIRMAN SOULES: That could be accepted to benefit or something. Okay.

HON. C. A. GUITTARD: And here is another matter that I would like to call attention to on this separate trial thing: In our Appellate Rules, which seem to be pretty mature at this time, in our provision about what the courts can do at both the court of appeals and Supreme Court level about remanding error affecting only part of the

case, if the error affects part but not all of the matter in controversy and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. But the court may not order a separate trial solely on unliquidated damages if liability is contested. Now, is that what we're proposing that would make us review that?

CHAIRMAN SOULES: Yeah. If we make this change, that might get reviewed.

PROFESSOR DORSANEO: The last sentence.

CHAIRMAN SOULES: Well, the last sentence would come out.

MR. ORSINGER: It permits the trial court to do something that we don't permit the Supreme Court to do. I don't know what sense that makes. But that's possible.

CHAIRMAN SOULES: Well, it's possible, yeah. Maybe we just need to open this whole thing up. I was hoping to get to maybe something easier, but in the context of mandatory same jury or do whatever you want,

same jury or more juries, I guess all these things come up. So maybe we ought to take that first so that we know what -- whether we're going to be trying these predicate issues, Iley vs. Hughes issues or expedition and economy, separable issues, either to the same jury or some other jury. In part that also addresses what Rusty raised earlier, and that's duplicating proof. Certainly if you have two juries you have to get enough to the second jury, if there is anything from the first trial for the second jury to function.

But anyway, let's first talk about whether in separate trials, not severances, but in separate trials a judge, a trial court should be required to try the separately tried issues to the same jury until -- well, to the same jury. Rusty.

MR. McMAINS: Luke, I just want to make an observation, especially when you look at where the sources are. It was in the '80s that we basically passed the rules which said that you can predicate liability findings on damage answers, you know, or damage answers on liability findings, in essence allowing the

jury to know that no damages are awarded if they answer the liability questions a particular way. Since that time there have been back-door efforts to try and avoid the application of those rules with regards to the PJC. That's what in my judgment a lot -- and this argument about Iley vs. Hughes being based on comparative negligence I think is silly, because Iley vs. Hughes is based on the notion of splitting causes of action and just saying you don't try pieces of causes of action here and there either to different juries or the same jury. It doesn't matter whether or not it's a personal injury where comparative negligence may apply or any other unliquidated damages case including a contract.

But it does make a difference when you say that the rights with regards to -- that the jury is entitled to know we don't have to consider the damages if we deal with the liability and the defendant is saying, "No, we don't want that. We don't want them to know how much they're damaged. We don't want any proof about the quadriplegic. We want to keep

all of this evidence away from the jury so that we can talk distinctly in this little narrow canister about liability issues and not what the impact is on the plaintiff, be it in a personal injury case, or how devastating it was with regards to a defendant in a contract case in terms of what the consequences of the conduct are. We've got to segregate those so we can try these pristinely in one area or another, and preferably I'd like to start with my affirmative defenses. Let's try those first."

Now, to allow the court to do that, it seems to me, is directly contrary to any kind of notions of economy and efficiency, except in a very limited number of circumstances. It is otherwise just largely directed about let's see how many hoops we can make somebody jump through before they can go ahead and get to the end of the line. And that's what I think all of this rules change and all of the dispute with regards to Iley vs. Hughes is about.

But a more fundamental question is the one raised by Justice Guittard. If we're not

going to change it in the courts of appeals and the Supreme Court where they have determined that you have gone through a trial and you have established your liability beyond dispute in terms of you can't attack it on appeal, but we're going to send you back to retry that because we find there's an error in the damages in some way or another and we're going to send the whole thing back -- and that's what the Court does. That's what they've done since Iley vs. Hughes.

As long as liability is contested, unless you're dealing with a default situation or a stipulated liability situation, they always send it back to retry both liability and damages, and that's because of the notions about splitting causes of action that they don't like. And what's good enough for the appellate courts is good enough for the trial courts in my judgment.

I mean, I don't like the federal procedure where they do send back unliquidated damage claims to be tried in the face of a liability finding that has been unsuccessfully attacked, or vice versa where they have got a

damage finding which they leave alone and send you back to try liability already knowing what your damages are going to be or going to be limited to one way or the other.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I'm not sure I understand whether somebody is attempting to change the way we do things now, but I can't get away from feeling that somebody doesn't like the practice that exists under the current rules and they're trying to improve their litigation posture, because I haven't heard anybody declaring that we have problems with our current rule in the way that it's being administered by our courts. And I'm wondering if what's going on here is that there is some tilting of the litigation process that somebody is engaging in that's not stated, because I haven't heard it articulated, nor have I heard articulated why our current rule doesn't work. Maybe I just missed it.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: One place where it doesn't work is in these mass tort cases where courts are trying to figure out how to efficiently handle huge numbers of cases.

MR. ORSINGER: But Scott says that they're doing it in Houston, so what's broken with the rule?

HON. SCOTT A. BRISTER: Well, you read Iley vs. Hughes and it's completely against Texas law what we're doing.

MR. ORSINGER: Are the cases geting reversed?

HON. SCOTT A. BRISTER: No, because the vast majority of the time, once you get the ruling on liability, then the case settles without going through four months of damages. Now, does that mean you might not get mandamused for it or you might not get reversed? You really don't know. But the problem is the birth and growth of the multiple mass tort, complex month-long cases. That's the pressure behind the rule.

MR. ORSINGER: If that's your problem, I think it would be a lot easier for

us to write a rule to address the problems that are particular to those cases than to take a rule that governs the other 99.99 percent of our lawsuits and try to write a rule to cover the one tenth of one percent that affects the others.

MR. MARKS: Well, I disagree with that, trying to specifically write a rule to cover all possibilities where a separate trial may be appropriate under the circumstances. I think giving the court discretion to do that in certain situations is what is needed, and not some specific rule relating to a specific situation. That kind of goes against, you know, what you try to do with rules in the first place.

MR. ORSINGER: But it gets us right in the middle of the fight that you're going to take your ordinary automobile case or your ordinary contract case and you're going to change the way we've tried it for 100 years because now people have invented these multiple-plaintiff mass tort cases.

MR. MARKS: Well, not necessarily, because, and correct me if I'm

wrong, in a contract case you can do that now.

MR. ORSINGER: If the damages are unliquidated.

HON. SCOTT A BRISTER: Iley vs. Hughes is limited to personal injury.

MR. MARKS: That's right. So the only difference would be, again, would it apply in personal injury cases.

HON. C. A. GUITTARD: Well, the appellate rule would.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, in sitting here listening to this, what I just determined is that we have one case, Iley vs. Hughes, which works in a particular context and means a particular thing, although it could be argued to be applicable in another context. It seems to me that on principle Iley vs. Hughes is inconsistent with Moriel, and Moriel works in the context in which it operates.

We don't know the answer to the question about the mass tort cases. And this rule accommodates with benefit -- the current rule

accommodates with benefit of subsequent interpretation everything that might be conceivable, although it doesn't deal with the same jury issue. Am I wrong, Judge Brister?

HON. SCOTT A. BRISTER: Well, just as a trial judge, I would prefer not to do something that I know is contrary to the law just because it works. And I've never bifurcated -- again, there's a big difference in my mind between bifurcation and separate trials.

I mean, in a bifurcated trial the jury is going to hear about the paraplegia from the first minute of voir dire through the opening statement, et cetera. It's not like that's going to be excluded, though, of course, the counterargument that these folks make is what logical reason is there to throw paraplegia in when the question is liability? How bad the damage was logically has nothing to do with it. That's their big argument, if you're just trying to prejudice the liability factor. But that argument, I don't care one way or the other, I don't know how that would affect it.

But certainly bifurcating the trial into

various parts with the same jury, I think we need to say that that's okay. And as I read Iley vs. Hughes, mass tort and personal injury stuff, it is not okay. It specifically said that that's not what this rule reaches. When you look at the rule, the language of the rule certainly reaches it, but I think we need the rule to at least change that result to allow it before the same jury, bifurcation, if not separate trials.

Then you've also got to consider the bad faith insurance contract stuff. Yes, you can do those severance; sometimes you have to do them severance. But you can also do them separate trial without severing. How about bifurcating? I mean, you know, when you get into the question about, you know, you have to bifurcate or you have to have a separate trial, there are just so many different contexts this arises in, I would hate to say anything in the rule other than "may" and let it just continue to work out case by case. The court may, you know, do separate trials on liability and damages. I don't know. Does the complex litigation thing suggest to you

sometimes on a huge class action or something that you try liability and then a different jury later?

MR. McMAINS: You're talking about in class actions?

HON. SCOTT A. BRISTER: Class action kind of things.

MR. McMAINS: Class action determinations are simply different anyway because they can be tried -- they can be certified for a specific purpose and therefore tried with regards to issues of liability collectively, and then provisions may be referred to separate trials on the others, and that's expressly authorized in the class certification rules. And that's the way it's done even in the mass tort cases these days. That's not a problem.

And 99 percent of those that I've ever been involved in, which has been a dozen or so now, are largely done by agreement. I mean, the parties agree to what it is they're -- they may have a little bit of a fight in front of the court about which ones they're going to try, they want these groups and this group,

but they go try a group with regards to the liability issues, maybe the damages for a test group, and then they're going to basically apply those damages to everybody -- the liability to everybody, and go try the damages for everybody else later on down the line, or sever, as you say. And that's generally the way most of those cases have been progressing and with not a great deal of difficulty.

And it's not just Iley vs. Hughes. What's the case? Winters, Bill? Something versus Winters. Anyway, that is the source of the rule that says you can't separate unliquidated damages, and that's true across the board, contract cases, personal injury cases at the appellate level, if you cannot affirm liability, if you send it back to retry unliquidated damages, it can't be done, you know. And they just say because you can't split causes of action you're not going to do that. And we differ with the Fifth Circuit in terms of how we handle that and whether or not there's a constitutional justification.

It may be Sweeney vs. Hughes. Anyway, the name is floating around. It's actually

cited in our current rulebook as a Texas Supreme Court case for the issue of you can't reverse and remand unliquidated damages for retrial on that issue alone in a case where liability is contested.

One of the concerns that I have with this separate trial notion is that there is no question that everybody is going to argue that what you try separately is some species of an affirmative defense that you're going to carve out, whether it be limitations, whether it be a release. If they've gotten a release from somebody and they want to try the release issue first before they try anything else, after they try that issue, if they happen to win that issue in the abstract, it's crystal clear that they're position is going to be "Okay. Well, we don't need to talk about the rest of it then, so let's go home."

That is their interest of economy, so that their interest of economy means that if I get to try my part of the lawsuit first and I win it, then you don't get to even try your part of the lawsuit, nor does the appellate court get to see any of it. And that's what's

wrong with this notion that this is something we should be doing in the interest of economy, because I think it is merely masquerading as an effort to gain a tactical advantage with regards to trying a particular aspect of the case at the selection of one or more of the defendants. I wish I didn't perceive it that way, but that is the way it is perceived.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: To me, this is one of the changes of greatest magnitude that we've ever been asked to face in three years of being on this Committee, and I believe that it will change the whole nature of the way we have litigated lawsuits since we became a state. And the only rationale that I've seen on the table right now is the large mass tort litigation which there appears to be a need for us to create an exception for that.

But the need to create an exception for the mass tort litigation does not mean that we should go back and say that a specific district judge can try a waiver issue or some kind of defense before we even try the case in

chief and then as a result of that jury verdict say there's no necessity for us to try the fundmental claim because the affirmative defense has already been established. There is some logic in that, but that isn't the way we've tried cases here for 150 years. And it's just astounding to me that we might make this change, which I think goes to the very core of the way we litigate cases, when the announced justification is to handle the mass torts where they do have this need, which can be addressed through a specific rule. So to me, this is an amazing proposal.

CHAIRMAN SOULES: Anything else? Justice Guittard.

HON. C. A. GUITTARD: Why couldn't we solve the problem by adding to 174(b) the provision that's in the rules, the Appellate Rules and so forth, that provides there is no separate trial of liability and unliquidated damages if liability is contested? Why don't we just put that in there? That would be consistent with our present rule, and otherwise it would be up to the judge.

Incidentally, it's interesting to think about the -- to consider the origin of that prohibition. I think when I was working for the Supreme Court some years ago, a case came up that involved that question and whether the Supreme Court should remand the case for trial of damages only. And there was a discussion among the judges to which I was allowed to observe at that time because of my employment, and Judge Kreis, I believe, said, "Well, we can't let them have a separate trial on damages and liability because everybody knows that in these special issues the jury trades on their answers, so a juror probably wouldn't vote to give any damages if he wasn't induced to do so because he gave up on some other issue." And whether that is salutory approach to the administration of justice, I don't know, but that's the sort of thinking behind some of this. So I would propose that Rule 174(b) be amended to add that provision.

CHAIRMAN SOULES: Well, that's really -- it seems to me like that's the only change that we're making to the present law other than articulating present law. Separate

trials, we don't have any limitations on when they can come under 174(b)(b). Just say conducive to expedition and economy and so forth, in furtherance of convenience or to avoid prejudice. That's about as big a universe of reasons that somebody could come up with.

HON. C. A. GUITTARD: That's just a specific instance of avoiding prejudice.

CHAIRMAN SOULES: Iley vs. Hughes clearly is an issue. Same jury is now open. You can do it with or do it without the same jury. Prerequisite issues, you can do it or not do it, if you want to, as long as it's not an Iley vs. Hughes issue. I mean, that's what we're really boiling this thing down to. Once we get past Iley vs. Hughes, I guess the rest of it probably gets a lot easier.

MR. MARKS: That's the point of this, isn't it?

CHAIRMAN SOULES: How many of you think we ought to change Iley vs. Hughes?

HON. SCOTT A. BRISTER: Well, separate trial or bifurcation?

CHAIRMAN SOULES: Separate trial to a different jury.

HON. SCOTT A. BRISTER: Okay. I mean, I don't want to say I can never do it. I can imagine -- I mean, it's perhaps -- the pressure is coming from mass tort cases, but you know, I've had cases -- you know, you have a medical malpractice case, just a run-of-the-mill malpractice case, but it's going to take $50,000 to prepare it, X months, and the defendant wasn't served until two years and six months. Why wasn't he served? Well, because they weren't diligent, says the defendant. "Well, I didn't call for three months to find out about it, but then I did call." We're going to have a big question on whether due diligence was used. I'm going to spend $50,000 if I can't bifurcate out in a particular case when I think it's going to be -- I'm not going to -- I don't like to try cases twice.

I don't know who these judges are that like to try things in bits over and over. I like to get them and get rid of them, but if I'm staring at something that's obvious that

summary judgment doesn't cover, there's going to be discretionary situations where everybody can be saved time and money. And I don't really care whether it's a plaintiff's or defendant's issue. It could be a plaintiff's issue on just suing to enforce our release or whatever it is. I'm just talking about where we have to go through all the discovery of everything before we do anything.

CHAIRMAN SOULES: Well, I don't think Iley vs. Hughes precludes you from trying limitations questions.

HON. SCOTT A. BRISTER: No. That's what the cases have said so far.

MR. ORSINGER: Is this an available procedure right now to try affirmative defenses --

CHAIRMAN SOULES: Sure.

MR. ORSINGER: And there's no prohibition against it?

CHAIRMAN SOULES: There's no prohibition against it, and it is done.

MR. ORSINGER: It is done? Okay. I've never heard of it being done.

HON. SCOTT A. BRISTER: I

wouldn't mind inserting, if I could suggest to Judge Guittard's proposal, that we make this both a bifurcation and separate trial, because it has been confused in the cases about which it is we're talking about. Let's say that you can order a bifurcation or a separate trial for any of these things, except that you can't order a separate trial of liability -- of unliquidated damages where liability is contested.

HON. C. A. GUITTARD: That's fine.

PROFESSOR DORSANEO: Or a bifurcation, I guess, under your terminology.

HON. SCOTT A. BRISTER: No, I want to make that distinction. I can order a bifurcation or separate trials, but if it's liability and damages, I can't order a separate trial; I can bifurcate it.

MR. McMAINS: Well, but Moriel says what's to be in the first trial on the bifurcated issue. And it says what's there is liability and damages, liability for gross negligence, for exemplary damages, and then the second trial is only on the -- the second

bifurcated part is only on behalf of -- on the amount of exemplary damages. There is no authorization in Moriel to say that you get to trial four bifurcated trials, one on liability, one on damages, one on gross negligence and another on --

MR. MARKS: That's a mandatory provision, though, and we're talking about --

MR. McMAINS: That's not a mandatory provision.

MR. MARKS: We're talking about --

CHAIRMAN SOULES: Just a minute.

MR. MARKS: -- giving the court discretion to bifurcate or give separate trials when it appears appropriate to do so, and I don't see any problem with that.

CHAIRMAN SOULES: Well, let's just focus on what seems to be the real tension here. A judge is trying to deal with mass torts, is one piece of the tension, and the question is, is the product unreasonably dangerous. That's the liability finding. And that can take weeks to try in breast implant

litigation or whatever the situation may be. Can a judge try that separately? Not now under Iley vs. Hughes, although apparently some judges are doing it. Now, if that can be tried to a jury that's not going to hear damages, then maybe the jury never hears about the quadriplegic, a quadriplegic damaged by a product, obviously not -- well, maybe a breast implant, but some product. So now you've got a jury that doesn't know the damages, doesn't know the consequences, trying liability, when the consequences may be indicative of whether there should be liability. It's possible.

HON. SCOTT A. BRISTER: I'd be willing to say you don't have two different juries hearing liability and damages.

CHAIRMAN SOULES: All right. But then you get to the problem of the judge tries a hundred cases on a product unreasonably dangerous. The caption takes three pages to type it out, five or 10. Now he's going to go to damages. Is that jury going to have to sit through it there and hear the damage proof for 100 individuals? That's a problem. I'm not arguing with that. There

we've set up one set of circumstances where the system has got a problem in those kinds of cases.

But the other problem is, it is highly prejudicial to plaintiffs to get there and in many cases to have the liability issues isolated from the damages and to have to go to a jury in those circumstances. There is real tension here.

MR. MARKS: Why is that prejudicial?

CHAIRMAN SOULES: Because the consequences of the product may bear on its danger.

HON. SCOTT A. BRISTER: It's not supposed to, but I will recognize that sometimes it's done.

CHAIRMAN SOULES: Well, maybe theoretically, but in the real world --

MR. MARKS: Only because that's the way our procedure is, but if the court --

CHAIRMAN SOULES: Okay. Debate that. Maybe I'm wrong, but I don't think I'm wrong. I think I'm right. But there is where the tension is. Is there any way for us to

ease that tension?

MR. McMAINS: It's not just that, Luke.

CHAIRMAN SOULES: Then give me some more.

MR. McMAINS: Because under our rules, the person who has the burden of proof has the right to go first. Now, if you're going to order a separate trial with regards to any of the affirmative defenses in the abstract, then basically you've just completely restructured the lawsuit like it was a dec action filed by the defendant, and that they are then -- they're going to become the plaintiff with regards to taking affirmatively the position, and they will structure the entire nature of the trial, because the only issue involved is the liability issue that would preclude them ever having to go any further. And what it means is, if you guarantee that at no time do you have any kind of a result that could be determinative of the litigation, other than in favor of the defendant basically until you get to the very end where the defendant has lost

all of these things, you've got to have all of these kind of hoops to jump through. And if you lose any one of them, which may have been wrongly submitted, may have been something else, but you don't have a damages finding, you don't have the issues.

Even if you have unliquidated damages, you never kind of get there. You may not have any basis whatsoever to go to the appellate court and seek any kind of relief other than for "Let's go have the trial that I was denied the first time" on any of these issues. And you've got four or five hoops to overcome in order to do that.

The thing is, I mean, basically all this is is an effort to say, okay, I want to try this defense first, and they want a number of free shots in terms of trial in which the only issue is an affirmative defense. That really is what this is about, and that is a partisan issue.

CHAIRMAN SOULES: Iley vs. Hughes doesn't prevent that.

MR. ORSINGER: Why not? Aren't you trying liability without damages if you

try an affirmative defense? Isn't that a liability question?

HON. SCOTT A. BRISTER: What Rusty just said is what courts have been saying is okay under the current rule for decades. Bill of review -- I've listed the cases there on limitations, bill of review.

At the same time, I bet you under the current rule all of the appellate courts would say we don't have a separate trial for sole proximate causes first either. But this is getting into the details of, okay, which ones are you going to allow it on and which ones are you not. And I think we would all probably agree on that, but it would take forever to draw up those 200 on either side that we are and aren't going to allow.

The key question, my concern is the six-month long trial, can I break it into manageable bits? To me, there is no logical reason, if it's the same jury and you voir dire and opening statement on as much as you want about how terrible this all was and everything else, you know, to me, there's no reason we shouldn't break that up into some

manageable bits. Everybody is doing it.

I mean, you know, this is that thing about interim arguments. People are even breaking these up in many states without bifurcating any of the trial, just allowing the jury to deliberate, allowing the lawyers to argue in the middle of liability, in the middle of all this stuff, because in a multi-month trial there's just a lot of stuff.

CHAIRMAN SOULES: I'll give you an example of the prejudice in this. I want to hear enough talk about this because I want to be damn sure we do everything in a balanced way.

The doctor says, "I only gave the right amount of medicine." The fact is, the doctor gave the baby an injection, and the baby has a fried brain in 15 seconds. So the doc is saying, "I didn't do that," and the best evidence that he did is the injury to the child. Are you going to bifurcate?

MR. MARKS: Well, wouldn't that be a reason to try the two things together?

CHAIRMAN SOULES: Yeah. But what if some judge says, "No, we're not.

We're going to let the doc and his nurses and his room full of people get up there and say they didn't do it. And maybe somebody says they did, some expert says they did, but we're going to find out whether he did or didn't before we show this jury the terrible consequences to the baby."

MR. MARKS: So you argue that because the judge may abuse the discretion that he has, you shouldn't do it. Well, then we should never have any discretion in the judge. And the judge has got discretion to do separate trials on a lot of different issues. Now, why should it be different on this? Because there are a lot of different reasons why liability and damages in a personal injury situation should be separated.

CHAIRMAN SOULES: Well, we can debate them, but these are issues and consequences about what we're doing.

MR. MARKS: Well, that's right, Luke. But what we've been hearing mostly is what Rusty is saying, and there is prejudice on the other side.

For example, if you have a case where

there is virtually no liability and the thing that gives it value is the damage to the plaintiff, that's tremendous prejudice to the defendant for not being able to try those two things separately.

CHAIRMAN SOULES: I understand. I'm not taking sides on this. I just want to be sure that we debate this.

MR. MARKS: Well, I'm just saying that if you give this discretion to the court under the general, you know, idea that if they abuse that discretion they can be reversed, then what else can you do? And this is the only single area where we have a problem.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, it seems to me historically that we copied our rule pretty much from the 1937 version of the federal rule in the context of a culture that probably did not understand what was being embraced with respect to what could be divided up and tried separately. Of course, that's speculation about whether that original

committee or court understood that issues meant, you know, something much smaller than causes of action.

But beyond that, we have two other rules that deal with this same subject, one that is now in the appellate rulebook, and that one is in our civil procedure rulebook as Rule 320. And there's a separate limiting requirement in there, without unfairness to the parties.

Now, I'm becoming convinced by what Judge Brister is saying that this is a good way to conduct business as long as it can be done without unfairness to the parties. And I heard him say earlier that since it's the same jury, then the jury will have heard about the damages during the selection process and they maybe don't need to hear about that during the liability, during the first trial, which presumably will be about some aspect of liability.

Now, I'm getting ready to kind of maybe give this serious consideration, but I would want to see not only expedition and economy in there, but I would want to see this other limiting thing, without unfairness to the

parties, so somebody could argue in a proper case that, no, you really can't try the liability issue in this case fairly unless the evidence comes in. Maybe it's an evidence relevance question. Maybe these two things ought to be tried together.

So my additional suggestion, I'm thinking this bifurcation thing doesn't bother me so much, same jury, but I sure as heck don't like these cases that are spread out over long periods of time. Boy, that seems to be a very odd way to run a lawsuit.

HON. SCOTT A. BRISTER: Short trials. You're preaching to the choir on short trials. Nobody dislikes longer trials more than me. But that's -- the idea is to break it up into something manageable.

PROFESSOR DORSANEO: My specific question would be, would you embrace the "without unfairness to the parties" standard in there?

HON. SCOTT A. BRISTER: Absolutely.

CHAIRMAN SOULES: Without unfairness to any party?

PROFESSOR DORSANEO: Yeah.

HON. SCOTT A. BRISTER: Sure. I can make up all kinds of worse examples than Rusty trotted out of stupid ways to try to -- you know, try sole proximate cause first, you know.

MR. McMAINS: Well, since you're not entitled to submission of it, it's kind of hard to do.

HON. SCOTT A. BRISTER: Well, okay. Whatever.

CHAIRMAN SOULES: We need to take a break. I've got five minutes to 4:00. Is that what you all have? Okay. Be back at 10 after, and we're going to work until 5:30.

(Recess.)

CHAIRMAN SOULES: All right. I'm going to ask your indulgence on this in the interest of getting on to Richard Orsinger and Bill's reports, which we have been for several meetings trying to work through, that we noodle on this 174(b) problem until our next meeting and get back to it and let everybody try to collect their thoughts and maybe organize their arguments and we'll come

back to it. I'm afraid that our time is such that we need to get to Richard and Bill in order for them to stay on track for resolution of the issues they have before them.

Okay. Richard, why don't you go ahead and start.

MR. ORSINGER: According to your agenda, on the proposal of an offer of judgment similar to or at least analogous to Federal Rule 68, we do not have a product to show you yet. The Court Rules Committee has done back in 1990 a comprehensive version of the rule, but the work product on that our committee has not been able to lay their hands on it. I think that Shelby Sharpe is probably the one who is going to end up having it, so I'm going to have to communicate with him.

We have correspondence that contains suggestions about how their committee proposal should be changed, but we don't actually have the committee proposal, and it was our thought that we would be better off looking and seeing what the ultimate outcome of that committee's suggestion was.

Now, Carl told me this morning that it

was so controversial that the rule was scotched even by the Court Rules Committee, right?

MR. HAMILTON: Right.

CHAIRMAN SOULES: In '90 or more recently?

MR. HAMILTON: More recently, like last year.

MR. ORSINGER: Like last year. Okay. Well, then maybe you have a more recent version than the one that I've seen evidence of.

MR. HAMILTON: Yeah, I bet we do. I think Shelby drafted something either at the last of last year or the beginning of this year, the last of last year, I guess, that was whittled down.

MR. ORSINGER: Well, it's our committee's view that we shouldn't just adopt the federal rule as is, because it would bring with it all the federal case law. I don't know what the particulars were of why the other committee's product never came to fruition, but we would like to look at it and work from it, so we don't have anything to

report to this meeting on that one.

The next item on the agenda for this meeting relates to our materials, Pages 276 through 293. And Pages 281 through 293 all relate to discovery and --

CHAIRMAN SOULES: In Agenda Volume 1?

MR. ORSINGER: Yeah. So there may be a typo, or we may just need to clarify.

CHAIRMAN SOULES: Richard, help get me where you are.

MR. ORSINGER: I am looking at the letter sent out for this meeting, the agenda, paragraph 7(b), which is Pages 276 through 293 of the original agenda materials.

CHAIRMAN SOULES: 276?

MR. ORSINGER: 276 through 293. Now, 277 is on Rule 21a about service to the party's last known address, and Page 278 is Rule 165a. Both of these have been talked about at this Committee having to do with DWOPs which are done administratively rather than as a result of the failure to appear at a docket conference.

Starting with 280, 280 is Hadley Edgar's

proposal that we change the word "judgment" to "order of dismissal" in the DWOP rule. We've talked about that before. That's the first item in our disposition table that I want to clarify today.

And then from 281 on relates to discovery, as far as I can see, and there is nothing that my committee would have responsibility for. 281 on is just a letter from Brent Keis in Fort Worth, county court at law judge, enclosing his article about the discovery process and how it went awry, so he's clearly put a finger on a problem.

CHAIRMAN SOULES: His quick medicine fix is there is one action the courts and the bar can take to diminish the disease: Attorneys should seek and judges should assign cases to mediation prior, underscore prior, to discovery.

HON. C. A. GUITTARD: And then the parties come in with "We can't decide how much this case is worth until we have discovery on it."

MR. ORSINGER: The obvious answer to that is nobody is ready to settle

before they know what their case is like.

Well, at any rate, it's really not part of our agenda here, so what I would like to do, then, is move on to paragraph (c), and that refers us to the agenda to Page 437 and 436. I don't know if that's a typo or not, and I couldn't figure out what it was supposed to be, but this appears to be a letter relating to mandatory mediation, if it's Rules 434 through 436. It's a letter from one man, Robert Martin, Jr., in Dallas, '91, and the sum total of what he has to say is that we ought to have mandatory mediation, as I see it.

MR. McMAINS: Is he still alive?

MR. MARKS: Are you following the agenda?

MR. ORSINGER: Well, "the agenda" is used in multiple purposes here.

MR. MARKS: Well, item (c) is Rule 76(a), and you're saying that has to do with mediation?

MR. ORSINGER: Well, Pages 437 through 436 do. Now, Holly, pages what

through what?

MS. DUDERSTADT: 437 through 447.

MR. ORSINGER: 447. Okay. 437 relates to a letter on Page 438 in which Judge Scott McCown thinks we need to special rule of evidence regarding grand jury testimony, which would not be a responsibility of our committee here. And then 439 through through 447 is an enclosure which is an order that Judge McCown signed in a case involving discovery --

CHAIRMAN SOULES: Well, he's saying he is concerned about whether 76a applies to grand jury testimony. Is 76a outside your bailiwick?

MR. ORSINGER: No. It's in it.

MS. DUDERSTADT: Alex Albright indicated that 76a was yours.

MR. ORSINGER: It is.

MS. DUDERSTADT: So we referred it from her committee to your committee.

MR. ORSINGER: Alex is on my committee. So Alex, that isn't going to work.

PROFESSOR ALBRIGHT: Well, maybe we could find some other committee to

give it to.

MR. ORSINGER: Okay. Well, then I'll have to say that we did not discuss this proposal from the standpoint of how it ought to impact on 76a, because I comprehended this to be a request that we consider creating a privilege for grand jury testimony.

I interpreted this to mean that we have a rule of criminal procedure, a statute, a federal statute that governs the disclosure of grand jury testimony. And he's suggesting that we need a state rule. Now, to me that's not a 76a problem; to me that's an evidentiary privilege problem. You don't even get to a 76a publication to the world unless you get ahold of the grand jury testimony to begin with, and I thought the thrust of this was to -- but at any rate --

MR. BABCOCK: Luke, there are two situations that might be at work here. One, in federal court, if you want grand jury testimony, there's a procedure whereby you go get it.

MR. ORSINGER: Okay.

MR. BABCOCK: I don't think

there's anything comparable in our state practice that's comparable to that federal practice. Now, we could create a new rule or we could tack on to 76a some procedure to get grand jury testimony, I suppose, if we thought that was a good idea.

The other situation that maybe he's talking about is if some civil litigant has somehow come into possession of grand jury testimony and it's being asked for in discovery, then 76a might be implicated. But I don't think that there's anything particularly peculiar about the way 76a is written now that would call for us to change the rule in response to that.

MR. ORSINGER: Okay. So in that context, I guess what Scott's proposal is is that if there is an instance in which the closure of the grand jury testimony is penetrated in a lawsuit, should we be sure that it doesn't get promulgated as a public record through 76a? I did not cover that.

CHAIRMAN SOULES: In the wrongful termination case of Therese Huntzinger, she is saying she got fired

because she was too vigorous as an assistant district attorney in pursuing a case. The grand jury testimony was germane in showing her tenacity and the reason she got fired. The court entered a protective order allowing her to have the grand jury testimony from the county, and the district attorney put constraints on it for purposes of only the lawsuit. It says two copies shall be made, all copies returned, which revives motion of San Antonio Light who seeks access to these documents pursuant to 76a. That's how 76a gets into it.

And then Scott McCown goes through a 76a analysis and says that 76a is not implicated in that protective order, and so they don't get it. I don't know.

MR. ORSINGER: I guess in that light, what Scott McCown is saying is that perhaps 76a should be altered to somehow treat grand jury testimony differently from other court records, if in fact they are court records, meaning that they are acquired through discovery.

MR. BABCOCK: Well, the only

way they would be court records is if it's unfiled discovery and it relates to official conduct of a government official or public safety and welfare.

CHAIRMAN SOULES: And he says these are outside of 76a because they are documents and court files to which access is otherwise restricted by 20.02 of the Code of Criminal Procedure and so forth.

I don't want to spend too much time on this, but what he says is we need a rule regarding when and how grand jury testimony is disclosed. I guess he had a real struggle with whether to order the county to give up --

MR. ORSINGER: No. I think that these records were produced in discovery by the plaintiff, and the question is whether the newspaper could get the grand jury testimony or not. And he ruled that 76a did not require divulgence to the newspaper.

MR. BABCOCK: But the other issue is whether or not there ought to be a rule that governs the disclosure of grand jury testimony for whatever standard or whatever reasons you may want. That's not a 76a

problem.

MR. ORSINGER: Well, according to his order, there is a Code of Criminal Procedure provision that the courts have engrafted exceptions on are not explicitly stated in the statute. So you have an unqualified privilege. Then you have court-created exceptions. Then you have a publicity rule that might mean that the court-created exceptions result in otherwise secret proceedings becoming public information.

CHAIRMAN SOULES: All right. Well, he doesn't propose -- do we want to write a rule or attempt to write a rule engrafted onto 76a or something separate that would deal with how grand jury testimony, once injected into a civil case, may be dealt with? Chip Babcock.

MR. BABCOCK: Has this problem ever come up before other than in this one instance?

CHAIRMAN SOULES: Not to my knowledge. I'm learning something as I read this that's rather interesting.

MR. ORSINGER: Apparently this

didn't migrate to an appellate court.

MR. BABCOCK: My vote is let it go case by case. If it becomes a big problem, then write a rule.

CHAIRMAN SOULES: Does anybody disagree with that? Okay. That will be the resolution of item (c). What was the resolution of item (a)?

MR. ORSINGER: The resolution of item (a), Luke, is that our committee wanted to build on the work product of the committees that have visited it before, and we haven't been able to lay our hands on it.

CHAIRMAN SOULES: Okay. We'll reassign it for next time.

And 165a, what was the resolution on that, item (b), 7(b)? It went by so fast.

MR. ORSINGER: Okay. I'll tell you, we have visited all of those before.

CHAIRMAN SOULES: All dealt with before on the record, right?

MR. ORSINGER: Yes. But there is still a lingering issue about 165a that has to do with the writing of a rule to handle DWOPs that are part of an administrative

procedure of methodically dismissing, and our committee hasn't finalized a rule to report yet on how to do that. We're not ignoring it, but we've just been dealing with the venue problem and have never seemed to have gotten to this issue. So that's still a pending issue which our committee, full Committee, has voted, I believe, to require sufficient notice before a dismissal for want of prosecution that would allow someone to get a trial setting. I believe we voted to give at least 45 days' notice, not on a failure to appear at a regularly called case, but when you have an administratively generated DWOP setting. We haven't written that rule yet.

The next page is Hadley Edgar's proposal that in the DWOP rule we take the word "judgment" and substitute for that the words "order of dismissal."

CHAIRMAN SOULES: And we've dealt with that?

MR. ORSINGER: We dealt with that last time and agreed to go with "order of dismissal," but there was a large discussion about the fact that the DWOP rule and order of

dismissal is not the equivalent of a judgment, which is why we want to get away from the use of the word "judgment" and make the word consistently "order of dismissal."

Bill Dorsaneo stated into the record, I believe, two concerns. One is, can a motion to reinstate be overruled by operation of law and should it be; and secondly, what is the effect on plenary power.

Now, it's the subcommittee's view that under the current language of Rule 165a, subdivision (3), third paragraph, which reads, "In the event for any reason a motion for reinstatement is not decided by signed written order within 75 days after the judgment is signed, or within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law," now, if it's overruled by operation of law, does it preserve the point for appellate complaint or not?

I pose that question because there appeared to be some uncertainty, but our subcommittee didn't have the answer to that, and I don't know if you do, Bill.

Furthermore, David Beck, although the subcommittee did not vote this, David Beck wanted to put up for discussion at this full Committee meeting that presentment of a motion to reinstate should be required. So he asked me to bring that to the table.

And then if you read on in that third paragraph, "If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate until 30 days after all the timely filed motions are overruled, either by writing a signed order, or by operation of law, whichever occurs first," the current rule seems to say that it can be overruled by operation of law and that it does extend plenary power.

It doesn't tell you, though, whether overruling by operation of law preserves the point on appeal or not. David Beck wants the rule to specify that operation of law is not sufficient to preserve for appeal; that you should be required to make a presentment of your proof. That's where we are on that.

CHAIRMAN SOULES: Well, my suggestion is we don't go back to that. We spent a long time debating that when this rule first came in and there were a lot of reasons for doing it this way. Unless somebody has really got a strong reason for doing it the other way, I don't think we ought to go back to it. I can give you all the reasons, if you want them, but unless somebody objects, I don't think we ought to change that. Does anybody object?

Okay. And if it needs to be clarified that it preserves error, then we'll say so, that it does.

MR. ORSINGER: I would like to defer to a procedure professor here. Are there cases saying that overruling a motion to reinstate by operation of law does not preserve the point for appeal?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Okay. Then we may need to write something here if we do not want presentment to be required.

CHAIRMAN SOULES: That was the intent of this, that it would preserve it.

MR. ORSINGER: Then if there are cases that say that it doesn't, then perhaps we better specify that it does.

PROFESSOR DORSANEO: Well, to be a little more accurate, there is a Shamrock case written by the Dallas court -- Judge Guittard, I believe, wrote the opinion -- and it's actually a Craddock motion case, which I would consider to be the equivalent of a motion to reinstate a case dismissed for want of prosecution, because the standard is essentially the same in terms of the showing that you would make. And Judge Guittard's opinion, I think, reasonably says that that needs to be presented before you could establish that there's an abuse of discretion in not granting the motion.

In Cecil vs. Smith, the Supreme Court case says that overruling by operation of law of a motion for new trial containing evidentiary sufficiency points preserves those complaints, you know, overruling Paul Colley's opinion out of the Tyler court that strongly suggested in footnote that if the motion would require the presentation of evidence, then

overruling by operation of law is inadequate.

The San Antonio court a couple of weeks ago in a case that I think is called Norton vs. Martinez, but I'm not completely sure that that is the order of the names, actually held in a case where there was an overruling by operation of law of a motion to reinstate that -- or a Craddock motion, I may be running the two together -- that that was just a fine way to preserve the complaint and reverse the trial judge for not granting the motion that was overruled by operation of law without mention of either Cecil vs. Smith or the Shamrock precedent. So I guess that's really about the size of it.

CHAIRMAN SOULES: Well, the trade-off that was here was there was a strong sentiment that this motion should be deemed granted if you couldn't get a judge to hear you, and you couldn't get a lot of judges to hear you. If you filed a motion to reinstate, you couldn't get to court, so the presentment was impossible. And the trade-off that this Committee and the Supreme Court bought off on was that it would be deemed overruled as a

matter of law, so then at least what you raised in your motion to reinstate could be reviewed by an appellate court rather than having a sweeping number of cases go back on the docket by deeming the motion granted. That was the reason for it. This was certainly set up here for purposes of getting the 165a motion before some court.

MR. ORSINGER: Well, I would point out that the first paragraph of 165a, paragraph (3), requires the court to grant a hearing.

CHAIRMAN SOULES: That's right.

MR. ORSINGER: But if they don't, you don't want them to be able to like pocket veto the motion so that it's not subject to appellate review.

CHAIRMAN SOULES: And that's what was going on when this 165a was written, because that was a huge problem. Judges were dismissing for want of prosecution by posting notices on the courthouse door of 150, as many as they wanted to, and people didn't even know. They woke up later on and found out their case was gone. Then you've got 301 and

all that stuff, 306a, and all this stuff. You've got to jump through the hoops to get your case tried. It's terrible. Malpractice cases, implication --

MR. ORSINGER: Well, in light of the argument that Bill has raised, then perhaps we should add a sentence in here that makes it clear that if there is no order overruling the motion, that a point is preserved when it's overruled by operation of law.

PROFESSOR DORSANEO: Actually in the Appellate Rules now too we have in what was 52, which I guess now is 33, a codification of Cecil vs. Smith and the interpretation that I just gave to it.

CHAIRMAN SOULES: I suggest that we just do this, Richard: Where it says "shall be deemed overruled by operation of law," say "shall be deemed to be a motion for new trial overruled by operation of law." And then if we don't have motion for new trial in the Appellate Rules or this thing in the Appellate Rules, that will carry us into the Appellate Rules.

PROFESSOR DORSANEO: That gets you into more trouble, though, Luke. I think it would be almost better to say that if it's not ruled upon, if the judge doesn't rule upon it in 75 days, then it's almost deemed granted.

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

PROFESSOR DORSANEO: Why not? We deemed affidavits of indigents, or whatever they used to be called, they were granted if you didn't overrule them.

MR. ORSINGER: But the bulk of these are going to be ignored probably, and probably mercifully so. I mean, a lot of people are going to have a gut reaction of filing a motion to reinstate and then just kind of let it go and not appeal it. So if you automatically reinstate it, then all of a sudden the case is back on the docket.

CHAIRMAN SOULES: That was the argument.

PROFESSOR DORSANEO: We ought to spell it out that this is different, because it doesn't look different. Until I

heard your explanation, I had forgotten all of that discussion.

HON. C. A. GUITTARD: But if the motion requires presentation of evidence, it ought not to be overruled by operation of law, should it?

MR. ORSINGER: Well, it's currently overruled by operation of law under the present language of the rule, but that doesn't necessarily mean that the point is preserved for appeal.

HON. SARAH DUNCAN: It seems to me we need to distinguish between preservation at the point of error and establishing error. I do have difficulty understanding and I would ask for guidance, I don't know what the law is, but get out of the motion to reinstate context.

If I have a motion for new trial and one of my points is juror misconduct and I attach affidavits from jurors establishing conclusively juror misconduct and I file that with the district clerk but I never bring it to the attention of the trial judge, okay, fine, I preserve my point of error. But can I

establish an abuse of discretion in denying my motion for new trial? Surely not.

MR. McMAINS: I'm not even sure you've preserved it in that sense.

CHAIRMAN SOULES: Well, spell it out. That seems to be the only glitch in the rule. And if we can spell that out, then obviously it doesn't establish error, but it's going to preserve error.

MR. ORSINGER: Well, you could just say where it says, "The motion shall be deemed overruled by the operation of law and the appellate point preserved," or some words to that effect. Stick it right onto the end of that sentence or something like that.

CHAIRMAN SOULES: Fine with me.

HON. C. A. GUITTARD: Now, we do have provisions as to when motions for new trial are required. Those are the cases that the trial court has not ruled on before the motion is filed. For instance, if a ground is an exclusion of evidence, well, the trial court has already made a record on that. If it's something like newly discovered evidence

or perhaps jury misconduct, that has to be ruled on in some way before error is made or error is preserved, it seems like to me.

CHAIRMAN SOULES: If you can get a judge to hear it.

HON. C. A. GUITTARD: Well, mandamus him.

CHAIRMAN SOULES: Too late. He lost plenary power before you can mandamus him.

MR. ORSINGER: Well, then your point of error on appeal was that you refused to give me a hearing, and then you have to rely on your affidavits to prove the harmfulness of the error. That is your typical remedy when you don't get a hearing even on a motion for new trial that requires that.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I need to correct this, so we'll go forward with that, but I'm looking at my main disposition table here, and I will have to say that I didn't recollect this, but apparently at our January meeting the full Committee rejected the

proposal that we give 45 days' minimum notice of the DWOP. That was not what I recollected, but that's in my disposition table, so therefore I must have a faulty memory on that.

CHAIRMAN SOULES: That's right. What your notes say is wrong.

MR. ORSINGER: Okay. Then I stand corrected on my earlier statement. So having said those things, I believe we have addressed the matters that were raised by Howard Hasting's letter and by Hadley Edgar's letter.

CHAIRMAN SOULES: What we decided to do was let the 165a process work internally by getting back on the docket, not having somebody scramble to get a trial setting by having 45 days' notice.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: So we're going to have 165a up again, 68 up again, and 76a is concluded. Okay. Now, (d).

MR. ORSINGER: Okay. Now, (d) is a project that we have not completed pending a receipt from Lee of the Appellate Rules. Justice Guittard and I have talked

through a strategy on this, and Justice Guittard has submitted quite a number of proposed General Rules that would unify language in both the Appellate Rules and the Trial Rules, and we have previously as the full Committee voted to reject them because the Appellate Rules have gone final. And so now that kind of leaves us in the situation that we need to match the Trial Rules with the Appellate Rules, and if there is a significant disparity, we either call it to the attention of the Supreme Court after the horse is out of the barn, or we amend the Trial Rules to comport with the Appellate Rules.

Now, that comparison hasn't been made, but I can do that probably by the next meeting assuming I get the rules within a couple of weeks, which we'll have them within a couple of weeks, won't we? Okay.

CHAIRMAN SOULES: That will come back then next time. (e).

MR. ORSINGER: Okay. On item (e) we have what is called a Supplemental Disposition Table which is this thin one relating to Rules 15 through 165a. This is a

miniature table that I've created to handle those matters that were called to our attention. And what I've been doing as we handle them is I fold them into our larger disposition, so ultimately this document will disappear, but we're working from it for this afternoon.

The first item on there is Page 111 of the agenda materials relating to Rule 18, which is a rule without any explanation, without any cover letter or anything, a federal rule having to do with where a judge has to be replaced after trial -- pardon me, well, during trial, while the trial proceeding is going on. And the rule apparently permits a new trial judge to take over upon certifying familiarity with the record and determining that he can complete the trial without prejudice to the parties. And in a non-jury case, the successor judge can recall witnesses and whatnot.

Now, we don't have a rule that's identical to this, but we do have Rule of Procedure 18 that has to do with when a judge dies during term, resigns or is disabled, and

it permits generally the substituting of a new judge for the old judge during term time without any specific constraints on the judge completing the trial or having to certify having read the statement of facts or anything of that nature.

Our subcommittee's view was that while the federal rule covers a contingency that the state rule does not specifically mention, we haven't heard or read of any instances where the state rule was inadequate and don't feel that it's necessary to adopt the federal rule to cover how you specifically handle the death or replacement of the judge in the middle of a trial proceeding.

CHAIRMAN SOULES: Your committee recommends no change?

MR. ORSINGER: No change.

CHAIRMAN SOULES: Any disagreement? No disagreement. The committee will accept that.

Okay. 18a. Change administrative judicial districts to AJRs.

MR. ORSINGER: Yes.

CHAIRMAN SOULES: Is there any

objection to that?

MR. ORSINGER: And we're in favor of that because the statutes have been changed and they're no longer called administrative judicial districts.

CHAIRMAN SOULES: No objection. That will be accepted.

MR. ORSINGER: The next item is Page 115 of your agenda materials, 116. He doesn't want the court to have to sign minutes at the end of the term. We've eliminated that rule already.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: The next item is Page 120 of the agenda, and that is another one of the federal rules that's just put in here to analyze, and that relates to Federal Rule 5(d) which contains, I think, three different subject matters, which is that you have to have a certificate of service -- we already have that requirement in the state rules, so no change is necessary there.

5(e) permits facsimile transmission of court pleadings and other papers if permitted by district court local rules, and we have fax

filing rules that we have adopted in this Committee and we have existing rules for service on other lawyers by fax, so we feel like we have already approved our existing rules that cover this issue.

And then the third issue is a specification of the clerk not being able to refuse the filing of a paper because it's not presented in proper form. It was our subcommittee's view that there is no Texas rule that permits a clerk to reject a filing anyway and we don't need to put in a rule there that prohibits them from rejecting it because they're required to accept for filing. There's no exception to permit a rejection, and therefore we don't feel like we need to write this into our Texas rules.

CHAIRMAN SOULES: Any disagreement with that, Bonnie or Doris?

MS. WOLBRUECK: None at all.

CHAIRMAN SOULES: Anyone else? That recommendation, then, is accepted without objection.

MR. ORSINGER: The next agenda item is Page 135 and 136. This is the old

problem of hand-delivery after 5:00 p.m. deemed served the following day. We debated that several years ago when we were all young and vigorous and decided that we weren't going to go with the proposal, and so we are not recommending any reconsideration of that issue.

CHAIRMAN SOULES: Does anyone disagree? The Committee has accepted the recommendation.

MR. ORSINGER: The next agenda item, Page 139 through 143, fax service only upon written stipulation of the attorneys; prohibit service of contempt motions directly on the attorney. We like our fax service rules that exist already. We recommend no change there.

And we felt like it was not necessary to put in the rules that you can't get service on a lawyer on a motion for contempt because everybody knows that if the relator or the accused contender doesn't appear in contempt, you can't have your hearing anyway. And this is all governed by constitutional law. It's well understood. There doesn't seem to be a

problem with it, and it was our view that this was an unnecessary rule to cover a point that is obvious and constitutional anyway.

CHAIRMAN SOULES: Does our rule require that fax service be to the fax that's on the opposite party's pleadings?

MR. ORSINGER: Yes.

CHAIRMAN SOULES: Okay. That was Dalton's big complaint, that Vinson & Elkins had 300 fax machines and they were serving him with -- at the time he was not a litigator -- with litigation faxes, and he was having to run them around and people were playing tricks on him.

MR. ORSINGER: We debated that extensively on this Committee, and the Committee discussed the possibility of allowing -- because sometimes the case is being worked by an attorney that's not in charge of everything, but if you ever once turn loose the control of where the fax goes, then you've lost the ability to know for sure it's going to the right person. So I think the Committee decided collectively that what's in the pleadings governs, and if you want to

change that, you have to have an agreement or a change in the pleadings.

CHAIRMAN SOULES: All right. So you recommend no change. And you've got that problem that is Dalton's main problem covered in the rule already. Okay.

MR. ORSINGER: And on this due process question, we don't think it's advisable to write a rule saying specifically you can't serve a lawyer on a motion for contempt. The constitutionality of that speaks for itself, and we don't think it's worth writing a rule for.

CHAIRMAN SOULES: Okay. Any disagreement? No disagreement. Your recommendation is no change, and it will be accepted.

MR. ORSINGER: Okay. Agenda item Pages 144 through 146 is a request that the government be relieved from sending certified mail. And way early on years ago before anyone may remember it, as a result of our subcommittee recommendation, we recommended we eliminate certified mail altogether. And the full Committee talked

about it, and I don't recall whether we voted on it or not. I just don't recall, and I don't even know that I have the transcripts from the hearings that were that early on. But our subcommittee had made the recommendation that we go like the federal rule does and just eliminate the certified mail requirement on notice between lawyers. And this was all at the time that we discussed the fax, the overnight rule and all that business, and I just have to confess I haven't been able to find that we voted on it or didn't vote on it.

MR. HAMILTON: It's a great idea.

MR. ORSINGER: It seems to be working on the federal side all right, and if someone feigns service and falsifies it, you can always get in court and have a hearing and prove you didn't get it.

CHAIRMAN SOULES: Sarah Duncan.

HON. SARAH DUNCAN: Maybe it's just me, but I've had more trouble getting served by the FDIC than any other party to any other lawsuit I've ever been in. They log it

in on the government's log sheet and use that as the date of mailing when it is not mailed on that day. And it can be two weeks before you get what they say they put in the mail two weeks ago; in fact, the postmark on it is three days ago, because it gets held in some government office somewhere as logged in but not sent out.

MR. ORSINGER: To me, that doesn't support the idea that we ought to require everybody to send everything by certified mail. We're truly spending untold amounts of money and time to go through the return receipt process, and the federal system has proved that it's not necessary in order to have a justice system that everything be served by certified mail. And our view was that we just don't need that safeguard, and if someone is victimized by a dishonest lawyer, they can get the court to remedy it through testimony and producing envelopes that have postmarks and whatnot.

CHAIRMAN SOULES: But what if you don't get an envelope with a postmark? What if you never get it?

MR. ORSINGER: Then you get down there with your testimony that I didn't get this until three days after my deadline to respond.

CHAIRMAN SOULES: What if you didn't get it at all; it never came?

MR. ORSINGER: Well, then you're going to presumably see some kind of order or something. If it's going to be discovery, like I sent him answers to interrogatories but he never got them, there's a presumption of service on mailing, but there's no presumption -- I mean, that can be overcome by actual testimony you didn't receive it. So then the victim becomes the party who sent it who can't prove that it was received. Now, you may wish to, when you're supplementing discovery, to send it by certified mail or to get a receipt from your courier in order to protect against the eventuality that the other lawyer is going to lie and say you didn't get it. And there's no harm in doing that and you can do that anytime you want.

But the current rule requires that all

things that require service be by certified mail even between lawyers that are honest and trust each other. And there's a lot of money that's spent for that, and we just don't -- it was our view that it's not necessary. We're not prohibiting you getting certified mail, we're not prohibiting you getting a signed receipt, we're just saying it's not necessary and that you're going to have to, if there's a dispute, have sworn testimony.

CHAIRMAN SOULES: I'm probably in the minority on this, but to reason that because something works in the federal system that it would work in the state system, particularly I think in this context, may be flawed. The cases that are in the federal system have a little different character.

MR. ORSINGER: Different lawyers.

CHAIRMAN SOULES: Different lawyers may or may not have a different approach, and the judges certainly have a different volume of flow and deal with things in different ways.

And if you go to docket call almost any

day on the daily docket in San Antonio, the judge is going to ask somebody if you've got a green card to prove service. And if there's a discovery dispute about timely responses, that's what the judge asks, "Do you have a green card?" And that resolves it. If you've got it and it shows it, it's done. If you don't have it, then don't go do it again, because you don't have proof. And these hearings go very, very fast, and the issues are eliminated.

It probably doesn't make any difference in my practice anymore because my cases are different and the lawyers I'm dealing with are different. But I don't think it's a waste of money to require the sending party to have proof that the party sent something when the issue is very important to a case. Maybe the transaction cost of having everything done that way is overpowering, but I favor certified mail because it does establish receipt.

And I'm more concerned about the sender misrepresenting that something was sent than the receiving party saying they never got it.

It's the never-received part of it that's a big problem for me. The sender says, "I sent it." Now you've got a swearing match. "I didn't get it."

Or the other side of it is, "I got it and I threw it in the trash. First class mail never came" -- or "It came through but I never got it." I think we're going to generate a lot of disputes among people that are not as sensitive to issues as most federal practitioners are. That's enough said. That's all I'm going to say about it. Sarah Duncan.

HON. SARAH DUNCAN: Why do trial judges need to be making these credibility calls, I guess is my problem with it. I'm not saying anybody would lie. I don't know. I don't know that that's generally -- that's not generally the problem we see, at least in the court of appeals. It's a question of disbursing responsibilities, and to me, the green card system that we've got now is not a problem. It's dispositive, and it costs a dollar and a half.

And if we really want to talk about costs, I don't think that's where the costs in litigation are. I think we're going to create a problem that we now have completely pretty much completely resolved.

I mean, if the FDIC comes in with their government log that shows that it was mailed and Luke Soules comes in and testifies, "Well, Judge, I understand that their log shows it was mailed, but I never received it," and it happens to be in federal court, you know, or state court, wherever, it doesn't really matter, how is the trial judge supposed to figure that out? Luke says he never got it. The government's log shows it was sent. I think that's adding a difficult call to a system where that just shouldn't be difficult. You show your green card. You show when it was sent. You show when it was received.

MR. ORSINGER: What I would say is that it's very difficult to talk about what life would be like without this rule in state court because we have this rule. But surely it's costing millions of dollars for us to

require the green card system to eliminate those instances where we have one dishonest lawyer and we don't want the judge to have to decide which one it is. If you don't trust the lawyer you're dealing with when you send something, then send a green card and then you'll have a return, or get it hand-delivered and get a receipt signed and then you can prove delivery.

The question is, in order to avoid disputes where you have either an inadvertent mistake or dishonesty, are we not spending too much money requiring too many people to do things that they don't need to do because of a smaller number that are a problem?

And that problem, by the way, is curable by anyone who wants to cure it in their situation, because we're not prohibiting them from sending a green card. It's just a question of whether everyone must send a green card so that the existence or nonexistence of a return receipt is determinative of the credibility issue in those situations where lawyers are saying opposite things. That's really what we're saying, that whoever sent it

loses if they don't have a green card because a green card is required, and that's costing million dollars.

And it also costs the labor costs, which around my office is not insubstantial. At the end of the day -- I have two employees, a legal assistant and a secretary. At the end of the day, the last 30 minutes of my secretary's day is spent typing green cards.

Most of the lawyers I deal with I trust, and I don't need those green cards in order to keep myself from being screwed, but I'm required to do it because the rules require it. I don't know. I just feel differently about it, that we're requiring everyone to do it. We're not prohibiting anyone from doing it. We're requiring everyone to do it just to make those tough situations where two lawyers disagree, to make them easier to resolve.

CHAIRMAN SOULES: The certificate of service raises a presumption of its correctness, so the lawyer that didn't get it has to prove a negative, "I didn't get it." That's not easy.

MR. ORSINGER: Well, if I slip

something under somebody's door after 5:00 o'clock and I don't have a receipt, I'm in the same boat. I'm going to testify that I slipped it under their door, but I've got no way to prove that other than just my credibility. I mean, I wish I knew how many millions of dollars we were spending on this so we could look at the cost of the rule.

MR. BABCOCK: We better think about, when we're talking about costs, the cost that it's going to take to the court system to have to go back and redo everything when nobody has notice and they can't prove it and the judge can't decide who is lying and who is not, because that's a cost too.

MR. ORSINGER: I really wonder how much that's going to happen, because if you have a dishonest lawyer, that will surface, and then people will start sending green cards and getting receipts.

HON. C. A. GUITTARD: It may not be a matter of dishonesty. It may be a matter of a failure of some secretary to turn the thing over to the party that the letter was to be served. If the lawyer says, "I

didn't get it," well, it may be his own office that is at fault for not giving it to him when it was probably served on somebody.

MR. BABCOCK: If you have a green card, you say, "Well, wait a minute, who is Susie Brown?"

"That's my receptionist." Oops.

CHAIRMAN SOULES: David Jackson.

MR. JACKSON: There's more significance attached to a document that you get that's got a green card on the back of it. It won't get thrown in the trash as junk mail or as something that's not of as much significance as a certified letter.

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: Can't you have an agreement that you don't have to send everything by certified mail? It seems like you should.

MR. ORSINGER: As a matter of fact, in a lot of my cases, Alex, I just don't comply with the rule when I have a lawyer on the other side that I trust and that trusts me and nobody cares, and they don't either,

because we don't ever try to take advantage of each other. So yes, I mean, you can get around it, but if you don't have an understanding like that, then you've got to spend the money and time.

MR. MARKS: Well, in my work I may run across the same plaintiff's lawyer once in five or 10 years. I don't know the guy. I'll never see him again. That happens a lot. In your business, divorce lawyers, you all know each other; you've worked with each other. There's a lot of accountability there that does not exist in our world, honestly.

MR. ORSINGER: Well, because of --

MR. MARKS: Take my word for it.

MR. ORSINGER: Well, because of your law practice -- I mean, do the problems that you have because of that in your law practice warrant that everyone everywhere has to have to green card every time?

MR. MARKS: Well, there are an awful lot of those lawyers out there, and it seems to me that I sure have been glad that I

had those green cards a lot of times.

MR. ORSINGER: Of course, you can always have your own green card. The question for us really is whether they're forced to have a green card on you. And if they can't produce a green card, then you have a slam-dunk case that you didn't get notice, because you can always get your own green card on them. The issue here is that if they can't produce a green card, you win.

MR. MARKS: Well, why isn't it the same? Aren't we talking the same issue, just two sides of it?

MR. ORSINGER: No, because you can always protect yourself on what you serve on them by sending it by certified mail, return receipt requested. What you can't protect against is then they can up the fact that they sent something to you, and you're now trying to prove a negative that you never got it. And in the ordinary situation, since the law requires that they get a green card, if they can't produce it, they lose. If we take the rule away and they can't produce it, then it's a swearing match.

MR. BABCOCK: So that's an argument in favor of green cards.

MR. MARKS: Right, exactly.

MR. ORSINGER: That's your argument. Your argument is not what you serve on them, but refuting they served something on you that they really didn't serve on you.

MR. MARKS: Well, I like to know when I'm served, so I don't mind getting a certified letter.

MR. BABCOCK: Let's vote.

CHAIRMAN SOULES: Those in favor of certified mail show by hands. In favor of certified mail. Eight.

Those opposed. Four.

Eight to four, we'll retain certified mail.

MR. ORSINGER: Now, then the subsidiary argument then arises of whether the government should be relieved from sending certified mail.

MR. MARKS: What's that, Richard?

MR. ORSINGER: Well, then we get back to the man's original proposal, which

is whether the government should be relieved from the requirement of certified mail.

CHAIRMAN SOULES: Say not in these rules. Is anybody in favor of government exemption of certified mail?

Those opposed to government exemption of certified mail?

We are unanimously opposed to that.

PROFESSOR DORSANEO: I'll vote for certified mail for the government only.

CHAIRMAN SOULES: Bill says certified mail for the government only.

MR. ORSINGER: Next is agenda Pages 147 through 150, and these are --

CHAIRMAN SOULES: So the vote on that is no change. No change.

Okay. Thank you. Next is 147 through 150?

MR. ORSINGER: Yeah. Howard Hasting doesn't like serving notice on a party when the party is represented. We've already fixed that. He also wants to say that service can be effected on the last known address of the agent or attorney if you can't find the party. If the party is gone and their

attorney is also gone, then you can serve it on the attorney's last known address.

Our feeling was that's such a remote contingency, although there is some symmetry that has intellectual attraction, it's not sufficiently important to be in the rule.

CHAIRMAN SOULES: So you recommend no change?

MR. ORSINGER: No change.

CHAIRMAN SOULES: No change is accepted. No opposition to that. That's accepted.

MR. ORSINGER: Agenda 151 through 153. Same complaint, you shouldn't be able to serve the client when they have an attorney of record. That's already been fixed.

I think these people were all outraged by the same case, and we have eliminated that glitch. The same thing occurs on Pages 154 to 156 and 157 and 158.

CHAIRMAN SOULES: Okay. Except you've got some change on 21?

MR. ORSINGER: Yes. And I'll talk about that.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Norman Kinzy's letter, Pages 157 to 158, also raises the issue about a reference in a rule that's nonsensical, and we agree that it's wrong, and we ought to drop the reference to Rule 21 from Rule 21b, and then that eliminates the discrepancy. It was a valid observation.

CHAIRMAN SOULES: Any opposition? That's accepted.

MR. ORSINGER: The next item is agenda Page 182 which is Federal Rule 15(c) involving the relation back doctrine for amended pleadings. It's our recommendation that we have no rule that relates to the relation back doctrine. The rule on causes of action is case law, not rule driven -- pardon me, it's statutory and not rule driven now. And additionally, the relation back problem that occurs when you amend your pleadings and inadvertently drop a party who you then rejoin in a subsequent amended pleading, we have specifically fixed that by rule. The statute of limitations will not run if you inadvertently drop a defendant, catch it, and

then reinstate them.

You may recall the long debate about it, that it requires an announcement of nonsuit in order for you to nonsuit a party, et cetera, et cetera. And there was a Supreme Court case a couple of years ago, and we've reacted to that, and we've already approved a rule that those inadvertent omissions from an amended pleading do not actually effect a dismissal against an omitted party.

CHAIRMAN SOULES: You recommend no change?

MR. ORSINGER: No change other than what we've already --

CHAIRMAN SOULES: Other than what's already been done?

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: Any opposition? That's accepted.

MR. ORSINGER: The next agenda item is 209, Paul Harris doesn't like Rule 76a. Our recommendation is let's not eliminate Rule 76a unless the Supreme Court tells us to.

MR. MARKS: I don't know --

CHAIRMAN SOULES: There was one effort to do that after the composition of the Court changed.

MR. ORSINGER: The letter was written in 1990, John, so I think there were still some tempers at that time.

CHAIRMAN SOULES: Well, we were told by the chief that the Court wasn't interested and they were going to leave it like it was.

So you recommend no change on 76a?

MR. ORSINGER: No change. And I want to further point out, as mentioned in this disposition table, that Judge Brister has moved to drop 76a(2)(c), which has to do with unfiled discovery, and we have tabled that pending the outcome of General Tire vs. Kepple, which is under submission to the Supreme Court to determine to what extent a confidentiality order as to unfiled discovery is or is not a 76a motion, and we have previously voted to table that until we find out the difference between a 76a proceeding and a confidentiality proceeding.

CHAIRMAN SOULES: Put this on

the agenda, Holly. Each time we'll carry it on the agenda until we get some direction. Okay. Next.

MR. ORSINGER: Okay. Next takes us to supplemental agenda -- well, no, it doesn't. It's the regular agenda, Page 4, and Greg Enos wants to ban smoking from depositions and court proceedings. And the Discovery Committee has recommended against that. We've already approved that. It's our view that the county commissioners control who smokes in the county courthouse. The city council will control who smokes in office buildings, and maybe the federal government will control who smokes anywhere. I don't know. But it's just not for us to decide in this rule. That's our committee recommendation. No change.

CHAIRMAN SOULES: And we have a rule in our office and a lot of buildings do to take care of that too.

MR. ORSINGER: It's just a building-wide rule.

CHAIRMAN SOULES: No change?

MR. ORSINGER: No change.

CHAIRMAN SOULES: Is anyone opposed? That's accepted.

MR. ORSINGER: That moves us to second supplement, Page 139 through all the rest of the entries which goes to Page 186. All of them relate to the Supreme Court promulgating uniform rules for private process serving. And we have decided that that is a political question. The legislature has refused to do that. These proposals usually would require the secretary of state to maintain a registry and whatnot. There's no allocation of money. We have no ability to allocate that money. It's just our -- we repeatedly recommend that this is not an issue to be addressed by the rule, and that applies, then, to the next five items on the supplemental disposition table.

CHAIRMAN SOULES: Let's see.

MR. ORSINGER: This is part of kind of a chain letter deal. In other words, everybody sent the same letter with the same suggestion to show a groundswell of support for it.

MR. JACKSON: For process

servers.

MR. ORSINGER: And it gets to the same thing, and I believe we've already rejected this in another form. It's just not in our rule making authority to tell the secretary of state to open up some kind of registration process for an industry, besides which, different counties have different standards.

Bexar County requires the posting of a bond. You have to have either an insurance policy or a bond. Other counties have prescribed lists. We would be stepping into the middle of a fight that even the legislature won't step into.

CHAIRMAN SOULES: We changed Rule 103 at a time when a lot of counties had a problem because neither the sheriffs nor the constables wanted to serve civil process. In some counties they didn't want the job. And the civil process servers were emerging. This came up, I don't know when, let's see, it looks like maybe '87, '81 maybe. And so we said, "Anyone authorized by law or written order of the court who is not less than

18 years of age," blanket. They can get it how they can from the courts. That was first interpreted to mean it had to be done on a case-by-case basis in some places, but that was soon abandoned when the judges didn't want to do it all the time, particularly in the counties where the sheriffs and constables didn't want to do the job.

So now it's pretty much by blanket order. Some requirements are imposed. And now the ground has shifted to they want to have a cottage industry to where there are only certain people who have certain credentials that can do this so that there's a limited number of people, and I don't think we need anything else, just to give you a little background on it.

But your recommendation is no change anyway, right?

MR. ORSINGER: That's right.

CHAIRMAN SOULES: Okay. No change.

MR. ORSINGER: And even if we wanted to change it, I don't think we have the constitutional power to change it, at least

insofar as the secretary of state is concerned.

CHAIRMAN SOULES: They've tried to get the legislature to put this under private investigators and have a separate agency and all kinds of things, and the legislature just stayed out of it too. Okay.

MR. ORSINGER: That concludes, then, our part of this agenda. We still have pending matters that are reflected on our disposition table, but they are all well known venue related things like that.

CHAIRMAN SOULES: Okay. What's next on the agenda?

MR. ORSINGER: Paula Sweeney.

MR. MARKS: How about adjournment?

MR. ORSINGER: Don Hunt has an item that might just be one letter.

CHAIRMAN SOULES: That's what I was thinking about.

PROFESSOR DORSANEO: Don, you're on.

MR. MARKS: 30 seconds, Don.

MR. HUNT: I have the only

copy. We'll have to do this orally and fast. This is a matter that Holly called to my attention that appeared to be merely an attachment to somebody else's letter. It was not. It was a separate submission by John Chapin, and he suggested that we adopt a new rule that would compare to Federal Rule of Civil Procedure 52(c) and that we stick that in Rule 296 or 297 or somewhere.

Rule 52(c) permits a court to make a finding of fact where it has rendered a judgment as a matter of law; that is, you'll recall that in the federal system, under Rule 50(a), when a party moves for judgment as a matter of law, it is really saying that there are no disputed issues of material fact and that one is entitled to judgment as a matter of law. And Rule 52(c) comes along and permits some sort of binding to be made with respect to that; that is, to simply say that the evidence has been heard and based on this evidence there's no disputed issue of fact; there's nothing to go to the jury. The idea is to spell out in the trial record and eventually the appellate record that this is

why the trial judge made the judgment as a matter of law, because the judge really found that there was no dispute.

I don't know whether we need this. We have a proposed Rule 301(c), and that's something else that you don't have before you.

CHAIRMAN SOULES: So you recommend that we don't need this change?

MR. HUNT: I don't see it. Right now we have Rule 301(c), which is the motion to modify judgment, and that was sent to the Supreme Court with our package back last July. And under the motion to modify the judgment we have the same procedure as the federal system. We've tried to follow Bill Dorsaneo's teaching and use similar language in here in making our motion to modify judgment at least in this area to really be the same as the federal system.

But we just don't have a place for a trial judge to record why the trial judge is granting the motion for judgment as a matter of law because there's been a determination in a particular area that an affirmative defense has been conclusively established or there's

some missing element in the plaintiff's case or something else of that ilk.

So I don't know that we need it. We've never had it. We've never suffered without it. It was adopted late in the game in the federal scheme of things, and I don't know that it does that much good in the federal scheme of things.

CHAIRMAN SOULES: What do you recommend?

MR. HUNT: I recommend -- well, our subcommittee has never considered it.

CHAIRMAN SOULES: What do you recommend?

MR. HUNT: I recommend that we forget it.

CHAIRMAN SOULES: Does anyone disagree with that, to find that it's not necessary in our practice to have this rule? That's what Don, I think, is saying. Does anyone disagree with that? Does anyone want to -- okay. So we all agree, then, that that's not necessary to our practice and at this time there will be no rule in that regard.

All right. It's almost 5:30. What can we do next?

MR. BABCOCK: Is there anything else we can do?

MR. ORSINGER: Can we talk about tomorrow morning?

PROFESSOR DORSANEO: I can finish mine if you give me about an hour now. I can finish it all off.

MR. ORSINGER: Bill has all of the pleadings, parties and all that stuff, and I'm wondering if we could do that in the morning, count on that, and tell everybody we're going to start with that, or do we have a lot of other things that what you want to do instead?

CHAIRMAN SOULES: We can do that.

MS. DUDERSTADT: That's all we have, unless Paula Sweeney shows up.

MR. ORSINGER: We better have Bill, and we'll have Paula as a fallback in case Bill doesn't show.

CHAIRMAN SOULES: Let's see, we've done No. 9. We've done Buddy Low,

that's 10. We've got Bill's information on No. 11 and 12 and 13. And Paula is Item 8. We've done seven. Peeples is on Rule 171, and I guess we could do that now.

Thank you all very much. You've put in a hard, hard day. We'll see you at 8:00 o'clock. 8:00 o'clock.

(MEETING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Court Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 7, 1997, Afternoon Session, and the same was thereafter reduced to computer transcription by me.

Charges for preparation of original transcript: $ 1,126.00.

Charged to: Soules & Wallace P.C.

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

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