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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 8, 1997

(SATURDAY SESSION)

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Taken before D'Lois L. Jones, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 8th day of
March, A.D., 1997, between the hours of 8:00
o'clock a.m. and 11:45 a.m. at the Texas Law
Center, 1414 Colorado, Room 101, Austin, Texas
78701.

COPY

MARCH 8, 1997

MEMBERS PRESENT:

Charles L. Babcock
Honorable Scott A. Brister
Prof. William V. Dorsaneo III
Michael A. Hatchell
Donald M. Hunt
David E. Keltner
Joseph Latting
John H. Marks Jr.
Russell H. McMains
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Prof. Alexandra Albright
Pamela Stanton Baron
David J. Beck
Prof. Elaine Carlson
Hon. Ann T. Cochran
Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence Guittard
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones, Jr.
Thomas S. Leatherbury
Gilbert I. Low
Hon. F. Scott McCown
Anne McNamara
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Paula Sweeney

EX OFFICIO MEMBERS:

Hon William Cornelius
O.C. Hamilton
David B. Jackson
Doris Lange
Bonnie Wolbrueck

Justice Nathan L. Hecht
Paul Gold
W. Kenneth Law
Mark Sales
Hon. Paul Heath Till
Paul Womack

MARCH 8, 1997

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TRCP 22 (New Rule 5: Commencement of Suit)	7918-7919
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Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

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- 7851 (2 votes)
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2 CHAIRMAN SOULES: Okay. We
3 will be in session. It's 8:00 o'clock
4 Saturday morning, the 8th of March, and we
5 will go with Bill's report.

6 MR. MARKS: Are there any new
7 handouts?

8 PROFESSOR DORSANEO: Yes.
9 Section 3. We are nearly to the end of
10 Section 3, pleadings and motions section of
11 this proposed recodification/reorganization,
12 and this is the section that has proposed rule
13 tentatively numbered as 25 in it that covers
14 the motion practice, including the venue
15 practice under current Rules 86 through 89 and
16 257 through 259, and what I propose to do is
17 to skip to Rule 26, which is on page 18 in
18 this little package identified as "Redraft,
19 January 22, '96," which goes from page 1 to
20 page 18.

21 We have previously discussed the Rules 1
22 through 24 as numbered in this section, or
23 rather, 20 through 24 as numbered in this
24 section. 26 is a reiteration of Civil
25 Procedure Rule 97 as it currently appears in

1 the Texas Rules of Civil Procedure and our
2 rule book, with one suggested adjustment which
3 isn't that critical. I probably should have
4 given you a redlined copy, but I don't think
5 you actually need it to understand what the
6 proposed change is from our committee.

7 Rule 97 right now has a paragraph (g)
8 before the paragraph headed "Separate
9 Trials/Separate Judgments," which is lettered
10 as paragraph (h) in the current rules that is
11 an unheaded paragraph that reads like this,
12 and it is subdivision (g) of the current rule.

13 CHAIRMAN SOULES: On 97?

14 PROFESSOR DORSANEO: Yes.

15 "Tort shall not be the subject of set-off or
16 counterclaim against the contractual demand
17 nor a contractual demand against tort, unless
18 it arises out of or is incident to or is
19 connected with same." That was added in by
20 the Supreme Court, no doubt on the
21 recommendation of the original advisory
22 committee in 1939-1940. I don't believe it's
23 ever had any impact on anything since that
24 time probably because of the "unless it arises
25 out of or is incident to or is connected with

1 same" language, and the committee just thought
2 we didn't need that. We make our rule just
3 like the Federal rule without that extra piece
4 on the basis that it's unnecessary.

5 MR. HUNT: Are you saying you
6 don't need (g)?

7 PROFESSOR DORSANEO: Right.

8 MR. HUNT: Okay.

9 PROFESSOR DORSANEO: So the
10 committee proposes that we retain Rule 97,
11 renumbered in this recodification except for
12 the elimination of subdivision, current
13 subdivision (g).

14 MR. LATTING: I have a
15 question.

16 CHAIRMAN SOULES: Joe Latting.

17 MR. LATTING: In paragraph (a),
18 Bill, what does it mean when it talks about
19 the presence of third parties of whom the
20 court cannot acquire jurisdiction?

21 PROFESSOR DORSANEO: Somebody
22 who is a nonresident who is not subject to
23 jurisdiction.

24 MR. LATTING: Well, my question
25 is, is there anything -- what is the phrase

1 "cannot acquire jurisdiction"? It seems like
2 one either has it or doesn't.

3 MR. ORSINGER: It's meant to
4 describe somebody that's out of state that you
5 don't have minimum contacts with.

6 MR. LATTING: Let's not worry
7 about it. I was just curious to know what it
8 meant.

9 PROFESSOR DORSANEO: Well, let
10 me say this about the rules in this section.
11 There is a lot of language in all of these
12 rules that is just in this draft pretty much
13 left the way that it's stated that could
14 probably stand some improvement.

15 MR. LATTING: All right. I'm
16 not meaning to get into that. I just
17 wondered.

18 CHAIRMAN SOULES: Okay. Bill,
19 so the only change you're proposing to 97 is
20 to drop paragraph (g), otherwise to carry
21 forward into the new recodification? That's
22 what this does?

23 PROFESSOR DORSANEO: Uh-huh.

24 CHAIRMAN SOULES: Any objection
25 to that? Carl Hamilton.

1 MR. HAMILTON: Paragraph (a) in
2 the last three lines where it's talking about
3 "compromising the claim of one party shall not
4 operate as a bar to the transaction or
5 occurrence"?

6 PROFESSOR DORSANEO: Yes.

7 MR. HAMILTON: That's not what
8 the current rule says. The current rule says
9 "shall not act as a bar to the continuation or
10 assertion of claims to any other party to the
11 transaction or occurrence." Was that
12 inadvertently left out? Because it looks like
13 that doesn't make a lot of sense. You can't
14 bar the transaction or occurrence.

15 PROFESSOR DORSANEO: That's a
16 typo in this draft. It's meant to say exactly
17 what the current rule says. So I will correct
18 that.

19 MR. ORSINGER: Sharp eyes.

20 CHAIRMAN SOULES: Okay.

21 PROFESSOR DORSANEO: This
22 language was just dropped in the typing
23 process.

24 CHAIRMAN SOULES: I guess the
25 only thing to debate then is whether we want

1 (g) in or (g) out, "Tort shall not be the
2 subject of set-off or counterclaim against a
3 contractual demand nor a contractual demand
4 against tort, unless it arises out of or is
5 incident to or is connected with the same."

6 MR. LATTING: That's not good
7 law, is it?

8 CHAIRMAN SOULES: I don't know.

9 MR. LATTING: I don't even
10 think that's the law. I think we ought to
11 leave it out.

12 PROFESSOR DORSANEO: I don't
13 think it's a good idea. First of all, the
14 difference between tort and contract in claims
15 that are in the same lawsuit, whatever may
16 have been somebody's attitude once upon a time
17 about keeping those things separate, that's
18 long ago over.

19 MR. LATTING: Let's get it out.
20 Out with it.

21 CHAIRMAN SOULES: Okay. So
22 everybody agrees with the subcommittee that we
23 drop (g) in the rewrite?

24 Okay. (G) is gone.

25 PROFESSOR DORSANEO: And the

1 next one is proposed Rule 27, which is
2 essentially the same as our current Rule 38.
3 There are a number of issues that we could
4 discuss here, but there is only really one
5 change, and I'm not thinking that it's all
6 that important. That is in this first
7 subdivision (a), and it has to do with the
8 leave of court language.

9 Now, before I get into that, it's my
10 recollection, and I don't know if there are
11 any discovery committee people here, that the
12 discovery committee had covered this same rule
13 for some reason and had taken out the leave of
14 court aspect of third-party practice
15 altogether. So, you know, that's one approach
16 to this larger subject; and I don't know how
17 all of this fits together; but at a simple
18 level, in this subdivision (a) in the sentence
19 that begins "The third-party plaintiff need
20 not obtain leave to make the service if the
21 third-party plaintiff files a third-party
22 complaint not later than 30 days." The
23 current rule says, "After serving" -- pardon
24 me for being a little slow. I left my glasses
25 somewhere in some exercise room this morning.

1 MR. YELENOSKY: Luke, don't you
2 have an extra pair for him?

3 CHAIRMAN SOULES: I broke one
4 pair.

5 MR. JACKSON: I have a pair. I
6 have to have two or three pair.

7 PROFESSOR DORSANEO: It says,
8 "After serving the original answer." Okay.
9 In fact, it says, "After he serves his
10 original answer," but we took out the -- last
11 time around we took out the gender references
12 in all of these rules. Now, that was added
13 in -- this rule was changed by the Supreme
14 Court in 1984. Prior to 1984 you had to get
15 leave of court all the time to do a -- it's my
16 recollection -- to do a third-party action,
17 and we kind of copied the Federal rule, but
18 not exactly, to say you only needed to get
19 leave of court if you were beyond 30 days
20 after the serving of the original answer, his
21 original answer.

22 Now, I will tell you that I was the one
23 who drafted our current Rule 38, and I
24 remember our discussion, and I also remember
25 from reading the minutes of the advisory

1 committee that no one raised the question
2 about what it means to say, "the original
3 answer." And in our current rule I think it's
4 ambiguous as to what that means, as to what
5 this time is, because you could think of an
6 original answer as being the answer that the
7 defendant first files, the first answer, at an
8 early stage of the lawsuit; or you could think
9 of the original answer being done any time the
10 answer is amended; and whatever we do, that
11 ambiguity needs to be cleared up, it seems to
12 me.

13 I don't know whether we need a leave of
14 court requirement at all, but if we have one,
15 and if it relates to the beginning of a
16 lawsuit, if that's a good idea, then it might
17 be better to say "after serving," and the
18 language in this draft is "the first
19 responsive pleading." Now, that's a little
20 bit inelegant right here in this draft, but
21 that's the ambiguity, you know, whether we are
22 going to require this at the beginning of the
23 lawsuit or just everybody now and again. Joe
24 Latting.

25 MR. LATTING: The spirit of the

1 state rules is that you can do what you want
2 to unless somebody complains about it, and we
3 have that in interventions, and we have it in
4 third-party practice, and it seems to me that
5 the 30-day requirement is arbitrary, and I
6 guess any time requirement is, but it doesn't
7 seem to me it's much connected with the
8 reality of particularly large complex cases.
9 You hardly know what the case is about for 30
10 days, much less who all the third-party
11 defendants might need to be.

12 And so I think we ought to consider or at
13 least address the question of whether we want
14 to have a leave of court requirement at all or
15 just say you can file a third-party complaint
16 subject to being stricken for the usual
17 reasons, that it's not timely filed, that it
18 works an improper delay on the discovery or
19 the trial of the case.

20 HONORABLE SCOTT BRISTER: Joe,
21 Rule 38 says just what this rule says, after
22 30 days you have got to get leave of court.

23 MR. LATTING: I understand.

24 HONORABLE SCOTT BRISTER: Did
25 you just say you don't have to get leave of

1 court?

2 MR. LATTING: No. I said you
3 don't have to get leave of court before then
4 and you don't have to get leave of court for
5 an intervention or for a nonsuit. I'm just
6 saying that the general spirit of the state
7 rules is you can do what you like, absent some
8 complaint, and I just think we should consider
9 whether there is a good reason for making a
10 requirement that the court give its blessing
11 for a third-party complaint that's filed 32
12 days after the other original answers.

13 HONORABLE SCOTT BRISTER: Sure.
14 Because the other two things you said are
15 voluntary, and the third-party defendant, they
16 are not voluntary. They are getting joined
17 involuntary. First thing they are going to do
18 is object to the discovery schedule and trial
19 settings that have already been set.

20 MR. LATTING: Well, that may or
21 may not be true and if they do --

22 HONORABLE SCOTT BRISTER: It's
23 always true.

24 MR. LATTING: Well, if they do
25 object then that would be a reason for

1 striking the complaint. I'm just bringing the
2 issue up. If what we are doing here is making
3 a requirement that you have to go to court
4 first and then -- and now that I think of it,
5 that potential third-party defendant wouldn't
6 be a party to the motion to add them, would
7 it?

8 HONORABLE SCOTT BRISTER: No.

9 MR. LATTING: So I don't see
10 how that saves any time. It seems like we are
11 building in an extra step of judicial
12 involvement that we were trying to get rid of.

13 CHAIRMAN SOULES: This is the
14 only place where, you know, earlier than seven
15 days ahead of trial there has to be a leave of
16 court to amend or join; and that historically,
17 the background on it is that most other
18 amendments are either by the plaintiff adding
19 parties or between the parties already to the
20 lawsuit.

21 This is, of course, a place where a
22 defendant is adding a third-party defendant,
23 new defendant; and the feeling was that this
24 would create a lot of defense strategies and
25 tactics to get continuances if you could just

1 join without leave of court, that a defendant
2 would, you know, wait 'til some point in time
3 and just bring a third-party action and the
4 parties in there, in the lawsuit. Was there
5 any other reason for it, Bill, that you can
6 remember, didn't want to build automatic
7 continuances in by just allowing defendants to
8 have free access to joinder of outside
9 parties?

10 MR. LATTING: Yeah. It may be
11 a good idea. I just bring it up.

12 CHAIRMAN SOULES: Well, that's
13 why it's here, and this is the only place, and
14 that's the reason for it.

15 MR. MARKS: Maybe the time
16 should be longer.

17 MR. LATTING: It just seems to
18 me the time either -- maybe we ought to extend
19 the time because 30 days doesn't seem
20 realistic to me, or maybe we could do it in a
21 way to back it away from the trial, where we
22 could say --

23 CHAIRMAN SOULES: 30 days is, I
24 think, the Federal rule, but that doesn't mean
25 we need to do it that way.

1 PROFESSOR DORSANEO: Right.
2 Well, I think the Federal rule is actually ten
3 days.

4 MR. LATTING: Yeah.

5 CHAIRMAN SOULES: Is it?

6 MR. LATTING: The Federal rules
7 are absurd in that respect, as though you are
8 sitting in your office doing nothing, waiting
9 for an order to be entered so that you can
10 start working on it promptly. It just doesn't
11 have any connection with reality.

12 CHAIRMAN SOULES: Carl
13 Hamilton.

14 MR. HAMILTON: Two things. One
15 is I think first responsive pleading is still
16 a little ambiguous.

17 PROFESSOR DORSANEO: The idea
18 there is the first thing that the defendant
19 files.

20 MR. HAMILTON: Why not tie the
21 time to when the defendant is served? It's
22 unambiguous as to when they get served.

23 The other question I have is what if the
24 defendant files a special appearance and
25 doesn't get heard for 30, 45, 60 days? Is he

1 out of luck on this?

2 PROFESSOR DORSANEO: Well, that
3 is also an open question as to is the special
4 appearance an answer or does this rule when it
5 uses the term -- or current rule when it uses
6 the term "original answer," does it mean an
7 answer on the merits as distinguished from a
8 dilatory plea, and these questions have come
9 up in a case that John and I have, and the
10 issue is being resolved, you know, by a
11 Federal judge in a context that would be, you
12 know, pretty atypical, but they are just all
13 questions that it came as a surprise to me
14 that there were all of these questions.

15 MR. MARKS: Well, I can
16 certainly understand your concern about it,
17 but I think I would go the other way on it in
18 the context of where you have amended
19 pleadings joining new parties or you had new
20 parties joined by the plaintiff by some other
21 means, interventions; and if you have an
22 intervention filed in the lawsuit in the
23 middle of the case by a new plaintiff or a new
24 series of plaintiffs, it seems to me that
25 answering those complaints would be a new

1 answer, an original answer; and the defendant
2 should have the right, that 30-day right,
3 right there, whether it's an amendment or
4 whether it's an intervention.

5 And I wouldn't want to do anything with
6 the language that would cut that off because,
7 as you say, that's a matter that you and I are
8 involved in right now. The very question is,
9 is an intervention a new suit and is an answer
10 to an intervention an original answer?

11 MR. LATTING: All of this seems
12 to me to be some -- and I'm not really -- I
13 don't know where I'm coming down on this, but
14 it seems to me to be some argument for the
15 notion that we ought to allow people to file
16 them when they please, subject to being
17 stricken for delay.

18 PROFESSOR DORSANEO: Well, I
19 frankly end up agreeing with Joe that we
20 should do it either that way or require a
21 leave of court all the time, but trying to
22 draft a rule that deals with all of these
23 things in the middle of the lawsuit, I don't
24 know whether it's worth all the trouble,
25 especially considering that we have that

1 language that the judge can disallow this, you
2 know, after the fact if it screws up things.

3 HONORABLE SCOTT BRISTER: The
4 rule doesn't say I can just strike and dismiss
5 the joined defendant, does it?

6 CHAIRMAN SOULES: No.

7 HONORABLE SCOTT BRISTER: Now,
8 I know we have had this discussion because I
9 remember Steve Susman making an impassioned
10 plea that allowing people to add parties any
11 time, which was Paula Sweeney's argument.
12 Paula Sweeney was for doing that, add parties
13 at any time, and Susman pointed out that this
14 is contrary to everything, that the idea of
15 the discovery rules was we are taking some
16 control away from the parties, giving it to
17 the judge, because the direction we are going
18 is not just endless discovery, but the judge
19 puts a stop to it at some point.

20 And so, therefore, we had the discussion
21 that you can't just add parties whenever you
22 want to because otherwise you make it
23 impossible for a judge to ever force a case to
24 trial. You can always add a party 30 days
25 before trial. Unless the judge can say, "No,

1 you may not add them," the trial date will be
2 continued forever. We have had a discussion
3 and a vote on this a year ago.

4 MR. LATTING: Well, I'm not
5 trying to revisit a vote, but once again, the
6 trial judge can control that by a pretrial
7 order or just any -- however you denominate
8 the order. He can say, "I don't want any more
9 parties added after such-and-such date."

10 HONORABLE SCOTT BRISTER: Not
11 if the rule says I can't.

12 PROFESSOR DORSANEO: How did
13 that come out, Judge, that discussion? I
14 wasn't here for that discussion, and I didn't
15 incorporate that in this draft.

16 HONORABLE SCOTT BRISTER:
17 Susman's view was -- which is mine also -- was
18 voted that you can't -- that the judge has to
19 give you leave, and I thought it was this same
20 issue about more than 30 days after the
21 answer, but I wouldn't swear to that, but I
22 know it was voted down that just to leave it
23 in the discretion of the parties when and who
24 to add to the litigation.

25 PROFESSOR DORSANEO: Well, the

1 issue that we are dealing with here is this
2 30 -- is how you calculate this 30 days. We
3 have this 30 days. It has to start at some
4 point, and my proposal, which is a very
5 simplified one, is that it starts from when
6 the defendant files the first thing a
7 defendant files in this lawsuit, regardless of
8 how the lawsuit changes; and that's a simple
9 thing because that's at the beginning of the
10 lawsuit, period. Now, maybe it could be 60
11 days, and that would be fine at the beginning
12 of the lawsuit, and it's not all that sensible
13 because the lawsuit could change a lot, but
14 it's at least simple.

15 HONORABLE SCOTT BRISTER: Yeah.

16 PROFESSOR DORSANEO: And we
17 would be better off with a simple rule than a
18 more complicated one.

19 MR. MARKS: Well, if a
20 plaintiff has the right to join either by
21 intervention or amending with new parties, a
22 defendant ought to have certain rights with
23 respect to that as well, and one of them
24 should be that if a new person comes into the
25 lawsuit then that should be considered as a

1 new lawsuit as to that person, and the
2 defendant should have all the rights to take
3 whatever action a defendant thinks it needs to
4 take with respect to joining third parties
5 after that point.

6 I mean, if you are going to do one for
7 one, you should do it for the other. If you
8 are going to limit the joinder of new
9 plaintiffs by amendment and by intervention,
10 then okay, maybe we will look at the third
11 party rule under that context, but as long as
12 they are allowed to join a new party at any
13 time they want to, subject to the 30-day rule,
14 then a defendant should have the right to join
15 third-party defendants.

16 PROFESSOR DORSANEO: Well,
17 Rusty, how does the -- I'm looking at the
18 joinder of responsible third party section of
19 the Civil Practice and Remedies Code, 33.004,
20 which is obviously related to this, dealing
21 with the exact same subject as this rule. You
22 mentioned yesterday that the defendant had a
23 right, just had a right to without court
24 control --

25 MR. McMAINS: Well, that right

1 I think -- I don't have my statute in front of
2 me, but I think the right is very clear that
3 even if you sue somebody the limitations has
4 run on, as I understand it, they still have a
5 period of time in which to join somebody as a
6 potentially responsible party.

7 PROFESSOR DORSANEO: But it
8 says, 33.004 says that -- it says, "The
9 defendant on timely motion made for that
10 purpose may seek to join responsible third
11 party," suggesting that leave needs to be
12 obtained and then there is kind of an unclear
13 reference to the Rules of Civil Procedure.

14 Nothing in this section, which means the
15 whole rule, shall affect the third-party
16 practice as previously recognized in the rules
17 and statutes of this state.

18 MR. McMANS: That's with
19 regard to the assertion of the rights to
20 contribution or indemnity.

21 PROFESSOR DORSANEO: Okay.
22 Yeah. And so now this rule which always dealt
23 with contribution and indemnity and always had
24 this "or to the plaintiff" language in it,
25 which didn't mean anything, I don't think,

1 until last year with this Civil Practice and
2 Remedies Code section, deals with a complex
3 range of things that relate not only to the
4 contribution or indemnity claims but to the
5 main lawsuit.

6 MR. McMAINS: Well, it's (d).
7 (D) says, "Third-party claim by a defendant
8 under this section may be filed, even though
9 the claimant's action against responsible
10 third person would be barred by limitations,
11 if the third party plaintiffs filed on or
12 before 30 days after the date the defendant's
13 answer is required to be filed," so it clearly
14 has, I mean --

15 PROFESSOR DORSANEO: Then
16 that's the same. The same ambiguity is in the
17 statute then, defendant's answer is required
18 to be filed, and I thought when we did this
19 the last time to the extent I've given it any
20 thought that that meant, you know, when you
21 filed your answer, not when you amend it, not
22 later when a new person comes in and you
23 change it, even though it's a different
24 lawsuit and, therefore, a different answer.
25 But I will be candid. I wasn't doing very

1 much serious thinking about the problem.

2 MR. MARKS: Well, with an
3 intervention you are required to file an
4 answer to an intervention. You're not
5 necessarily required to file one on an amended
6 pleading.

7 MR. McMAINS: I thought that
8 our rule that we had drafted was that you are
9 deemed to have filed a general denial.

10 PROFESSOR DORSANEO: Not for an
11 intervention.

12 MR. McMAINS: Is that not right
13 for an intervention?

14 MR. ORSINGER: Counterclaim.

15 PROFESSOR DORSANEO:
16 Counterclaim.

17 MR. McMAINS: Well, I mean, I
18 knew that's right in our current rules. I was
19 talking --

20 PROFESSOR DORSANEO: But even
21 that's probably an oversight.

22 MR. ORSINGER: What happened on
23 the discovery thing? Did you verify? Did we
24 do something in the discovery?

25 CHAIRMAN SOULES: We can't find

1 it.

2 MR. ORSINGER: It must have
3 just been a discussion then.

4 CHAIRMAN SOULES: I remember
5 the debate, but I don't remember the
6 resolution. I'm not sure we got it resolved.

7 MR. McMAINS: Well, I think we
8 kind of didn't know where the discovery rules
9 were at some point, was my recollection.

10 PROFESSOR DORSANEO: Well,
11 what's added to this is the statute also says,
12 when it's talking about joinder of responsible
13 third parties, "A third-party claim under this
14 rule may be filed if the third-party claim is
15 filed on or before 30 days after the date the
16 defendant's answer is required to be filed."

17 MR. McMAINS: Right.

18 PROFESSOR DORSANEO: And I
19 think our committee view was that that should
20 mean the first answer filed, although we might
21 do something special about intervention or
22 work on that some more.

23 CHAIRMAN SOULES: Well, there
24 is only one answer that's required to be
25 filed.

1 PROFESSOR DORSANEO: Well, no,
2 John is right. If they have intervention and
3 they have an answer --

4 CHAIRMAN SOULES: Yeah. That's
5 true.

6 MR. ORSINGER: Don't we have an
7 imbalance between the rule and the statute
8 anyway, because we trigger it from the serving
9 of the responsive pleading, and the statute
10 runs from when the pleading is due, which
11 could be after?

12 CHAIRMAN SOULES: That's the
13 same day. Under 21a, if you follow it, you're
14 supposed to serve the same day you file.

15 MR. ORSINGER: No. But what if
16 you file before answer date? Under the
17 statute you're still running from answer date,
18 but under the rule you are running from the
19 date you file your pleading.

20 CHAIRMAN SOULES: Okay.

21 MR. ORSINGER: So we are out of
22 balance with the statute, at least to the
23 extent that we trigger from the date of
24 filing.

25 PROFESSOR DORSANEO: I think at

1 a minimum what I would recommend is that we
2 use the same language as the statute, make it
3 work the same way, and then the next question
4 is do we try to clear up what it means to say
5 "answer."

6 MR. ORSINGER: Can I ask this?
7 Are we not free to adopt Joe's suggestion that
8 we obviate this requirement because the Civil
9 Practice and Remedies Code has the same
10 restriction, or are we free to --

11 PROFESSOR DORSANEO: Well, the
12 Civil Practice and Remedies Code has it for
13 the responsible third party part of this rule,
14 but it doesn't have it for the contribution
15 and indemnity part.

16 MR. McMAINS: Right.

17 PROFESSOR DORSANEO: Now, quite
18 frankly, the contribution and indemnity part
19 is the part where you ought to get leave of
20 court because you're not, in my judgment, hurt
21 in any way, shape, or form as a defendant by
22 not bringing your contribution or indemnity
23 claim in this same lawsuit because you can do
24 it later. Now, I realize there are arguments
25 about that, but there are arguments about lots

1 of things that should otherwise be clear.

2 MR. MARKS: Well, Bill, does
3 the Civil Practices and Remedies Code preclude
4 the ability of the court to make that period
5 longer?

6 PROFESSOR DORSANEO: That's
7 unclear to me, John. I mean, it looks like it
8 might.

9 MR. MARKS: Well, it says, "It
10 may be filed even though the claimant's action
11 against responsible third party would be
12 barred by limitations if the third-party claim
13 is filed on or before 30 days after the date
14 the defendant's answer is required to be
15 filed."

16 PROFESSOR DORSANEO: It says
17 "if." It doesn't say "only if."

18 MR. MARKS: That's right.

19 CHAIRMAN SOULES: Well, that's
20 what that means, "only if."

21 MR. MARKS: Well, it doesn't
22 say it.

23 CHAIRMAN SOULES: Well, it
24 can't mean anything else. I mean, that's an
25 extension of limitations, isn't it?

1 MR. McMAINS: Yes. It is
2 talking about extending limitations, and I
3 think that --

4 MR. MARKS: So that would be
5 out of context in the context of what we are
6 talking about here?

7 MR. ORSINGER: But this doesn't
8 purport to regulate when you would ordinarily
9 do this other than when you are joining in
10 someone against whom the statute has run.

11 PROFESSOR DORSANEO: Yeah. I
12 guess maybe that's right.

13 MR. ORSINGER: So it seems to
14 me that except in those instances where the
15 third-party defendant has a statute of
16 limitations defense, we are not controlled by
17 the statute. We can do what we want with the
18 rule.

19 PROFESSOR DORSANEO: I'm back
20 to then on the statute, it looks like then the
21 statute is subject to the judge's control to
22 me. Does he file? Yes. You ask, "May seek
23 to join a responsible third party," doesn't
24 that have to mean that the judge can say "no"?

25 MR. MARKS: "May seek to"?

1 MR. McMains: As I read the
2 statute, you know, and I haven't looked at it
3 in a while, while it was kind of truncated in
4 the Civil Practice and Remedies codification,
5 but when you see the statute altogether as it
6 was passed by the legislature, it seems clear
7 to me that there was a right to join to the
8 extent you could within the limitations in the
9 statute.

10 You had a right to join a potentially
11 responsible party. I mean, that was the
12 intent of the legislature, to be able to join
13 these people even if your limitations by the
14 plaintiff had run technically at the time of
15 their answer; and everybody else, every other
16 claim that you had, like for contribution or
17 indemnity or cross-claims or whatever, is just
18 covered by third-party practice, which
19 obviously we have the ability to control
20 through our rules.

21 And I think just like in the intervention
22 part in the venue statutes where they talk
23 "seek to join," you know, by intervention
24 they -- and that assumes that there is a
25 court -- their whole thing there assumes the

1 court determination of a right to join, which
2 isn't consistent with our practice. It's
3 clear the legislature or whoever drafted this
4 for them didn't really know how our
5 third-party practice works.

6 PROFESSOR DORSANEO: I'm not
7 surprised with what we are discussing right
8 now. I don't think we know how it works.

9 MR. McMAINS: And so, but I
10 think that there is -- you can't read that
11 entire section without seeing that they treat
12 the potentially responsible third party issue
13 differently than they treat other third-party
14 claims.

15 PROFESSOR DORSANEO: Well,
16 Mr. Chairman, our choices are to just leave it
17 the way it is and where it says "his original
18 answer" or "the original answer," and let that
19 be worked out by case law interpretations;
20 although it, frankly, will come as a surprise
21 to someone that that's way deep into the
22 middle of the lawsuit rather than at the
23 beginning of the lawsuit. It certainly came
24 as a surprise to me. Normally that won't be
25 such a big deal, although it can be a big deal

1 in some unusual contexts.

2 MR. MARKS: In these
3 multi-plaintiff cases it can be a big deal, in
4 just about any of them.

5 PROFESSOR DORSANEO: Or we
6 could say, you know, leave of court is -- take
7 "leave of court" out of it altogether and
8 leave it up to the judge and the remainder of
9 the law, or we could have leave of court all
10 the time.

11 MR. LATTING: Question.

12 CHAIRMAN SOULES: Joe Latting.

13 MR. LATTING: From a policy
14 point of view, what is the problem with --
15 and, Scott, I'm sure not trying to truncate
16 the authority of the judge.

17 HONORABLE SCOTT BRISTER: Of
18 course not.

19 MR. LATTING: Well, I'm not. I
20 think judges ought to have wide latitude, and
21 my question is what is the evil to take the
22 leave of court requirement out altogether and
23 leave it up to the judge to balance these
24 things as the suit requires instead of trying
25 to anticipate all the permutations that might

1 occur and impose some arbitrary time limits
2 which don't seem to me to have any connection
3 to anything? What's the problem with doing
4 that?

5 PROFESSOR DORSANEO: Well,
6 historically this is a complicated area.

7 CHAIRMAN SOULES: Eight days
8 before trial, I'm going to get skinned in this
9 trial. Eight days before, I join a new third
10 party -- I'm a defendant. I join a new
11 third-party defendant. I just file my
12 pleading there in the case.

13 MR. LATTING: Go down and move
14 to strike them, just like you file a motion
15 for continuance. I've got to do something.
16 It's like you file a notice to take a
17 deposition in Saskatchewan.

18 CHAIRMAN SOULES: So that puts
19 the plaintiff to scrambling to try to figure
20 out what in the heck they are going to do to
21 hold their trial setting in the last week of
22 trial when they ought to be getting ready to
23 go to trial.

24 This is there to try to be a barrier to
25 manipulating it into a continuance. That's

1 why it's there. If it's not needed for
2 that --

3 PROFESSOR DORSANEO: In our
4 unusual case, one of the things that can
5 happen, although it is, you know, abnormal is
6 the third-party defendant can remove the whole
7 case.

8 MR. McMAINS: It's not that
9 unusual.

10 PROFESSOR DORSANEO: Well --

11 MR. McMAINS: I mean, there
12 are --

13 PROFESSOR DORSANEO: They can
14 keep removing it like, you know, over and over
15 and over again until you get sick of them.

16 MR. MARKS: Well, that's in
17 control of the plaintiff. They don't have to
18 keep filing intervention joining 200 new
19 parties or 300 new parties or 500 new parties.

20 CHAIRMAN SOULES: That's right.

21 HONORABLE SCOTT BRISTER: From
22 a judge perspective, though, people that have
23 been in the case for a year, if I deny their
24 continuance, there is not going to be any
25 ground for appeal, but somebody that -- on

1 somebody new, not a new plaintiff because a
2 new plaintiff can't complain. If they wanted
3 to jump in then they want to jump under the
4 circumstances they jumped in under, but a new
5 defendant who did not voluntarily come is
6 going to have an absolute right to a
7 continuance, and so really we are just asking
8 about who has to file the motion.

9 MR. LATTING: That's right.

10 HONORABLE SCOTT BRISTER: And
11 come in and prove it, and it seems to me if
12 it's a whole new party, it ought to be whoever
13 is -- defendant or plaintiff, whoever is
14 dragging a new party in involuntarily ought to
15 have to file the motion.

16 MR. ORSINGER: But we don't
17 have such a rule.

18 CHAIRMAN SOULES: How many
19 motions for leave to join third parties do you
20 deal with, Judge?

21 HONORABLE SCOTT BRISTER: A
22 lot. Actually, 50 percent of the new parties
23 added don't ask for leave. They just join
24 them, and then somebody -- and then they get
25 served. They come in three weeks before trial

1 and want a continuance and then I say,
2 "Continuance-schminuance. I'm going to strike
3 you as a party," and they say, "Oh, yeah, we
4 would rather do that."

5 So that there is a lot of -- a lot more
6 judges -- we have discussed this a lot in
7 Harris County, and all of my colleagues agree
8 that, you know, this is the biggest bar to
9 controlling our docket that we have.
10 Discovery, late discovery, late designation of
11 experts is not as big a problem for judges'
12 docket control as adding new parties. That is
13 the biggest bone of contention in our control
14 of our trial dockets.

15 CHAIRMAN SOULES: So you would
16 like that to be more insulated.

17 HONORABLE SCOTT BRISTER: I
18 think we need the rule that says, "Don't do it
19 unless you got leave." If you didn't ask for
20 leave --

21 PROFESSOR DORSANEO: The
22 original rule, you know, my recollection, and
23 let's be fair, when we changed from the 1937
24 version of the Federal rule to something more
25 like the current Federal rule it was more

1 monkey-see-monkey-do than it was anything
2 else.

3 HONORABLE SCOTT BRISTER: Yeah.
4 And, again, my concern about the trial date
5 doesn't apply to the first 30 or even 60 days.
6 If it's just when the case starts, you know,
7 we are not talking about great concerns about
8 the trial date now.

9 CHAIRMAN SOULES: Richard, and
10 then I will get Carl.

11 MR. ORSINGER: There are no
12 constraints against plaintiffs adding
13 defendants at the last minute, are there?

14 HONORABLE SCOTT BRISTER: Not
15 true. No. 37, additional parties, says
16 before it's called -- "a case is called to
17 trial, additional parties may be brought in
18 either by the plaintiff or defendant upon such
19 terms as the court may prescribe, but not at a
20 time nor in a manner to unreasonably delay the
21 trial of the case."

22 PROFESSOR DORSANEO: And we
23 retain that in our 22 and 23.

24 MR. ORSINGER: So the plaintiff
25 can add subject to being stricken, but the

1 defendant cannot add without prior permission.

2 HONORABLE SCOTT BRISTER: I
3 think that's correct.

4 PROFESSOR DORSANEO: Well,
5 third party. That's true for third-party
6 defendant. It's not true for --

7 MR. MARKS: Plaintiffs.

8 PROFESSOR DORSANEO: -- other
9 additional parties that the defendant would
10 want to join in connection with a counterclaim
11 or a cross-claim.

12 HONORABLE SCOTT BRISTER: And
13 the distinction is there that the statute is
14 not even running on the third-party defendant,
15 and you can always sue. The statute, I agree
16 with Bill, your statute doesn't start running
17 until the verdict comes down that the
18 defendant lost in the first case.

19 MR. ORSINGER: Well, how do you
20 control plaintiffs adding people at the last
21 minute, or do you never have that happen?

22 HONORABLE SCOTT BRISTER:
23 Pretty rare. I'm trying to think of when it
24 would.

25 CHAIRMAN SOULES: It's sort of

1 a self-policing activity. If the plaintiff
2 adds somebody at the last minute, they are
3 going to lose their trial setting.

4 MR. ORSINGER: Okay.

5 CHAIRMAN SOULES: So they have
6 got to balance. The defendant moves -- and
7 that's why the defendant adds somebody at the
8 last minute, so that the plaintiff will lose
9 their trial setting.

10 MR. ORSINGER: Right.

11 CHAIRMAN SOULES: Carl
12 Hamilton.

13 MR. HAMILTON: I was going to
14 say something somewhat similar to what Richard
15 said, but what bothers me is the intervention
16 part, is you have three or four or five
17 hundred plaintiffs in a lawsuit, and you get
18 an amended pleading, and maybe they stick in
19 one or two additional plaintiffs, which really
20 doesn't put the defendant on notice unless you
21 very carefully read every single name in the
22 pleading. So now you have a -- I guess you
23 have an intervention at that point, and there
24 is no rules that prohibit that from being done
25 at any time, and yet we are going to impose

1 rules upon adding third parties that have to
2 be done within a certain time.

3 MR. MEADOWS: Just putting
4 plaintiffs' names in an amended petition
5 doesn't make them a party to the lawsuit. You
6 have to get service.

7 MR. McMAINS: Yeah. You have
8 to have served the claim.

9 MR. ORSINGER: If they are
10 joined as plaintiffs, you have to serve them?

11 MR. MEADOWS: Absolutely.

12 PROFESSOR DORSANEO: Right.

13 MR. ORSINGER: Why? They are
14 making an appearance. If they are in the
15 petition as a plaintiff, they are voluntarily
16 making an appearance. You don't have to --

17 MR. McMAINS: Yeah. They may
18 be voluntary, but they still have to serve the
19 defendant with the claim.

20 CHAIRMAN SOULES: By certified
21 mail, just like you serve everybody else with
22 your amended pleadings. That takes care of
23 it. There really isn't anything special about
24 adding plaintiffs. You just add a couple of
25 new names, maybe in the heading, hopefully in

1 the body, too.

2 MR. ORSINGER: Not as part of
3 the "et al."

4 CHAIRMAN SOULES: And you serve
5 it by certified mail, at least as of today,
6 and it's over. That's it. If a plaintiff
7 hasn't been in a case, now you have got two
8 new plaintiffs. Whatever number of new names
9 you put in there are new plaintiffs.

10 MR. HAMILTON: And it was
11 suggested a moment ago that if you don't file
12 an answer to that it may be default.

13 MR. MARKS: Intervention.

14 CHAIRMAN SOULES: No. Only in
15 an intervention. They are not intervenors.
16 Interventions is somebody else coming into the
17 lawsuit from the outside, not being added by
18 counsel that are already there.

19 MR. MARKS: Well, a new
20 plaintiff is a person coming in from the
21 outside.

22 CHAIRMAN SOULES: Well,
23 intervention usually comes -- I think that the
24 reason that we deal with interventions
25 differently is that they usually are coming

1 from --

2 MR. MARKS: May be represented
3 by separate counsel?

4 CHAIRMAN SOULES: Non-parties
5 represented by somebody else, somebody that
6 the parties really don't care about having in
7 the lawsuit, but they are coming anyway,
8 uninvited to the party.

9 MR. MARKS: But it also
10 happens, Luke, that the lawyers representing
11 these 100 plaintiffs will intervene with 20
12 more or 30 more.

13 CHAIRMAN SOULES: I know there
14 is a new activity that the rules weren't
15 really designed -- that wasn't the -- the
16 reason for intervention was to let this person
17 who had a right to be at the party but wasn't
18 yet invited or wasn't going to get invited to
19 get to the party. So the classic sense of
20 intervention was something that wasn't going
21 to happen just to get a continuance between
22 the already existing parties. It was for
23 another reason, theoretically. Joe.

24 MR. LATTING: Scott, how would
25 it suit you and, Bill, how would it suit you

1 if we took another round and made this time 90
2 days instead of 30 days?

3 HONORABLE SCOTT BRISTER: If
4 it's from the first pleading you file, I think
5 that's fine.

6 MR. LATTING: That would
7 satisfy some of my concern to try to give you
8 a little more time to make an intelligent
9 decision and not have to go to court
10 unnecessarily and still not delay things.

11 HONORABLE SCOTT BRISTER: Is it
12 from appearance date or first pleading filed,
13 or are we trying to get away from appearance
14 date?

15 MR. MARKS: Well, we have got
16 this problem when a plaintiff brings in new
17 parties, new plaintiffs.

18 HONORABLE SCOTT BRISTER: But
19 if you are a defendant, in other words, I'm
20 concerned also about that, you know, if you
21 file a third amended supplemental answer then
22 that starts the 90 days over again, and that
23 would be a disaster. As long as it's
24 appearance date, you have already appeared
25 even though you may be filing stuff we call

1 answers.

2 MR. MARKS: Well, what about
3 the situation where the plaintiff joins new
4 plaintiffs? I mean, doesn't that change the
5 equation a little bit? I mean, the plaintiff
6 has done something that they had the right to
7 do. That ought to trigger certain rights on
8 the part of the defendant, and one of them
9 should be to revisit whether they want to join
10 third parties or not. Now, the plaintiff can
11 control it by not joining other people.

12 CHAIRMAN SOULES: Ordinarily
13 whenever the plaintiff group expands aren't
14 they -- isn't the group, whether before or
15 after expansion, basically making the same
16 claims against one or more common defendants?
17 Shouldn't the defendant -- is there anything
18 really in an ordinary case that's going to
19 change very much by adding plaintiffs to the
20 plaintiff's group? Is there anything that's
21 really going to change very much in terms of
22 giving the defendant enough information to
23 know that he ought to bring a third party in?

24 MR. HAMILTON: Yes.

25 CHAIRMAN SOULES: How so, Carl?

1 MR. HAMILTON: Well, a new
2 plaintiff joins because he claims he was
3 injured by a certain component of a product,
4 and the defendants in the case hadn't been
5 defending against that component. Now he's
6 got to add a third party on that.

7 CHAIRMAN SOULES: Wouldn't that
8 be an exceptional occurrence though, probably?

9 HONORABLE SCOTT BRISTER: Or I
10 think you would have to sever those cases
11 anyway. That's two different discrete
12 injuries.

13 CHAIRMAN SOULES: Rusty.

14 MR. McMANS: Well, as to any
15 new party that is added, either by an amended
16 pleading or an intervention, when you are
17 talking about that you think you need to do
18 something because you are close to trial, the
19 truth of the matter is that you have the right
20 under our venue statute to move to strike that
21 as a defendant anyway. That gives a -- what
22 is it, 30 days? Is that right? 30 days after
23 it's allowed or something like that.

24 So you have 30 days to strike that and
25 then you can appeal it, and it puts everything

1 in the deep six. So, I mean, there is
2 absolutely no incentive under the way the
3 statutes are drawn for anybody to be adding
4 people at the last minute shortly before trial
5 settings, because there is no question that it
6 will destroy the process.

7 HONORABLE SCOTT BRISTER: On
8 the other hand, I don't mind making it the
9 plaintiffs have to get leave of court 30 or 60
10 days after. What's the big deal there? I
11 mean, we are seeing some abuses, some of the
12 forum shopping abuses. You know, you file
13 eight asbestos cases until you get the judge
14 you want and then you intervene with 200
15 plaintiffs in the judge's court you want. We
16 have things we can do about that, but there is
17 no reason we can't make them parallel if
18 that's the concern.

19 CHAIRMAN SOULES: Okay. We are
20 going to hear from David Keltner, and we are
21 going to get this done. We have been on this
22 for an hour, and we've got to keep moving.

23 MR. KELTNER: It seems to me
24 this is a situation that does arise
25 occasionally but is relatively rare. It seems

1 to me that if any party adds an additional
2 party, for example, John, in your situation,
3 plaintiff, new plaintiffs intervene, you may
4 very well want to add a third-party defendant,
5 that the rule that we had prior to Bill's
6 revision could be read to say that your
7 original answer to these new plaintiffs was
8 just being filed and you had a right to add
9 third parties. I mean, I think that is fair
10 if it is responding to a new party.

11 Other than that it ought to be 30 or 90
12 days, and that's putting an end to it.
13 Because real truth, forum shopping isn't going
14 to happen at the end of a case. It will
15 happen at the first. The only problems we
16 have are, one, somebody new getting in the
17 case and messing up the trial schedule. It's
18 generally, unfortunately, going to be a
19 defendant who does that historically, but we
20 are now seeing some abuses on the plaintiff's
21 side.

22 Easy solution. I think new parties come
23 in, you do that as a risk, and the other party
24 has a right to respond and add any third
25 parties they want to at that point. Let's do

1 it that way and make it 30 days the way Bill
2 has it in now. It just takes another sentence
3 to the rule. That makes it fair, keeps
4 everybody happy.

5 MR. MARKS: You have got two
6 things, 30 days as a matter of right and then
7 discretionary on the court whether you are
8 joining a new plaintiff or joining a
9 third-party defendant, and if the court allows
10 the plaintiff to join new parties then
11 automatically the defendant would have the
12 right to --

13 MR. KELTNER: Yes. And that's
14 going to prevent plaintiffs from doing that
15 unless they absolutely believe they have to do
16 it, and I think that's a fair rule.

17 HONORABLE SCOTT BRISTER: Is
18 that -- then are you saying the plaintiff
19 always has the right to add somebody new and
20 then the defendant within 30 days has the
21 right to add somebody new and then my trial
22 date is wiped out? How is that not taking the
23 control of the trial date out of my hands and
24 putting it in the parties' hands?

25 MR. KELTNER: Well, I would say

1 two things. Practicality prevents that. I
2 mean, the truth of the matter is if nobody
3 wants a trial, perhaps that is a situation in
4 which the judge is robbed of his or her trial
5 date, but there may very well be good reasons
6 if that's the case, and while that is a
7 problem it's not, I think, a huge problem.

8 I think the real truth of the matter is
9 this doesn't come up in the circumstance of a
10 defendant wanting to add a third party in
11 response to people who were intervening into
12 the case. Intervention just generally doesn't
13 happen unless somebody is trying to protect a
14 right that has not otherwise been protected.

15 Third party rights, really, the truth of
16 the matter, is the same thing. The defendant
17 looks there, says, "Oh, my God, if I don't get
18 this person in, I may not be able to litigate
19 this." Again, that's truly really what
20 happens or they are trying to get a
21 continuance, but it seems to me the easy
22 solution that won't change the rules a whole
23 lot and have to re-educate everybody is just
24 say if you bring a new party in, the opposing
25 side is going to have an opportunity to

1 respond to that and determine whether that
2 party needs to bring someone else in, and I
3 don't think it will work a hardship on judges
4 or on trial settings, and it's fair.

5 MR. MARKS: If you put it in
6 two separate deals then, I mean, first of all,
7 you have it as a matter of right for some
8 period of time after the suit is filed.

9 MR. KELTNER: Right.

10 MR. MARKS: Then after that
11 period goes by the boards then the plaintiff
12 has to get leave of court to join new parties,
13 Judge, and if the court grants that leave to
14 join those new parties then that automatically
15 triggers the right of the defendant to --

16 MR. KELTNER: Right. It's not
17 important to me that the plaintiff have the
18 right to do that, because that's really
19 controlled by practical considerations anyway,
20 but I don't mind that.

21 The other thing is this is going to
22 dovetail with discovery, but I think it does
23 in the context that Bill has got it, because
24 if we key it to appearance day, or I think the
25 way he's got it, 30 days after first

1 responsive pleading, that's in time for all of
2 the discovery committee's proposals to take
3 effect if the Supreme Court adopts them.

4 MR. LATTING: God forbid.

5 CHAIRMAN SOULES: All right.
6 Anything else on this? Okay. Bill, what's
7 next?

8 PROFESSOR DORSANEO: Well, what
9 are you doing, leaving me to redraft this and
10 come back and try again?

11 CHAIRMAN SOULES: No. I
12 haven't heard any motion to change it.

13 MR. ORSINGER: I would second
14 Joe's motion to move it to 90 days after the
15 starting date and that we ought to -- we
16 probably ought to have the starting date run
17 from appearance day rather than the day the
18 pleading is filed.

19 CHAIRMAN SOULES: 90 days from
20 appearance day. Those in favor show by hands.
21 Eight.

22 Those opposed? Three. Eight to three,
23 90 days from appearance day will be the --

24 MR. MARKS: I would like to
25 move to suggest what David has suggested with

1 respect to the joinder of new parties.

2 MR. LATTING: Second.

3 PROFESSOR DORSANEO: Well, and
4 that's part of this 90 days from appearance
5 day issue. I would rather write it up to make
6 it clear that if a new party is added that,
7 you know, we are talking about a new
8 appearance day.

9 MR. MARKS: Okay. Richard,
10 would you amend your --

11 CHAIRMAN SOULES: I don't hear
12 what -- we can take care of that without
13 Richard being involved. What do you want the
14 committee to pass on?

15 PROFESSOR DORSANEO: Let me
16 write a sentence that deals with this subject
17 of new parties joining, because I do think it
18 is probably reasonable to take a look at it,
19 to see whether -- where is Judge Brister? He
20 needs to listen to this. You know, whether
21 joinder of new parties --

22 CHAIRMAN SOULES: I would
23 rather move on. I mean, we have talked about
24 the issues here for an hour. I think the
25 committee ought to be in a position to decide

1 whether or not the plaintiff ought to have to
2 get leave of court to add plaintiffs, and we
3 might as well get a consensus on that and move
4 on.

5 MR. LATTING: Yeah. I agree
6 with that.

7 CHAIRMAN SOULES: Okay. Those
8 who think that the plaintiff should have to
9 get leave of court to add plaintiffs show by
10 hands. Six.

11 Those opposed? Seven. The plaintiff
12 does not need to get leave.

13 PROFESSOR DORSANEO: Well,
14 that's just intervention. If we are going to
15 change that, we can just change our whole
16 deal. We can just kind of go completely in
17 reverse, if that would have been voted up.

18 CHAIRMAN SOULES: What's that?

19 PROFESSOR DORSANEO: I mean,
20 plaintiff joining new plaintiff, that's just
21 intervention. That's just subject to being
22 stricken, unless we are going to go to the
23 Federal practice where it's the other way
24 around.

25 CHAIRMAN SOULES: That's right.

1 Plaintiffs add subject to being stricken.
2 Third parties, though, outside third parties,
3 90 days from appearance.

4 MR. MARKS: May I ask a
5 question? Are you going to then try to write
6 something that allows the joinder of a third
7 party once the plaintiff brings new parties
8 in?

9 PROFESSOR DORSANEO: I'm going
10 to try to make it clear what "appearance day"
11 means.

12 MR. MARKS: Okay. In that
13 context? Okay.

14 Now, does that have to do both with
15 interventions and joining new parties by
16 amendment?

17 PROFESSOR DORSANEO: To me
18 that's the same thing.

19 MR. MARKS: I agree.

20 CHAIRMAN SOULES: Well, let me
21 get a consensus on that. This is a new period
22 of free third-party practice after any
23 plaintiff, new plaintiff, is joined or a new
24 intervention. Those in favor of triggering a
25 new 90-day period of free third-party practice

1 after the addition of a new plaintiff or an
2 intervention show by hands.

3 MR. KELTNER: Just 90 days?

4 CHAIRMAN SOULES: A new 90-day
5 free period.

6 MR. McMAINS: Can I ask
7 something?

8 CHAIRMAN SOULES: Yes.

9 MR. McMAINS: For a point of
10 clarification, you are talking about as to the
11 newly added parties only?

12 MR. KELTNER: That was my
13 proposal.

14 CHAIRMAN SOULES: Okay. As to
15 the new parties only. Well, is that for the
16 new claims? That won't work. No. I'm not
17 talking about that because it's nonsense.

18 MR. KELTNER: Yeah. It won't.
19 He's right. It won't work.

20 CHAIRMAN SOULES: It's
21 nonsense. No. We are talking about a new
22 free period of third-party practice.

23 MR. MARKS: Luke, let me
24 suggest that we vote on that before we vote on
25 the time. In other words, would people be in

1 agreement for a new free period after new
2 parties are added and then talk about the time
3 separately. Because, I mean, people may want
4 to do it but may not want 90 days.

5 CHAIRMAN SOULES: A new period
6 of free third-party practice along the process
7 of the case when any new plaintiff or
8 intervention is added. Those in favor.

9 Those opposed? Eight to four to have a
10 new period.

11 90 days, those in favor of 90 days.
12 Opposed? Seven to five against 90 days in
13 that context. Somebody make -- 30 days.

14 MR. MARKS: Let's do 45.

15 CHAIRMAN SOULES: What?

16 MR. MARKS: 45.

17 MR. KELTNER: 45?

18 CHAIRMAN SOULES: 45 days?

19 One. 30 days? Ten. 30 days in that context.

20 PROFESSOR DORSANEO: Now, you
21 know, just for the record, this all is
22 subject, except for what the statute may do,
23 in my view, to the judge striking, you know,
24 the third-party claim if it screws up the
25 works. I mean, this is all subject to judge

1 control. What we are talking about is whether
2 you need to ask or just go ahead.

3 CHAIRMAN SOULES: Is the word
4 "strike" used in the third-party practice?

5 MR. HUNT: Yes.

6 HONORABLE SCOTT BRISTER: I
7 thought it was used --

8 CHAIRMAN SOULES: Is it in the
9 rule anywhere in third-party practice?

10 MR. HUNT: "A party may move to
11 strike the third-party claim," next to last
12 sentence.

13 CHAIRMAN SOULES: Okay.

14 PROFESSOR DORSANEO: What does
15 it say?

16 MR. ORSINGER: "Strike the
17 third-party claim or severance or separate
18 trial."

19 PROFESSOR DORSANEO: It doesn't
20 have a standard. Should we put a standard in
21 there?

22 CHAIRMAN SOULES: I don't think
23 so.

24 MR. LATTING: No.

25 PROFESSOR DORSANEO: Okay. All

1 right. The next thing in this draft that's
2 different from the current rule is the
3 subdivision (c), which is the same type of
4 change we made to the very similar provision
5 in an earlier rule about liability insurers.
6 So, you know, quite frankly, I think we have
7 already voted on this concept in the other
8 context and what we are trying to do is
9 improve on the more opaque language of current
10 Rule 38, which says, "This rule shall not be
11 applied in tort cases so as to permit the
12 joinder of a liability or indemnity insurance
13 company, unless such company is by statute or
14 contract liable to the person injured or
15 damaged."

16 It's meant to mean the same thing, but we
17 took out the reference to tort cases as being
18 a needless complication, and otherwise the
19 language is just a little simplified. It's a
20 change in language, wouldn't you agree,
21 Richard, more than anything else?

22 MR. ORSINGER: Yeah.

23 CHAIRMAN SOULES: Anything else
24 on 27? Those in favor of 27 show by hands.

25 Anybody opposed? Not opposed. Okay.

1 It's unanimously approved.

2 PROFESSOR DORSANEO: All right.
3 Now, the next one is 28, and what I'm going to
4 do at the same time is to ask you to turn to
5 the agenda to pages -- original agenda, if you
6 have it, pages 181 through 184. Now, Richard,
7 this is -- Holly assigned these things to me,
8 although they are really yours for the
9 disposition chart.

10 MR. ORSINGER: Can I allocate
11 my authority to you for the purpose of this
12 discussion?

13 PROFESSOR DORSANEO: For the
14 purpose of discussion, but for the purpose of
15 preparing the disposition chart, I'm not so
16 sure about that.

17 MR. ORSINGER: I will handle
18 that.

19 PROFESSOR DORSANEO: All right.

20 CHAIRMAN SOULES: And those
21 things we passed yesterday you are going to
22 give me redlined changes on those to send to
23 the Court out of your disposition table?

24 MR. ORSINGER: Well, our rules
25 are still in formative stage, Luke, so we are

1 not at redline stage. We still don't know
2 about the sequence of the entire rules or
3 anything.

4 CHAIRMAN SOULES: Well, I
5 understand that, but we passed some changes
6 yesterday that you had on your disposition
7 chart.

8 MR. ORSINGER: What we are
9 doing is we just carry forward the language in
10 our Sections 1, 2, 3, 4, and 5 kind of as we
11 go. So it's not like we have a final report
12 that now needs to be redlined. Our report is
13 still formative and has a bunch of gaps in it
14 that we are going to go back and fill.

15 CHAIRMAN SOULES: Okay. Okay,
16 Bill.

17 PROFESSOR DORSANEO: All right.
18 Rule 28 is a combination of a number of
19 existing rules with some slight changes.
20 Subdivision (a) is current Rule 62 verbatim,
21 with this one exception.

22 In the current rule it says "the object
23 of an amendment" and then there is this
24 language, "as contra-distinguished from a
25 supplemental petition or answer," and that "as

1 contra-distinguished from a supplemental
2 petition or answer" language was excised as
3 unnecessary and because we are changing a
4 supplemental petition or answer to a reply. A
5 supplemental petition we are changing to a
6 reply to an answer.

7 CHAIRMAN SOULES: Okay. Any
8 objection to that? That's to 28(a), right?

9 PROFESSOR DORSANEO: Uh-huh.

10 CHAIRMAN SOULES: No objection
11 to 28(a). That's accepted.

12 PROFESSOR DORSANEO: The second
13 unnumbered paragraph of 28(a) is 65 verbatim.
14 I'm not thrilled with 65 verbatim, but we have
15 no proposal for changing it now.

16 CHAIRMAN SOULES: Any objection
17 to the second paragraph of 28(a)? No
18 objection. That's accepted.

19 PROFESSOR DORSANEO:
20 Subdivision (b) is Rule 63, and a number of
21 people -- and I think we have discussed this
22 at this committee level, too, in the discovery
23 rule context and otherwise. A number of
24 people have expressed the view that seven days
25 prior to trial is -- which is in the current

1 rule, is too short a time, even though it's
2 merely in the proviso rather than in Rule 63
3 as a part of the rule as to when pleadings are
4 timely. On pages 181 through 184 of the
5 agenda -- or, I guess, really, first I'll say
6 on page 181 of the agenda the suggestion is
7 made that we modify Rule 63 --

8 MR. ORSINGER: Let me --

9 PROFESSOR DORSANEO: -- to
10 change the matter to 30 days and make further
11 modifications as well.

12 MR. ORSINGER: We have already
13 discussed this as part of our ordinary
14 committee report, and action was postponed
15 pending the decision on the discovery period
16 because the discovery committee recommended
17 that we count backwards from the close of the
18 discovery period rather than from a trial
19 date. We have had several suggestions in this
20 regard, and we have tabled them all pending
21 the Supreme Court's determination of that.

22 PROFESSOR DORSANEO: Well, you
23 don't think we should deal with it now? It's
24 too early?

25 MR. ORSINGER: Well, when we

1 have discussed this before we have said --
2 first of all, the discovery committee has made
3 a recommendation that we close the pleadings
4 off before the close of the discovery window,
5 and we have deferred writing a pleading rule
6 until we found out whether there was going to
7 be a discovery window closing. That's the way
8 we have handled this every time we have
9 discussed it before.

10 CHAIRMAN SOULES: Well, let's
11 write one assuming there is not a discovery
12 window. Let's go ahead and do this. We have
13 had some discussion here.

14 MR. ORSINGER: Okay.

15 CHAIRMAN SOULES: We might as
16 well move on to a consensus about what we are
17 going to do in that event.

18 PROFESSOR DORSANEO: Well, the
19 various approaches in these letters from our
20 constituents is to expand the seven days to 30
21 days and then there are additional
22 suggestions, such as for further providing
23 that the court have discretion to permit leave
24 to file the amended pleading, but changing the
25 burden. The burden is on the movant that

1 surprise is not shown, you know, rather than
2 as under Greenhall and Chapin and interpreting
3 current Rule 63 and 67 that the burden is on
4 the party that doesn't want the pleading to be
5 amended to show surprise or prejudice.

6 CHAIRMAN SOULES: Okay.

7 PROFESSOR DORSANEO: The bigger
8 issue seems to me to be the timing one.

9 CHAIRMAN SOULES: How many
10 think we ought to change seven days to 30
11 days? Show by hands. Six.

12 Those opposed?

13 MR. LATTING: Luke, can I be
14 heard on that?

15 CHAIRMAN SOULES: What do you
16 want? What do you want it to be?

17 MR. LATTING: Well, I want
18 some -- well, I think we ought to recognize if
19 we make it 30 days that we are talking about a
20 potential strong impact in the summary
21 judgment practice because summary judgment
22 hearing is a trial for purposes of amendment,
23 and if we do this then we are going to -- we
24 are upsetting that whole timetable, and we
25 better deal with that issue.

1 I don't object to the 30 days for a trial
2 that's on the merits, but we have had law out
3 of the Supreme Court now that you can amend
4 the pleadings on Monday before a Monday before
5 the summary judgment is set. So we have the
6 anomalous situation that you might be in a
7 situation where a summary judgment gets filed
8 with a hearing set off for 21 days, and you
9 don't have time to amend your pleadings in
10 order to meet the moving summary judgment
11 motion, which is one of my very important
12 weapons.

13 CHAIRMAN SOULES: John Marks.

14 MR. MARKS: Well, I'm kind of
15 concerned about moving the date off of the
16 seven-day rule because, you know, if you plead
17 new matters that should have been pled six
18 weeks ago, the court can take action on that,
19 but in just cleaning your pleadings up and
20 getting ready to go to trial, that kind of
21 thing, I don't know that we should mess with
22 that necessarily.

23 CHAIRMAN SOULES: Okay.

24 Richard Orsinger.

25 MR. ORSINGER: I would propose

1 that we disjoin the amending pleadings before
2 summary judgment from a final trial and vote
3 on them separately because I could support
4 moving the deadline back from the final trial
5 date, and perhaps we ought to independently
6 consider what you do about someone that amends
7 their pleadings between the date that a motion
8 for summary judgment is filed and the date
9 that it's heard, which then results in your
10 summary judgment motion being incomplete.

11 In other words, all of the sudden you
12 would have had a summary judgment that might
13 have taken care of the whole case, and now all
14 of the sudden there is a new cause of action
15 that's not in your summary judgment motion, so
16 then you have to amend that again, set off the
17 trial date, and get another pleading.

18 To me that's a different debate than we
19 ought to have about amending pleadings after
20 your case has been around for nine months or
21 three years, and you wait until eight days
22 before you are going to go pick a jury and you
23 suddenly add theories.

24 MR. LATTING: That's why I
25 raised it.

1 CHAIRMAN SOULES: Carl
2 Hamilton.

3 MR. HAMILTON: I agree with
4 Richard, and one of the reasons to vote for 30
5 days -- and the court rules committee sent an
6 amendment to the Supreme Court changing it to
7 30 days -- is that court rules thinks that
8 that helps save money because so many times
9 amended pleadings come in seven days before
10 trial, it's a whole new lawsuit. It results
11 in a continuance because the court says,
12 "Well, you have a matter of right to do that,"
13 so everybody has gotten ready for trial and it
14 gets put off. So it's one more device that's
15 used to postpone the trial date; whereas if
16 it's done 30 days out then there is time for
17 new discovery or whatever needs to be done in
18 that 30-day period.

19 CHAIRMAN SOULES: Okay. All
20 right. Well, should we vote again?

21 MR. ORSINGER: If you don't
22 mind, could we make the vote that it's 30 days
23 before a trial on the merits as distinguished
24 from a summary judgment trial, so we don't get
25 complicated with that issue?

1 PROFESSOR DORSANEO: You could
2 say "conventional trial rather than summary
3 judgment."

4 MR. BABCOCK: I don't think
5 that's wise myself. I mean, there is a lot of
6 case law saying that a summary judgment is a
7 trial and all the deadlines flow from that,
8 and if we start pranking with it in this
9 instance then we are going to have to prank
10 with it in other instances. I think that's a
11 very bad idea.

12 CHAIRMAN SOULES: The other way
13 to fix it would be to have a 45-day setting on
14 a summary judgment.

15 MR. ORSINGER: That doesn't
16 offend me at all.

17 CHAIRMAN SOULES: What?

18 MR. ORSINGER: That doesn't
19 offend me at all.

20 CHAIRMAN SOULES: Doesn't
21 offend me either. I mean, the 21 days on a
22 summary judgment, maybe that's okay on a
23 simple thing, but sometimes that puts you
24 scrambling.

25 MR. ORSINGER: Oh, sure.

1 CHAIRMAN SOULES: You have got
2 14 days. Huh? You have got to do a lot
3 maybe, huh?

4 MR. ORSINGER: I agree. Very
5 much so.

6 CHAIRMAN SOULES: So the
7 pleading rule to me, when you can -- well, I
8 guess we could vote on this. How many believe
9 that the time should be the same regardless of
10 what kind of trial? In other words, summary
11 judgment, actual trial, whatever, that the
12 pleading rule be seven, be 30, whatever it is
13 should be the same across the board. I mean,
14 we can deal with the consequences of that in
15 other ways.

16 Those in favor show by hands. Ten.
17 Those opposed? To one. Ten to one to be the
18 same.

19 All right. If it's 30, summary judgment
20 could be 45, which maybe we need to vote on
21 those two together. I don't know. Do you
22 want to do that?

23 MR. ORSINGER: Well, it's
24 consistent with Chip's idea that we would have
25 45 days notice of the summary judgment trial

1 just like our trial on the merits.

2 CHAIRMAN SOULES: All right.
3 Those in favor of a 45-day summary judgment
4 rule just like other 45 days trial settings,
5 if it's a trial, I guess it is, and 30 days
6 for amended pleadings, show by hands.

7 HONORABLE SCOTT BRISTER: Can
8 we discuss that for one minute?

9 CHAIRMAN SOULES: Yes, sir.

10 HONORABLE SCOTT BRISTER:
11 Remember that the summary judgment rule we
12 just sent, the idea was to respond to
13 legislature, et cetera, by having this point
14 where there is a cut-off. We have done enough
15 discovery, now we move to trial, and if that
16 has to be waited 'til the discovery is all
17 done on it but more than 45 days before trial,
18 those two are going to pass like ships in the
19 night.

20 In other words, by making a longer time
21 between your filing of your motion and the
22 hearing you are going to make that before the
23 discovery is done, and you wipe out, in my
24 opinion, a lot of the rule we just sent to the
25 Supreme Court.

1 MR. McMAINS: Well, not if -- I
2 mean, as a trial judge, of course, you always
3 have the ability to set discovery cut-offs in
4 your pretrial order amply before any kind of
5 trial settings.

6 HONORABLE SCOTT BRISTER: Yeah.
7 But my experience, every discovery cut-off
8 that I assign just means I'm going to have to
9 sign an order later extending the discovery
10 date because people don't finish discovery 45
11 days before the trial date. Nobody does.

12 CHAIRMAN SOULES: Well, there
13 is a consequence of this, too. The toughest
14 thing I have in trying to get scheduling
15 orders is for a judge to give me enough time
16 for dispositive motion practice, you know.

17 "Oh, we are going to finish discovery.
18 We are going to go to trial." You say, "Wait
19 a minute. I want to build in 60 days or 90
20 days or 45 days or something in here where I
21 can get my dispositive motion practice in here
22 done," and you just get ignored by the judges,
23 I mean, as a defendant. The
24 commercial -- I do commercial work, so I'm on
25 both sides, sometimes plaintiff, sometimes

1 defendant, but defendant gets up and says, "I
2 want this gap of time in here to get my
3 dispositive motion practice going." It seems
4 to me like the judges just think, Oh, that's
5 just dilatory bullshit; and it's not. It's
6 serious stuff.

7 So I don't know whether changing it from
8 21 to 45 days is going to make that a bigger
9 problem for that context. Probably it will,
10 and maybe we just need to be doing a better
11 job educating the trial judges to give us an
12 opportunity to get our business done, but I
13 think maybe that is another issue.

14 HONORABLE SCOTT BRISTER: And
15 second, the vast majority of my cases don't
16 need more than 21 days. Now, probably the
17 majority of you-all's cases need more than 21
18 days, but you-all ought to be the ones --
19 you're handling the unusual cases. You-all
20 ought to be the ones filing the motion, "I
21 need more time."

22 MR. LATTING: Here, here.

23 HONORABLE SCOTT BRISTER: The
24 vast majority of my car wrecks, slip and
25 falls, that's what I do day in and day out.

1 That's 80 percent of the district court
2 docket, and it don't need ten days.

3 MR. BABCOCK: Luke, the nature
4 of the way lawyers are, with the 21-day
5 period, the big cases that maybe some of us
6 handle usually do get stretched out to 45 by
7 agreement, or if there is no agreement, they
8 go to the judge and they get more time. If we
9 put 45 days on here, what's going to happen
10 now is it's going to get stretched out to 60
11 and 65 and 70 days. Maybe that's okay, but
12 the problem you identified is a critical
13 problem, particularly with the rule we just
14 sent up to the court.

15 Most of the scheduling orders I get have
16 the trial date 30 days after the end of
17 discovery, and I mean, if we move this to 45
18 days, we are never going to -- we are never
19 going to get our motions heard anyway under
20 the rule we just sent up to the Court, which
21 is what I have expressed problems with in the
22 past, but this is going to make it worse, and
23 maybe we propose a rule that there can be no
24 trial setting until 60 days after the close of
25 discovery and that would fit in.

1 CHAIRMAN SOULES: Rusty, and
2 then I will get back to Bill.

3 MR. McMAINS: Well, two things.
4 No. 1, the summary judgment rule we sent up to
5 the Court and that we modified, while it does
6 have modifications for what happens at the
7 close of discovery and that stuff, it doesn't
8 deal with what most of discovery practice is
9 about now. I mean, what summary judgment
10 practice is about.

11 There is no prohibition in that rule for
12 getting a summary judgment almost from day one
13 if your position is you don't have a claim or
14 you've got a release or you've got the
15 conditional privilege applied. You can go get
16 that, and it doesn't -- that's not going to be
17 affected by the trial setting. It's only the
18 Celotex type motion that's affected by the
19 trial setting issue anyway.

20 No. 2, and just as a thought, and it may
21 not be a whole lot of relief, but if you move
22 the time to 14 days prior to trial then that
23 still gives you a week after you get notice of
24 the summary judgment. If you are going to
25 take your crack at amending, you can do that.

1 Probably less downtime. So you can still do
2 it that way. It doubles the time that we have
3 now and kind of is a compromise for everybody.
4 Then you could leave the 21 days the way it
5 is. So I just throw that out, for whatever
6 it's worth.

7 CHAIRMAN SOULES: All right.
8 After that fairly lengthy discussion obviously
9 it seems to me that some minds may have
10 changed on how long, or maybe we haven't
11 really voted on how long yet.

12 How long? Seven? Those in favor of
13 seven, leaving it the way it is. Seven.

14 14? Two. 30? One. Okay. Any other
15 number? Some other number? None. Okay.
16 Seven days it stays.

17 PROFESSOR DORSANEO: I just
18 have one question. Across the state --

19 CHAIRMAN SOULES: Let me go
20 back now and try one other alternative. We
21 voted to keep it the same in all cases, but
22 then there was discussion about the impact on
23 summary judgments and so forth. Is anyone
24 interested in pursuing debate about whether we
25 should have one period for amended pleadings

1 for conventional trial and different period
2 for summary judgment?

3 MR. LATTING: Yes, I am.

4 MR. ORSINGER: Me, too.

5 CHAIRMAN SOULES: All right.

6 Let's -- I'm assuming that everybody is in
7 agreement that seven days should apply in
8 summary judgment context. That's what drove
9 us back to seven days. Any disagreement with
10 that? Okay. Summary judgment, seven days.

11 Conventional trials now. Let's take a
12 vote again. Seven days? No votes. 14 days?
13 Two.

14 30 days? Or I think we always ought to
15 count in multiples of 7, but 28 days?

16 Well, the problem is that you get into
17 this Saturday/Sunday stuff, and I think every
18 time period in the rules ought to be a
19 multiple of seven days instead of all of this
20 other stuff. Okay. I don't know that it makes
21 any difference.

22 Anybody agree that multiples -- we will
23 vote 28 or 30 so that maybe it doesn't make
24 any difference to anybody else. 28 days? 30
25 days? Three. Everybody vote.

1 MR. LATTING: 30 days is when
2 you've got to do your experts, you've got to
3 supplement. You might as well amend. That's
4 as good as any.

5 CHAIRMAN SOULES: One, two,
6 three...

7 Okay. 30 days for conventional trials.
8 Seven days for summary judgments.

9 MR. BABCOCK: Didn't we vote a
10 minute ago that we weren't going to split
11 those?

12 CHAIRMAN SOULES: Well, but I
13 came back to that after that discussion
14 because it seemed to me like there was strong
15 sentiment for an early amendment in a
16 conventional trial, but that really messed up
17 the summary judgment practice. So we got
18 driven back to seven days, shifted back to
19 seven days, because of the summary judgment
20 issue not because of conventional trial
21 problems, and it seemed to me like I should go
22 back and revisit that. That's why I did it,
23 and if anybody is dissatisfied, we will vote
24 again on whatever somebody wants to vote on so
25 that we don't leave anybody feeling that this

1 didn't go right in terms of what got presented
2 and moved.

3 MR. McMains: Luke?

4 CHAIRMAN SOULES: Rusty.

5 MR. McMains: The problem I
6 have is that when you say that you have got
7 seven days for summary judgment, which we
8 left, and then you have got 30 days for a
9 conventional trial, if you are doing the
10 Celotex motion and there is only 30 days
11 before the end of the trial -- from the end of
12 the discovery period, and you file your motion
13 for summary judgment, and seven days later you
14 amend, as you are entitled to do as the
15 plaintiff, to bring a new cause of action or
16 whatever. Then you have it, under what you
17 have just suggested we set up, your amendment
18 applies for your summary judgment, but it
19 doesn't apply for your trial, which didn't
20 make a whole lot of sense.

21 CHAIRMAN SOULES: Well, I would
22 say it should apply to both, the seven days
23 should apply to both, because what's happened
24 is after you filed your last pleading, your
25 30-day pleading, somebody comes in and says,

1 "You missed a law issue in your pleading" or
2 someplace in your case; but since it says the
3 seven-day rule is going to come into play it's
4 going to be a pleading area.

5 "You have got a pleading void, and I'm
6 going to summary judgment you on that," and
7 you say, "Whoops, I sure do," and you amend to
8 fix it. You have taken care of the client's
9 interest, and I don't see anything unfair
10 about making that seven-day pleading that was
11 triggered by a motion for summary judgment,
12 and the only reason you got a seven-day --

13 MR. McMAINS: But there is
14 always going to be --

15 CHAIRMAN SOULES: -- deal is
16 because somebody filed a summary judgment that
17 triggered that right.

18 MR. McMAINS: While there may
19 be some disagreement about this, by and large
20 I think it's going to become a routine
21 practice to file a Celotex type motion for
22 summary judgment, if our other rule applies,
23 at the end of the discovery period.

24 CHAIRMAN SOULES: If they do
25 that, they trigger a seven-day amendment.

1 MR. McMAINS: And so you're
2 saying the way we reconcile these is if you
3 choose to file that, then they can amend
4 within seven days, even though they are also
5 inside of 30 days from the date of the trial.

6 CHAIRMAN SOULES: You would
7 trigger a seven-day amendment date as opposed
8 to a 30-day.

9 MR. McMAINS: But filing your
10 amended pleading would be applicable to the
11 case to be tried on the merits as well.

12 CHAIRMAN SOULES: Sure.
13 Because you are fixing a legal problem in the
14 pleading, and once the summary judgment is
15 denied how could you say, well, I didn't fix
16 it, though, for trial, so I'm going to get
17 DV'd.

18 MR. McMAINS: Well, it may not
19 be a legal problem. It may be that you state
20 a new cause of action.

21 MR. BABCOCK: Yeah. You may
22 state a new cause of action. That's the
23 problem, that if you divorce these two
24 procedures, the regular trial and the summary
25 judgment trial, then you could have, as Rusty

1 says, a pleading that applies only to summary
2 judgment but not to trial.

3 So, for example, you allege a cause of
4 action for tortious interference which you
5 have never alleged before, so now you can beat
6 summary judgment on that, but you can't go to
7 trial on that. That doesn't seem to make any
8 sense to me.

9 CHAIRMAN SOULES: Well, I think
10 you should be able to go to trial on a
11 seven-day pleading if somebody triggers it
12 with filing a summary judgment.

13 MR. BABCOCK: Yeah. Well, I
14 don't think that's what we voted on.

15 MR. ORSINGER: What Luke is
16 saying is, is that if the summary judgment is
17 filed during that last 30-day period to where
18 you can respond to it, it's like you are given
19 an exception to the 30-day requirement.

20 MR. LATTING: I like that. Can
21 we vote on that? You're right about that.

22 CHAIRMAN SOULES: I'm not
23 limiting to that, because I don't think we can
24 write a rule that just tailors itself down so
25 to that extent. It's got to be broader than

1 that.

2 My concept is if a party files a motion
3 for summary judgment and one of the bases for
4 summary judgment is somehow the fact that
5 there is a pleading mistake or void, is a
6 basis for the summary judgment, that that
7 pleading, that party can fix that.

8 MR. ORSINGER: Yeah. But
9 also --

10 CHAIRMAN SOULES: And do
11 anything else they want to do.

12 MR. ORSINGER: -- raise five
13 new causes of action eight days before we pick
14 a jury.

15 CHAIRMAN SOULES: Right. Yes.

16 MR. LATTING: You can always
17 cure that by going and moving to strike. We
18 have the ability to deal with this stuff.

19 CHAIRMAN SOULES: Right.
20 Right.

21 MR. LATTING: And I agree with
22 you. I only reluctantly voted for 30 days
23 because everybody said, "Well, yeah, let's
24 change it," but really it's working okay like
25 it is. Let's not step in and make a major

1 change in the way people have to practice law
2 that's going to have repercussions that we
3 don't know all about. We are going to send
4 ripples all over the --

5 PROFESSOR DORSANEO: I have
6 this one question. It seems to me that seven
7 days is -- when this rule was drafted
8 originally and the standard of the rule is not
9 to separate as a surprise to the opposite
10 party. I mean, that's the standard.

11 MR. LATTING: That's right.

12 PROFESSOR DORSANEO: And then
13 the proviso is within seven days. Now, in the
14 culture of law practice across the state is
15 that considered to be, you know, within seven
16 days for most cases, an all right rule; or is
17 it longer than that now? I mean, if you get a
18 pleading, Judge Brister, that's filed on the
19 tenth day before the trial setting, is your
20 reaction to that, "That's late," or "That's
21 not late"?

22 HONORABLE SCOTT BRISTER: It
23 depends on if it adds some things like
24 expert's opinions. If it adds details you
25 already knew about, you already knew about

1 from discovery, it's okay; but if ten days
2 before for the first time you add breach of
3 fiduciary duty, good faith/fair dealing where
4 we've just had a contract case, strike it,
5 because it's going to delay the trial.

6 MR. ORSINGER: I wouldn't say
7 that that's the norm in Bexar County, but then
8 our trial judges don't have their own dockets
9 there. So you inherit whatever you get the
10 morning you come into work.

11 PROFESSOR DORSANEO: So
12 everything is a surprise.

13 MR. ORSINGER: What do you
14 think, Luke? I'm not used to having pleadings
15 struck if they are filed seven days before
16 trial.

17 CHAIRMAN SOULES: Huh-uh.
18 That's true.

19 MR. MARKS: Do you normally
20 allege new cause of actions?

21 CHAIRMAN SOULES: Yeah. Take a
22 negligence case, and the plaintiff sits on a
23 negligence case until seven days ahead of
24 trial and then files a DTPA claim, hasn't
25 changed a single factual allegation. I just

1 pitched in the DTPA and going to take a shot
2 at additional damages.

3 MR. ORSINGER: It doesn't affect
4 our docket in San Antonio. It affects whether
5 that case goes to trial, but if that case
6 doesn't go to trial, we have got 15 that are
7 going to replace it with one phone call. So
8 the trial judges really don't care about their
9 docket in that sense.

10 CHAIRMAN SOULES: That's true,
11 but in the counties around here they do, and
12 that's the kind of concern I've got, is there
13 is some short practice on the parts of some
14 plaintiffs to not really give good notice of
15 what the case is all about until seven days.
16 They have got all the facts that occurred out
17 there, but what are they going to submit to
18 the jury? They get their pleadings set up for
19 the jury charge right at the end, and it can
20 be a surprise.

21 If you have got a trial setting in seven
22 days in Karnes County, that judge has got the
23 time set aside for that trial, and there is a
24 pretty serious resistance to a continuance at
25 that point; whereas, if it moves back earlier

1 30 days, a judge can find something else to do
2 maybe; but whether that has anything to do
3 with this or not, I just pitch it out there.

4 MR. HAMILTON: A lot of this
5 discussion is premised on the idea that the
6 Supreme Court is going to adopt the suggested
7 motion for summary judgment rule, which is
8 tied to the discovery period cut-off time. If
9 that's not done then these problems go away,
10 and maybe we ought to send up a version if
11 that's not adopted and a version if it is
12 adopted.

13 CHAIRMAN SOULES: Well, even
14 under present 166a we have the same seven-day
15 issue, don't we?

16 MR. BABCOCK: Sure.

17 CHAIRMAN SOULES: Without
18 whether (e) goes forward or not. Maybe I'm
19 not understanding, Carl.

20 MR. HAMILTON: Well, I thought
21 Judge Brister's comment was the rule that was
22 sent up was tied to the discovery period, and
23 that's why we couldn't extend this time.

24 CHAIRMAN SOULES: Only (e), the
25 new (e) is tied to discovery.

1 MR. HAMILTON: Only what?

2 MR. ORSINGER: Only the new no
3 evidence summary judgment is tied to it.

4 MR. HAMILTON: Oh.

5 MR. BABCOCK: Only subpart (e).

6 CHAIRMAN SOULES: Okay. Well,
7 what do we want to do with this? Let's move
8 the train.

9 MR. LATTING: I move we leave
10 the pleading amendments rules like they are.

11 CHAIRMAN SOULES: Let's just
12 wipe the slate of prior votes and start over
13 again so that everybody gets a fair input, and
14 we are going to vote this time and close the
15 bank and go to another issue. Okay. You move
16 that no change on the seven-day rule?

17 MR. LATTING: Right.

18 CHAIRMAN SOULES: Okay, is
19 there a second?

20 MR. BABCOCK: Second.

21 CHAIRMAN SOULES: Those in
22 favor show by hands.

23 Those opposed? Nine to three, it stays
24 seven days.

25 PROFESSOR DORSANEO: All right.

1 In the next little paragraph that's current
2 Rule 64 is shortened down from the draft
3 that's in the current rule book, and one of
4 the letters from a Mr. Richard Sommer of
5 Hibler & Sommer, San Antonio, deals with
6 current Rule 64.

7 CHAIRMAN SOULES: Where is that
8 one?

9 PROFESSOR DORSANEO: On page
10 185 of the agenda. His complaint about
11 current Rule 64 --

12 MR. ORSINGER: Let me interrupt
13 and say we have already voted on this on
14 September 20th and rejected this proposal.
15 Not to say that we shouldn't discuss it, but
16 that's what the disposition table shows.

17 PROFESSOR DORSANEO: Well, all
18 right. I'm just doing what Holly's letter
19 tells me to do.

20 CHAIRMAN SOULES: All right.

21 PROFESSOR DORSANEO: I will
22 start these letter questions differently from
23 now on.

24 MR. ORSINGER: If I can, Luke,
25 on September 20th, we considered this. The

1 subcommittee recommended no change, and this
2 has to do with allowing amendment of pleadings
3 by designating the page and paragraph amended
4 without the necessity of repleading
5 everything.

6 CHAIRMAN SOULES: That's been
7 voted down.

8 MR. ORSINGER: We have already
9 debated this, and we voted it down.

10 CHAIRMAN SOULES: That's
11 correct. You're right.

12 MR. McMAINS: After lengthy
13 discussion.

14 MR. LATTING: That's right.

15 CHAIRMAN SOULES: Okay. Now,
16 do you need any other input on 64?

17 PROFESSOR DORSANEO: No.
18 Although I'm going to tell you I'm going to
19 take from 64 some language that I
20 inadvertently left out of this that deals with
21 this subject, and those are the words "entire
22 and complete in itself" and put that after
23 "substitute pleading."

24 The current rule talks a lot, but then it
25 says, "The substitute pleading must be,"

1 quote, "entire and complete in itself," and I
2 think that is what you voted should stay.

3 CHAIRMAN SOULES: Right.

4 PROFESSOR DORSANEO: Okay.

5 Then the next thing is --

6 CHAIRMAN SOULES: Now, are we
7 ready for 28(b), to vote on 28(b)?

8 PROFESSOR DORSANEO: We already
9 did.

10 CHAIRMAN SOULES: Okay.

11 MR. ORSINGER: But you just
12 made a change to (b). I mean, you have just
13 announced a change to the last paragraph of
14 (b), so now we need to vote.

15 PROFESSOR DORSANEO: Yes.

16 CHAIRMAN SOULES: Those in
17 favor of 28(b) in conformity with our
18 discussions today show by hands. Eight.

19 Those opposed? All right. There is no
20 opposition to it. It will be accepted.

21 PROFESSOR DORSANEO: (C) and
22 (d) are verbatim reiterations of current Rules
23 66 and 67 and --

24 MR. McMANS: Luke?

25 CHAIRMAN SOULES: Rusty.

1 MR. McMains: On this "party
2 amending must file a substitute pleading" part
3 at the -- on page 23, is that right? Is that
4 where we are?

5 MR. ORSINGER: Well, we just
6 voted on that.

7 MR. McMains: The one we just
8 passed on?

9 MR. ORSINGER: Yes. We just
10 voted on that.

11 MR. YELENOSKY: Yeah, but it
12 looks funny because --

13 MR. McMains: Well, the reason
14 I -- it says, "The party amending must file a
15 substitute pleading or motion," and how does
16 it finish reading?

17 MR. YELENOSKY: Are those
18 examples?

19 CHAIRMAN SOULES: "Complete in
20 itself."

21 MR. McMains: "That is complete
22 in itself"? Is that all it says?

23 PROFESSOR DORSANEO: Well, it
24 says, "If the party amending must file a
25 substitute pleading," and the language is a

1 little different. If you are complaining
2 about the language, that would be fine.
3 "Entire and complete in itself."

4 Oh, okay. "Substitute pleading or
5 motion." Okay. "Entire and complete in
6 itself," and I could just use a different
7 sentence.

8 MR. McMAINS: No. I mean, but
9 that --

10 MR. YELENOSKY: Well, what
11 we're looking at --

12 MR. McMAINS: It says "first
13 amended complaint," "second amended answer,"
14 whatever.

15 MR. YELENOSKY: Yeah. It's
16 that stuff.

17 MR. McMAINS: Is that there or
18 not there? That's what I'm trying to figure
19 out.

20 CHAIRMAN SOULES: You're on
21 page 23?

22 MR. HAMILTON: 22.

23 MR. McMAINS: This is this
24 letter that we were on, and maybe that's not
25 the right thing.

1 PROFESSOR DORSANEO: What
2 letter?

3 MR. YELENOSKY: No, no, no.
4 Not the letter. We are looking at page 23.
5 It says, "The party amending must file a
6 substitute pleading or motion that is entitled
7 'first amended complaint,' or 'second amended
8 answer'" --

9 CHAIRMAN SOULES: Oh, I see.

10 MR. YELENOSKY: -- "or 'third
11 amended motion to transfer venue.'"

12 CHAIRMAN SOULES: They want to
13 know is this paragraph right here, is that
14 part of the rule?

15 PROFESSOR DORSANEO: Yes.

16 MR. ORSINGER: Yes.

17 MR. YELENOSKY: Well, are those
18 examples?

19 PROFESSOR DORSANEO: Yes.

20 MR. YELENOSKY: Well, it
21 doesn't say they are examples.

22 MR. ORSINGER: It better say
23 "such as" or something like that.

24 MR. YELENOSKY: Yeah. It needs
25 to say something like that.

1 MR. McMains: Well, I have a
2 problem with it. I mean, just as it's stated,
3 because it talks about third amended motion to
4 transfer venue. We just worked on the venue
5 rules, and we have basically said that you
6 don't keep changing motions to transfer. They
7 are due orders of pleadings. They have to be
8 done right the first time, and to give an
9 example of the third amended motion to
10 transfer --

11 MR. YELENOSKY: Well, that's an
12 objection to the example. My objection was it
13 doesn't say these are examples. It doesn't
14 say "such as," and that's just a minor point.
15 Maybe that's duplicate, but...

16 PROFESSOR DORSANEO: All right.

17 CHAIRMAN SOULES: Just stop
18 after "motion," "third amended motion."

19 MR. McMains: I mean, I don't
20 have a problem with the idea that it needs to
21 be entire and complete into itself, but when
22 you start talking about, for instance, it
23 should be titled something, it just looks
24 funny, especially when you have got one thing
25 there that I don't know what it is.

1 PROFESSOR DORSANEO: Let me
2 just say this in English, that to file a
3 substitute it's going to be entire and
4 complete in itself and it's going to
5 identify --

6 MR. YELENOSKY: What it is.

7 PROFESSOR DORSANEO: -- what it
8 is.

9 MR. McMAINS: Okay. That's
10 fine.

11 PROFESSOR DORSANEO: If that's
12 all right.

13 CHAIRMAN SOULES: That's fine.

14 PROFESSOR DORSANEO: Thank you.
15 That language was funky. But 66 and 67, to
16 finish up this Section 2 this go-around, are
17 the same as in this draft, including the
18 proviso that was added in 1940 to our Rule 67.

19 CHAIRMAN SOULES: Okay. So
20 page 62, on 28(c) and (d)?

21 PROFESSOR DORSANEO: Uh-huh.

22 CHAIRMAN SOULES: Okay. With
23 the understanding that these are verbatim of
24 the present rules, any opposition to 28(c) or
25 (d)?

1 There is none. That will be accepted.
2 Bill, I think we probably -- to an extent that
3 you are carrying the precise language of the
4 present rule forward, we probably ought to get
5 some law clerk or something to --

6 PROFESSOR DORSANEO: Well, I'm
7 going to redline these.

8 CHAIRMAN SOULES: You are going
9 to redline them?

10 PROFESSOR DORSANEO: Well, we
11 are doing a side-by-side comparison.

12 MR. ORSINGER: It will be like
13 the appellate rules. It's going to have to be
14 side-by-side because we have moved so much
15 stuff you can't possibly do a redline.

16 CHAIRMAN SOULES: All right.

17 PROFESSOR DORSANEO: Now, when
18 I say the same, it's to be understood if the
19 word "petition" was in these trial amendment
20 (c) and (d) rules, that got changed to
21 "complaint."

22 CHAIRMAN SOULES: Okay. I
23 understand. We have seen a couple of places
24 where words got dropped, and I just want to be
25 sure that there is some check done that we

1 don't inadvertently drop words.

2 PROFESSOR DORSANEO: Now, if
3 you want to please turn to page 217 of the
4 agenda, and, Richard, did we deal with Hadley
5 Edgar's letter on page 217 concerning Rule 90
6 in the disposition table yet?

7 MR. ORSINGER: Yeah, we did.
8 On September 20th we tabled this suggestion
9 pending submission of the proposed rule.

10 PROFESSOR DORSANEO: Well, you
11 need to change the disposition table because
12 when we dealt with the special exception
13 redraft we did deal with this exact problem.
14 I think we did anyway, the special exception
15 redraft one or two meetings ago in subdivision
16 (e) of proposed Rule 21.

17 MR. ORSINGER: What section?

18 PROFESSOR DORSANEO: Section 2,
19 pleadings and motions, but I did not, you
20 know, copy that in this handout we are just
21 discussing dated January 22, 1996. Oh, maybe
22 we didn't answer it. We had this blank.

23 "Every pleading defect of form or
24 substance not made the basis of special
25 exception and presented to the judge at

1 least," blank, "days before trial is waived"
2 and Hadley Edgar's letter says it needs to be
3 called to the attention of the trial court
4 prior to trial to avoid waiver. I think we
5 have already gotten past that. We have
6 already voted up the idea that it needs to be
7 prior to trial, but we didn't identify the
8 number of days prior to trial. That same
9 issue is raised in the next letter.

10 MR. ORSINGER: On page 226 by
11 Broadus Spivey. For the record, let me say
12 that we are in proposed rules Section 3 on
13 page 7 entitled "special exceptions." It's in
14 proposed rules Section 3.

15 PROFESSOR DORSANEO: They do
16 not have that.

17 MR. ORSINGER: 21, 7. Well, it
18 was not passed out here?

19 PROFESSOR DORSANEO: No.
20 Because we are just dealing with these
21 letters. We have already done this one.

22 MR. ORSINGER: Okay. What we
23 did on Hadley Edgar's proposal was that we
24 tabled the suggestion because we were
25 deferring the date about how far back you have

1 to amend pleadings before trial, so we didn't
2 want to determine how far back you had to file
3 your special exceptions until we decided what
4 was going to happen to the discovery window
5 because pleadings amendments were going to
6 affect discovery.

7 So all of -- everything, both the special
8 exception deadline and the pleading deadline
9 were put off, and Broadus Spivey has suggested
10 that we do it ten days before trial. That's
11 page 226, and on September 20th that was
12 postponed. Our subcommittee had recommended
13 counting back from the end of the discovery
14 period, and then on page 228 we had a letter
15 from an unknown party that was submitted by
16 Broadus Spivey wanting it 30 days prior to
17 trial, special exceptions, and again that was
18 tabled, and the subcommittee recommended
19 counting back from the end of the discovery
20 period. So we are kind of arguing something
21 similar to what we argued earlier on amending
22 pleadings before trial.

23 PROFESSOR DORSANEO: And also,
24 Edward Lavin, if that's how they pronounce his
25 name, from San Antonio, has a letter to our

1 chair about Rule 90 that deals with this and
2 other Rule 90 problems, including how the
3 waiver concept works, and for all of these
4 people they should be advised that the
5 committee has revisited current Rules 90 and
6 91 and has at this point determined that
7 special exceptions should be presented, you
8 know, before a trial without coming to a firm
9 conclusion about how long before trial and has
10 made the waiver applicable to all parties, not
11 in the manner of the current rule of parties
12 seeking reversal on such account. Pleading
13 defect account only. So we have addressed all
14 of the concerns in these letters and have
15 tried to make the special exception rules more
16 understandable and workable from a legal and
17 practical standpoint.

18 CHAIRMAN SOULES: Okay. So we
19 have worked on them in every way except to get
20 a day.

21 PROFESSOR DORSANEO: Right.

22 CHAIRMAN SOULES: All right.
23 Let's get the day, assuming that we don't have
24 a discovery window. Okay. My question to
25 start the debate is if a party can amend up to

1 seven days prior to trial, how can we require
2 special exceptions to be done earlier than
3 that?

4 PROFESSOR DORSANEO: Good
5 question.

6 CHAIRMAN SOULES: Second piece,
7 I have got three pieces of this. That's the
8 first piece. The second piece is people that
9 are really serious about their special
10 exceptions because they can't understand what
11 they are being sued for are not going to wait
12 that late anyway. They are going to start
13 getting the pleadings to where they are
14 understandable, the defendants can understand
15 what kind of discovery to do or what kind of
16 dispositive motions to make and so forth.

17 And then the third piece is that if the
18 defendant believes they know what the case is
19 about from reading the plaintiff's pleadings
20 but realizes that there is some slippage there
21 and is really only trying to get a strict
22 construction of the pleadings as opposed to a
23 broad construction of the pleadings and they
24 are using the special exceptions to make the
25 pleadings strictly construed for the purposes

1 of trial, they could file a special
2 exceptions, of course, after the last pleading
3 and preserve error of a broad -- too broad of
4 a construction of pleading.

5 And I guess a lot of us have done that,
6 come in and say, "I have got all these special
7 exceptions. I think I know what the pleading
8 says, but I'm not absolutely sure, and I don't
9 care what you do with them, Judge. You can
10 overrule them if you want to. I mean, I'm not
11 volunteering that you overrule them, but when
12 we go to trial I don't want to be surprised by
13 some general statement in the pleadings that
14 isn't pinned down," and so to me prior to the
15 commencement of trial is early enough to
16 present special exceptions because the
17 practice of using them elsewhere is going to
18 drive them to be used earlier where necessary.
19 But whatever you think.

20 PROFESSOR DORSANEO: The court
21 rules committee proposed that the time be a
22 reasonable time, and then they say, "and not
23 less than 30 days before the commencement of a
24 jury or nonjury trial," but I guess really
25 what you're saying is just a reasonable time.

1 CHAIRMAN SOULES: Well, I'm
2 talking about right before or right after the
3 motion in limine, which occurs just before you
4 start voir dire. Any time prior to trial,
5 prior to the commencement of the trial.

6 PROFESSOR DORSANEO: And the
7 other thing to say is that there are local
8 rules that deal with this subject that require
9 it to be done in a certain period of time, and
10 those rules are probably inconsistent with the
11 current rule, but nobody likes the current
12 rule, so that inconsistency is not pointed out
13 very often.

14 CHAIRMAN SOULES: Well, if we
15 have the seven-day rule, what is the -- we
16 voted to keep the seven days. What's the
17 alternative? What are the available
18 alternatives for special exceptions if you can
19 get a new pleading seven days ahead of trial?

20 PROFESSOR DORSANEO: It just
21 has to be a reasonable time before trial. It
22 can't be -- I don't think it can be one minute
23 before trial in every circumstance.

24 MR. ORSINGER: Well, let me
25 say, there are local rules. For example, I

1 believe the Dallas courts require you to
2 resolve it a week before trial, but in San
3 Antonio you just have to resolve it -- I don't
4 remember what the rule in San Antonio is.
5 Before trial, but I don't know that it was a
6 week before trial.

7 CHAIRMAN SOULES: Before trial
8 commences.

9 MR. ORSINGER: But there are
10 some local rules that require you to get them
11 heard more than the day -- in advance of the
12 day of trial. I have got some local rules
13 here.

14 PROFESSOR DORSANEO: And if you
15 remember, our current Rule 90 says you can do
16 it during trial.

17 MR. KELTNER: Right.

18 PROFESSOR DORSANEO: Which
19 improved to the former practice when you could
20 raise pleading defects after trial.

21 MR. YELENOSKY: In Fort Worth
22 they do that.

23 CHAIRMAN SOULES: Well, you
24 still -- you can raise pleading defects --

25 PROFESSOR DORSANEO: Ooh, don't

1 say that.

2 CHAIRMAN SOULES: -- after the
3 close of evidence because the charge rules
4 give you that right at the charge conference.

5 MR. KELTNER: That's right.

6 MR. ORSINGER: Luke, can I read
7 what the Dallas local rule is?

8 MR. KELTNER: Don't tell
9 anybody that.

10 CHAIRMAN SOULES: Go ahead.
11 Don't tell anybody that. Okay.

12 MR. ORSINGER: Okay. The
13 Dallas local Rule 1.10, which is coming out of
14 my paperback copy of the rules of court says
15 that "No dilatory pleas, motions (including
16 motions in limine), or exceptions shall be
17 heard less than ten days before the date on
18 which the case is set for trial, provided that
19 the pleadings to which same are directed has
20 been on file more than 30 days at the time of
21 hearing."

22 So they are saying that if the pleading
23 has been on file for at least a month before
24 the hearing, you have got to have your hearing
25 not less than ten days before trial. If the

1 pleadings have been filed within a month of
2 your hearing then you don't have that deadline
3 before trial.

4 PROFESSOR DORSANEO: Do you
5 have a proposal on that?

6 MR. ORSINGER: Well, I don't
7 think --

8 CHAIRMAN SOULES: That won't
9 work in San Antonio because the trial judge --
10 the daily docket judges are not going to hear
11 motions in limine. They wait until the case
12 is assigned off of monitoring to the trial
13 judge, and you go that day.

14 PROFESSOR DORSANEO: Yeah.

15 MR. ORSINGER: Well, let's
16 ignore the motion in limine part and just look
17 at the exception part. You know, I don't
18 personally like the fact that you get
19 exceptions on the day you show up for trial
20 because if they are granted then you have to
21 decide whether you want to replead right then
22 and go to trial or whether you want a
23 continuance, and I would rather that they be
24 taken care of in advance, but I don't care
25 that much. It's not a big problem.

1 MR. HAMILTON: What rule are
2 you reading from?

3 MR. ORSINGER: That's in the
4 Dallas rules, Rule 1.10, page 374 of the green
5 paperback.

6 CHAIRMAN SOULES: Let's take
7 about a ten-minute break here and give the
8 court reporter some relief. We have been on
9 it for a couple of hours here.

10 PROFESSOR DORSANEO: This is
11 the last issue in this Section 2.

12 CHAIRMAN SOULES: Okay. Well,
13 do you want to go ahead and get it done now
14 and then we will take a break?

15 MR. ORSINGER: This is Section
16 3.

17 PROFESSOR DORSANEO: Section 3,
18 yeah. I don't care.

19 CHAIRMAN SOULES: Okay. Let's
20 take a break. We will be back in ten minutes
21 and wrap it up.

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

25 CHAIRMAN SOULES: Okay. Bill,

1 what's next? What's next?

2 PROFESSOR DORSANEO: Well, the
3 thing we were talking about at the end.

4 CHAIRMAN SOULES: Special
5 exceptions when? Somebody make a motion.
6 Nobody wants to change the present practice?

7 Present practice remains. All right.
8 That's the way it is.

9 MR. ORSINGER: For lack of
10 interest.

11 CHAIRMAN SOULES: For lack of
12 interest the present practice will prevail.

13 Okay. What's next?

14 PROFESSOR DORSANEO: Well, I'd
15 like to say, "a reasonable time before trial,"
16 if nothing else.

17 CHAIRMAN SOULES: Any objection
18 to that? Any second to that?

19 MR. HUNT: I'll second it.

20 CHAIRMAN SOULES: Moved and
21 seconded, "reasonable time before trial."

22 Any opposition? That's what it will be.

23 MR. KELTNER: That was either
24 real important or doesn't make any difference
25 at all.

1 MR. ORSINGER: That was really
2 important because that was discretionary.

3 MR. BABCOCK: What did we just
4 do?

5 MR. ORSINGER: Special
6 exceptions a reasonable time before trial. No
7 time specified, just "a reasonable time."

8 MR. KELTNER: Luke, does that
9 change the charge rules? That doesn't change
10 the charge rules, does it?

11 PROFESSOR DORSANEO: No.

12 CHAIRMAN SOULES: No. I don't
13 see that it does.

14 MR. KELTNER: No, I guess it
15 doesn't. It's a time-honored practice in Fort
16 Worth to make your special exceptions after
17 trial.

18 MR. ORSINGER: Well, that could
19 be a --

20 MR. KELTNER: No. This is
21 fine. This is a good change.

22 CHAIRMAN SOULES: We still have
23 the 270 series, complaint, no pleadings.

24 MR. KELTNER: Right.

25 PROFESSOR DORSANEO: Let me see

1 if there is anything else. So the next thing
2 is Section 2, which you had passed out before,
3 but we made additional copies. This has been
4 on the agenda before, and I may be retracing
5 some old ground in some respects, but not too
6 much. In addition to that this Section 2
7 embraces the materials presented by Bonnie
8 Wolbrueck and Richard Orsinger concerning
9 citation and service. Well, more citation
10 form, I guess, than anything else.

11 CHAIRMAN SOULES: Bill, could I
12 ask you a question about Rule 6 on page 1 of
13 this Section 2?

14 PROFESSOR DORSANEO: Uh-huh.

15 CHAIRMAN SOULES: I just
16 realized because there was a court of appeals
17 decision I recently read that the method for
18 counting in the Code of Construction Act, I
19 guess it is, or in the Government Code,
20 someplace, that governs statutes doesn't have
21 this period, this thing about "Saturdays,
22 Sundays, and legal holidays must not be
23 counted for any purpose of any time period
24 five days or less," and so that means that
25 when you are counting times for the Texas

1 Practice and Remedies Code, you count them
2 different than if you are counting times for
3 the Rules of Civil Procedure.

4 Now, we thought that this was a good idea
5 not to count Saturdays, Sundays, and legal
6 holidays in a five-day period because it was
7 too compressed and put it in the Rules of
8 Civil Procedure, and I still think it's a good
9 idea, but I want to point out that it does
10 conflict with -- it may be in the Texas
11 Practice and Remedies Code where the
12 computation rule or statute is, and this court
13 of appeals was dealing with counting two
14 different ways. So we can go --

15 MR. ORSINGER: Well, Luke, did
16 they say that the statute overturned the rule
17 or the rule overturned the statute?

18 CHAIRMAN SOULES: Neither. If
19 you are doing something that's a statutory
20 time period, you count it according to the
21 statute.

22 MR. ORSINGER: But it's not the
23 specific statute. It's a general kind of
24 default statute?

25 CHAIRMAN SOULES: Right.

1 MR. ORSINGER: Is there a way
2 for us to provide that our rule overrides that
3 general default?

4 CHAIRMAN SOULES: I don't think
5 so. I mean, that says how you can count
6 statutory time periods.

7 MR. ORSINGER: Doesn't the
8 Supreme Court have certain authority under its
9 rule-making power?

10 CHAIRMAN SOULES: Well, we can
11 say how you count times for the rules, but we
12 can't say how you count times for the
13 statutes.

14 MR. YELENOSKY: What is the
15 statutory provision?

16 CHAIRMAN SOULES: It's the old
17 Rule 4, that it doesn't have this you skip
18 Saturdays and Sundays and legal holidays in a
19 five-day or less period. We engrafted that on
20 Rule 4 sometime ago because people were having
21 problems with getting a notice, a three-day
22 notice of a hearing, on Thursday night and
23 then you count Friday, Saturday, Sunday,
24 Monday hearing; and you didn't even know about
25 it until you got to the office on Friday; and

1 we thought it was important to change that and
2 did so; but the statute is not changed.

3 MR. YELENOSKY: And what does
4 the statute say? The same thing?

5 CHAIRMAN SOULES: The statute,
6 it does not -- you count every day, including
7 Saturdays and Sundays and legal holidays that
8 fall in between the first and last day of a
9 period, no matter how long the period is.

10 MR. YELENOSKY: And the statute
11 applies to what?

12 CHAIRMAN SOULES: Texas Civil
13 Practice and Remedies Code, and et cetera, et
14 cetera. I don't really know where there is a
15 period of five days or less in the Civil
16 Practice and Remedies Code.

17 MR. ORSINGER: Must have been
18 somewhere or it wouldn't have been coming up
19 in your case.

20 CHAIRMAN SOULES: Yeah. It was
21 in that case. I'll find it and come back next
22 time, okay, with that problem if we want to do
23 that.

24 Okay. It's supposed to be in my file for
25 this meeting, but it's not here. I will come

1 back to it, and we can decide if we want to do
2 anything about it.

3 Where do you want to go to, Bill?

4 PROFESSOR DORSANEO: Well,
5 let's just do it one-by-one. Rule 5 is
6 current Rule 22 and part of Rule 6, current
7 Rule 22.

8 CHAIRMAN SOULES: Have we done
9 this before?

10 PROFESSOR DORSANEO: Well, I
11 think we may have done Rule 5 before. Holly,
12 do you have a list?

13 CHAIRMAN SOULES: So that it's
14 on the record here, some people come, some
15 don't, some leave. Once we vote on something,
16 Bill, we are not going to go back to change
17 it. In other words, when you write the rule
18 the way we voted, we don't need to talk about
19 it again. We don't need to say, "Now, this is
20 the way we voted." It's up to us to catch
21 something that you don't write the way we
22 voted because we will never get done if we
23 have to open debate to the 10 or 12 people
24 that are not here today about when are special
25 exceptions to be filed. We will have that

1 whole hour's discussion again, and we can't do
2 that.

3 MR. ORSINGER: Well, part of
4 our difficulty is we don't have a disposition
5 chart on these rules. I suppose we should
6 probably construct one, but they are all
7 remanufactured rules anyway, so we don't have
8 a -- I don't know whether it's worth trying to
9 draw one up or not.

10 CHAIRMAN SOULES: Well, except
11 for a couple of items we have closed
12 Section 3.

13 MR. ORSINGER: Yes, I know, but
14 Section 2 Bill can't remember nor can I --

15 CHAIRMAN SOULES: Okay. Then
16 let's do it. From now on we will try to close
17 them up as we go, get them behind us.
18 Otherwise we will never get through.

19 MR. ORSINGER: Well, I know we
20 have discussed Section 2 before.

21 PROFESSOR DORSANEO: Yes.

22 MR. ORSINGER: And I think that
23 what we are doing here probably is just
24 revisiting the edits we made as a result of
25 our prior discussion.

1 CHAIRMAN SOULES: Are they
2 consistent with our prior discussion and
3 votes?

4 PROFESSOR DORSANEO: I
5 haven't -- I apologize for not doing so --
6 checked 2 against the transcript of the
7 meetings.

8 MR. ORSINGER: Well, then I
9 would propose that we defer it because the
10 subcommittee has taken no official action to
11 alter the prior vote. So if there is a
12 discrepancy between a prior vote and the
13 current rule, it's just a drafting mistake.

14 MR. YELENOSKY: And we are not
15 going to be able to catch that as a group here
16 unless we have the transcript or some other
17 paraphrase of what the vote was.

18 CHAIRMAN SOULES: So what I
19 would propose, and I don't want to walk on
20 Bill's agenda here, just if you agree or
21 disagree tell me, Bill, that we -- where you
22 rewrite and it's consistent with a vote of the
23 committee, we just rely on you to do that; and
24 if somebody when they get this rewrite thinks
25 it's not consistent and they raise it, not as

1 a new agenda item, but that that's not what we
 2 voted; and then you will probably see things
 3 that occur to you as a proceduralist expert
 4 where something might should be added to a
 5 rule. That should be brought to our
 6 attention, anything new that occurs in the
 7 drafting process in the evolution of the
 8 drafting, but when you respond to a vote I
 9 don't think we need to go back and revisit it.

10 MR. ORSINGER: You know, I
 11 remember specifically we had a discussion
 12 about citation in tax suits and stuff like
 13 that and --

14 PROFESSOR DORSANEO: Well,
 15 that's because there was a different report
 16 made about those rules and kind of a getting
 17 to the second stage, and there is a larger
 18 issue, and Bonnie maybe can help me on this.

19 We looked at the current publication
 20 rules. This committee as a whole reviewed.
 21 It was looked at, and those rules were
 22 revised, and that's reflected I think
 23 accurately in this draft, including the rules
 24 on form of citation and nonpublication cases
 25 as well, and much of this draft is just that.

1 I'm pretty confident that we would find almost
2 all of this has been reviewed, although it may
3 have been reviewed from a different piece of
4 paper that's now been organized in this form,
5 and we ultimately came to the conclusion, I
6 think Bonnie and I have, that we could take
7 the publication rules that we have in this
8 draft and reduce them further.

9 The policy issue would be whether we
10 should continue to have a separate lengthy
11 rule that's in here as Rule 9, citation in
12 suits for delinquent ad valorem taxes. It
13 goes from page 16 through the top of page 22
14 or whether we should try to fold that into the
15 other rules, maybe having a little separate,
16 tiny paragraph for ad valorem cases if that's
17 necessary.

18 There is some interesting stuff in the ad
19 valorem tax case rule that relates more to tax
20 cases. I would like to have the authorization
21 to try to modernize these further. We have
22 gotten to the point where we have all of
23 these -- and I'm focusing on publication
24 because that's where the discrepancies are
25 largest.

1 We have all of these publication service
2 situations involving publication one time, and
3 although there is a difference between the
4 number of days in family law cases by separate
5 statute and in regular cases in terms of when
6 answer day is, generally speaking for both tax
7 suits and other publication circumstances your
8 answer day is on a date certain, is in the 42
9 days after the date that the citation and
10 summary complaint was, you know, published the
11 one time, with the rules also providing that
12 it needs to be published at a minimum 28 days,
13 you know, before the 42 days.

14 We could put all of this -- we could
15 reduce this down into something simpler. Now,
16 the question is whether we wouldn't want to do
17 that because the tax people like their own
18 rules. They are happy with their own rule.
19 Nobody else cares about the tax rule except
20 the tax people, and I guess then --

21 CHAIRMAN SOULES: Richard, you
22 bird-dogged it out with Oliver, and what was
23 their position?

24 MR. ORSINGER: Well, the change
25 that --

1 PROFESSOR DORSANEO: We made
2 that change.

3 MR. ORSINGER: Yeah. There
4 was -- well, this had to do with the
5 publication and the number of newspapers and
6 this and that and the other, and the only
7 change that they had to offer was adopted. We
8 discussed a more --

9 PROFESSOR DORSANEO: That's in
10 here.

11 MS. WOLBRUECK: That's what
12 they had offered to us, and I think that's
13 what we adopted.

14 MR. ORSINGER: Would you mind
15 summarizing that if you have it in your head?

16 MS. WOLBRUECK: I don't. I
17 apologize.

18 MR. ORSINGER: Okay. Bonnie
19 has --

20 PROFESSOR DORSANEO: Well, I
21 can summarize it. It was a circumstance where
22 the tax cases if they couldn't get the lowest
23 per line rate for publication then they wanted
24 to be able to go and post it at the courthouse
25 door rather than mess with the newspapers, and

1 that's the change.

2 MR. ORSINGER: Did we permit
3 them to do that?

4 PROFESSOR DORSANEO: Yes.

5 MS. WOLBRUECK: Yes, I think we
6 did.

7 CHAIRMAN SOULES: Well, my
8 reaction to what you just said is it's a bunch
9 of make-work to go through the tax citation
10 rule and strip out what's different and to
11 then just say, "In tax cases you do these
12 things differently, different as follows," but
13 if you want to do it, I don't have any
14 objection to it, but I don't think it's
15 necessary either.

16 PROFESSOR DORSANEO: What do
17 the clerks think, Bonnie? Should we have one
18 rule, or should we have different ones?

19 MS. WOLBRUECK: I think that we
20 have made some of the changes that have the
21 difficulty with the publication time. That
22 was one of the major issues because every set
23 of citations by publication had a different
24 publication time. We have simplified by
25 running all of them the same time. So that

1 has simplified that issue.

2 Granted, it's still more difficult with
3 the tax cases because there is a lot of other
4 provisions that are addressed in the
5 publication rule in regards to those versus a
6 regular civil citation or even a divorce
7 citation. You know, each one is in a
8 different format. So it would be simpler if
9 we could bring them down to a more simpler
10 format, but you know, we can deal with that.
11 That's up to you, whatever you think. I mean,
12 I understand there may be some necessities for
13 that reason.

14 CHAIRMAN SOULES: Let me see if
15 this is -- to put the question to you
16 differently, I don't know if this is the same
17 question. Assuming that the practice has not
18 changed, that we have the various practices
19 that prevail, does it make any difference to
20 you whether we have a general rule and then
21 exceptions for tax cases set out specifically
22 or a general rule which is completely
23 supplanted by a tax rule, most of which is the
24 same as the general rule?

25 MS. WOLBRUECK: I don't know if

1 it makes any difference one way or the other,
2 Luke.

3 MR. ORSINGER: Well, I would
4 say that the rewriting process creates a
5 possibility of unintended change, and if it's
6 very close to the same either way, then I
7 would suggest we leave the separate rules
8 as-is.

9 MR. YELENOSKY: It's not as
10 elegant because you are going to have a
11 repetition of the general rule.

12 MR. ORSINGER: But it is an
13 area that's fairly unique. In other words,
14 there is only a certain number of lawyers that
15 concern themselves with citation in tax suits.

16 CHAIRMAN SOULES: Is this
17 something you really want to do, Bill? If you
18 do --

19 PROFESSOR DORSANEO: It's
20 something that I think ought to be done. I
21 think it doesn't make sense to have a whole
22 different set of procedure for some other kind
23 of case. I'm probably going to never work on
24 one of those kinds of cases, but somebody is,
25 and they ought not to be at a disadvantage

1 because there are special rules for tax cases
2 that the tax prosecutors know about, and it's
3 kind of like going to Louisiana to do
4 something now.

5 CHAIRMAN SOULES: Well, the
6 clerks say it doesn't make any difference to
7 them one way or the other. So if you want to
8 do it, do it.

9 MR. YELENOSKY: It might make a
10 difference though, as Bill is suggesting, to
11 somebody who is on the other end of the suit
12 and gets a lawyer that doesn't typically do
13 these things, is not a -- is on the defense
14 side of this. I don't know if it's the
15 defense side, but the side that doesn't
16 typically deal with this. It would be easier
17 if you just stated the exceptions to the
18 general rule separately.

19 CHAIRMAN SOULES: Well, given
20 that this is Bill's project and it's a huge
21 project, and if Bill has an inclination to
22 have it appear in a different way but
23 essentially to be the same in substance, I
24 would defer to Bill on that because at some
25 point he is going to have a great deal of

1 pride in what he has done here, which is a
2 huge effort.

3 PROFESSOR DORSANEO: All of us
4 will, not just me.

5 CHAIRMAN SOULES: And it ought
6 to be something you are pleased with. Anybody
7 disagree with that?

8 All right. I will just leave it to Bill
9 to do. If you want to take a shot at making
10 one general rule with just exceptions, fine.
11 If you don't, that's fine, too.

12 PROFESSOR DORSANEO: I'm
13 reporting that I think now that it can be done
14 if you want it to be done, and the rules would
15 be easier to use if it was that way.

16 CHAIRMAN SOULES: What's your
17 preference?

18 PROFESSOR DORSANEO: I want to
19 do it.

20 CHAIRMAN SOULES: All right.
21 We will do it. Bill will do it.

22 PROFESSOR DORSANEO: Now, this
23 Section 2 has a hole in it. Where we stand is
24 that many of these things have been voted on
25 and many of them have been discussed, and we

1 don't have a detailed list of what has been
2 and what hasn't. Much of it has not really
3 changed except in reordering of paragraphs.
4 So, you know, if you want to put this off to
5 another time, it's not going to do any harm.

6 CHAIRMAN SOULES: I'd like to
7 see us vote to approve Section 2 unless
8 somebody finds a fly speck or a concern to
9 bring back on a subsequent motion, a very
10 specific subsequent motion. Carl.

11 MR. HAMILTON: You mentioned a
12 moment ago about getting served with something
13 on Friday and having hearings on Monday.
14 Court rules says and is in the process of
15 drafting a change to the three-day rule and
16 making it five days instead of three, and I
17 wondered if there was any interest in this
18 committee in doing the same thing.

19 CHAIRMAN SOULES: That was
20 discussed when this change was made, when the
21 Saturday, Sunday, legal holiday change was
22 made.

23 MR. HAMILTON: Because under
24 the three-day rule you count Saturdays and
25 Sundays, and so you get served at 5:00 o'clock

1 Friday afternoon, you have to be in court on
2 Monday.

3 CHAIRMAN SOULES: No, you don't
4 under present Rule 4. You have to have -- if
5 you get served on Thursday, you can't be
6 hailed into court until Wednesday.

7 MR. HAMILTON: It says,
8 "Saturdays and Sundays must not be counted for
9 any purpose except for three-day rule."

10 CHAIRMAN SOULES: That's the
11 three-day period that extends certified mail
12 service. If you get your interrogatories by
13 certified mail, they are served the day they
14 are mailed, but you have got 33 days from that
15 date. That's the --

16 MR. YELENOSKY: That's the only
17 time period less than five days where you do
18 count it. It's for the three-day mail rule,
19 not for --

20 CHAIRMAN SOULES: It's only the
21 three-day mail rule that is not extended. Any
22 other three-day period is extended.

23 PROFESSOR DORSANEO:
24 Mr. Chairman, why don't we go through these
25 one-by-one? It won't take that long for me to

1 just make the report.

2 CHAIRMAN SOULES: Okay.

3 PROFESSOR DORSANEO: There are
4 some things that have shown up on the agenda
5 about conforming to appellate rules and other
6 matters that are far pertinent, and we might
7 have other suggestions.

8 CHAIRMAN SOULES: Okay. Let's
9 go. Let's do it.

10 PROFESSOR DORSANEO: This
11 Rule 5 is the same as our one-sentence Rule
12 22, which says, "A civil suit in the district
13 or county court shall be commenced by a
14 petition filed in the office of the clerk,"
15 except it says "complaint" rather than
16 "petition" in accordance with our vote about
17 nomenclature.

18 The second sentence is taken from part of
19 current Rule 6, which also says that no
20 process shall be issued or served on Sunday,
21 provided that citation by publication
22 published on Sunday shall be valid. That part
23 of current Rule 6 should be included in Rule
24 7, probably in subdivision (a). It's not in
25 there now, but I would propose to put it in

1 there; but for our purposes of moving through
2 this, you know, Rule 5 is Rule 22 with a
3 one-word change and part of Rule 6 without
4 change dealing with commencement of suits on
5 Sundays.

6 CHAIRMAN SOULES: Any
7 opposition to Rule 5?

8 Rule 5 is accepted.

9 PROFESSOR DORSANEO: This No. 6
10 is 4 verbatim. It's meant to be. We will
11 have to check that on a side-by-side
12 comparison, but it is just simply our current
13 rule organized into a separate rule entitled
14 "Time" in the manner of the overall
15 organization of a similar section in the
16 Federal rules.

17 CHAIRMAN SOULES: Any
18 opposition to Rule 6(a), (b) or (c)?

19 There is none. Those are accepted.

20 PROFESSOR DORSANEO: The next
21 paragraphs, (b) and (c) of this proposed --
22 the next subdivisions, (b) and (c) of this
23 proposed Rule 6 are the two paragraphs in our
24 current Rule 5 without change except for
25 it's -- there is an (a) and a (b) in the first

1 unnumbered paragraph of Rule 5, and those are
2 (1) and (2) in this draft.

3 CHAIRMAN SOULES: Any
4 opposition?

5 There is none. That passes.

6 PROFESSOR DORSANEO: Okay. And
7 this (c) is the second paragraph of current
8 Rule 5, which has a counterpart in the
9 appellate rules that we spent a lot of time
10 talking about, and this does not match that,
11 and if you want us to try to make it match, we
12 can go do that and bring it back to see if
13 that's fine.

14 That's part of -- you know, was on the
15 agenda item for you, Richard, conforming these
16 rules with the appellate rules.

17 MR. ORSINGER: Right. I think
18 we should --

19 CHAIRMAN SOULES: It should be
20 in conformity. Anybody in disagreement with
21 that?

22 Okay. Make (c) conform. That's 4(c).
23 Make it conform to whatever the appellate
24 rules say so that the process is consistent in
25 both the trial and appellate on that issue.

1 So you will need to put 6(c) on the
2 agenda, Holly. 6(c) will come back.

3 PROFESSOR DORSANEO: Rule 7 is
4 an amalgamation of a number of rules. This
5 first subdivision, which is entitled "Form,"
6 is part of current Texas Rule 15. Bonnie, was
7 this part of your report, this one?

8 MS. WOLBRUECK: I think it was,
9 and we have approved it in that format.

10 CHAIRMAN SOULES: Rule 7 is
11 passed already?

12 MS. WOLBRUECK: Yes.

13 CHAIRMAN SOULES: Okay.

14 PROFESSOR DORSANEO: Now, I
15 would say -- and this is one correction that I
16 want to add into probably subdivision (a),
17 this sentence which comes from current Rule 6,
18 if we don't want to change this part of our
19 current law. "No process shall be issued or
20 served on Sunday, provided that citation by
21 publication published on Sunday shall be
22 valid." And that is in Rule 6.

23 MR. YELENOSKY: As far as
24 whether we want to do that, that was voted on,
25 wasn't it? My recollection is we voted to

1 keep that.

2 PROFESSOR DORSANEO: Yes.

3 MR. YELENOSKY: Although that's
4 not how I voted, that's what my recollection
5 is.

6 PROFESSOR DORSANEO: Yes. I
7 think that's right, but I want to put it in
8 this subdivision (a), maybe changing the title
9 to "Issuance and form" or put it in here
10 somewhere dealing with issuance.

11 MR. HAMILTON: What about the
12 exceptions?

13 CHAIRMAN SOULES: You've got to
14 put those in there, too.

15 PROFESSOR DORSANEO: Pardon me?

16 CHAIRMAN SOULES: You have to
17 put the exception on injunction, attachment,
18 garnishment, sequestration, or distress
19 proceedings in there, too.

20 PROFESSOR DORSANEO: Well, do
21 those relate?

22 CHAIRMAN SOULES: Yeah. In
23 Rule 6 they modify both "commencement" and
24 "issue."

25 PROFESSOR DORSANEO: Oh, okay.

1 CHAIRMAN SOULES: Okay. Any
2 opposition to that?

3 Okay. You are so directed. We don't
4 need to visit that again either.

5 PROFESSOR DORSANEO: Okay. But
6 the rest of 7 has been -- all of it, Bonnie?
7 Has all of it been done?

8 MS. WOLBRUECK: Yes. Yes, it
9 has.

10 CHAIRMAN SOULES: Okay. That
11 takes us to Rule 8 on 11, page 11, then.

12 PROFESSOR DORSANEO: And that's
13 the publication business that this Rule 8 --
14 well, all of the rest of this has been voted
15 on, hasn't it?

16 CHAIRMAN SOULES: Yes.

17 PROFESSOR DORSANEO: Except
18 until we get down to Rule 10 on page 23, but
19 I'm going to take a stab at reducing all of
20 that publication into one more user-friendly
21 rule without changing the substance.

22 CHAIRMAN SOULES: Okay. Now we
23 go to Rule 10 on 23?

24 PROFESSOR DORSANEO: Yes. Now,
25 this Rule 10 is meant to be 21 and 21a and b

1 rolled into one rule, but organized a little
2 differently because of the way principally 21a
3 is crafted. I think subdivision (a) is
4 identical to 21 and -- now, maybe this could
5 stand a little more work. Maybe we ought to
6 run it back through our committee, Richard, to
7 see whether we want to give subheadings to
8 this paragraph because it's got one, two,
9 three, four, five in it, as does the current
10 rule, little paragraphs one after the other.
11 But as far as (a), I can say it is identical
12 to Rule 21, so we would be talking about
13 matters of form rather than matters of
14 content.

15 CHAIRMAN SOULES: Okay. Well,
16 if we -- and, Carl, in order to get back to a
17 question you had before under 6(a) on page 1
18 where you looked at the three-day period, that
19 would be the three-day period on page 25.

20 MR. HAMILTON: Except that it
21 doesn't include a hand-delivery.

22 CHAIRMAN SOULES: Hand-delivery
23 doesn't extend the three-day period.

24 MR. HAMILTON: That's what I'm
25 saying. If you have a hand-delivery notice on

1 Friday, you can have a hearing on Monday.

2 MR. YELENOSKY: Yeah. And
3 that --

4 CHAIRMAN SOULES: No. No.

5 MR. ORSINGER: No.

6 CHAIRMAN SOULES: No. Look at
7 what the three-day period is in the -- let me
8 see.

9 MR. YELENOSKY: It's received,
10 but there is three days for notice of hearing.

11 CHAIRMAN SOULES: In the last
12 sentence of what's going to be 10(b)(2), it's
13 (2) at the top of page 25. It's only that
14 three-day period, "whenever a party has the
15 right or is required to do" something but the
16 service is by mail or facsimile, you add those
17 three days. You add three days.

18 MR. HAMILTON: Right.

19 CHAIRMAN SOULES: Those are the
20 only three days that are not extended by
21 Saturday, Sunday, or legal holidays.

22 MR. YELENOSKY: So although you
23 can receive something by hand on Friday, there
24 is still a three-day period for a hearing
25 which is not going to run over the weekend.

1 Is that --

2 CHAIRMAN SOULES: Let me stack
3 this up. You are served on Friday. You are
4 served by certified mail with some
5 interrogatories. Okay. The service date is
6 the date of mailing.

7 MR. HAMILTON: Right.

8 CHAIRMAN SOULES: You count the
9 30 days from the date of mailing and then you
10 add three days because of certified mail.

11 Now, if a Saturday or Sunday or legal
12 holiday occurs in the three days that are
13 added to the end of the 30-day period, you
14 count them but only in the three-day
15 incremental additional period that is
16 triggered by certified mail service. Every
17 other three-day period in the rules is
18 extended.

19 MR. HAMILTON: Well, it doesn't
20 say that. It doesn't say that

21 CHAIRMAN SOULES: Yes, it does.

22 MR. HAMILTON: It says it's
23 extended as to the -- as to when service is by
24 registered or certified mail, but it doesn't
25 cover where you hand-delivered on Friday a

1 motion that's going to be heard on Monday
2 morning.

3 MR. YELENOSKY: No. That's
4 under Rule 6 because Rule 6 says that the
5 three-day period that you have to give in
6 order to have a hearing cannot run on a
7 Saturday, Sunday, or holiday; and therefore,
8 the Saturday and Sunday could not be counted
9 in the three days required for a hearing.
10 That's separate from the mail period.

11 You're right, however, and there is a
12 discrepancy, but it's not that one. If
13 somebody mails to you a notice for a hearing,
14 the mail rule may give you a different time
15 frame than if somebody hand-delivers a notice
16 of hearing, but it's not going to be something
17 that's going to catch you up on a Friday or
18 Monday, but as to that point the Federal rules
19 have just changed.

20 I say "just," but maybe it's just the
21 appellate rules, and I apologize I can't
22 report it accurately, but I know that the
23 proposed circuit rules and maybe the district
24 court rules as well, as I understand it, are
25 changing to apply the three-day mail rule even

1 in a hand-delivery situation in some
2 circumstances. So there is a policy issue
3 there, but it's different from what I hear
4 Carl to be saying.

5 Does that make any sense? Bill, do you
6 know what I'm talking about about the Federal
7 rules changing to include hand-delivery three
8 days if it's not delivered the same day or
9 something like that? There has been a recent
10 change.

11 PROFESSOR DORSANEO: No.

12 MR. YELENOSKY: Okay

13 CHAIRMAN SOULES: Anyway, let's
14 get on to 10. Okay. Bill, what do you need
15 on 10?

16 PROFESSOR DORSANEO: Well, I
17 can just say in terms of (b). Have we gotten
18 past (a), besides let it be the way it is?

19 In (b), in reviewing it, and I, you know,
20 did this --

21 CHAIRMAN SOULES: 10(a) is
22 okay?

23 PROFESSOR DORSANEO: Yeah.

24 CHAIRMAN SOULES: Any
25 objection?

1 That's fine.

2 PROFESSOR DORSANEO: I did
3 this, you know, awhile back. (B)(2), (3),
4 (4), and (5) are identical to 21a except if
5 you look in your rule book 21a is just one
6 large long paragraph that's not broken down
7 into parts. So except for being broken down
8 into parts, (2), (3), (4), and (5) are
9 essentially, if not entirely -- and it's
10 pretty close to entirely verbatim
11 reproductions of the language of 21a.

12 Paragraph (1), and I now do not remember
13 what I used as a model for the first paragraph
14 that's just as general in paragraph (1) of
15 subdivision (b), is a little different, and I
16 don't know that it needs to be different.
17 It's likely that I used the Federal rule as a
18 model, but I don't have the Federal rule here
19 handy.

20 It makes sense to say, "Except as
21 otherwise provided in these rules or by order
22 of the court," but then the discussion "Every
23 order required by it's terms to be served,
24 every pleading subsequent to the complaint,"
25 is a different method of describing what needs

1 to be served in the methods listed than what
2 we have in 21 and 21a, which simply talks
3 about every notice, every pleading, plea,
4 motion or other form of request required to be
5 served under Rule 21, and those are required
6 to be served under 21 when they are not
7 presented during a hearing or trial.

8 I guess at some earlier point in time
9 that I don't recall I was dissatisfied with 21
10 and 21a. I don't feel particularly
11 dissatisfied with them here this morning and
12 would be happy to change that to be verbatim,
13 and (a), (b), (c), (d), and (e) are just
14 breakdowns of the methods in the current rule.
15 "Delivering a copy to the party to be served,
16 or the party's duly authorized..."

17 Do we have a problem there, Richard, on
18 all of these people who were complaining about
19 serving the party instead of serving the
20 attorney? Did we make a fix in that language
21 that's not reflected here?

22 MR. ORSINGER: I believe we
23 did. I believe we did, but the words are not
24 magic. It's just that I think we did the --
25 the conception was to the party's duly

1 authorized agent or to the party's attorney of
2 record unless there is none and then to the
3 party. Service on the party was made
4 contingent on there not being an attorney of
5 record.

6 PROFESSOR DORSANEO: Okay.
7 This (b)(1) needs to be redrafted,
8 Mr. Chairman.

9 CHAIRMAN SOULES: Okay.

10 PROFESSOR DORSANEO: So let's
11 leave that one back on the agenda.

12 CHAIRMAN SOULES: Okay. (B)(1)
13 in its entirety is still on the agenda.
14 Except for that do we have approval on Rule
15 10(a) and then (b)(2), (3), (4), and (5)? Any
16 objection?

17 No objection. Those are passed. Let's
18 see.

19 PROFESSOR DORSANEO: Now, in
20 this draft there is an (f) in the next page.
21 I don't know why it's (f). It would be (c),
22 and that is the current Rule 21b, and we
23 decided to do something with that, too,
24 yesterday.

25 CHAIRMAN SOULES: I don't

1 follow you.

2 PROFESSOR DORSANEO: Well,
3 there was some adjustment voted on yesterday
4 from current 21b, which now eliminated a
5 crossreference or something like that to 21a.

6 MR. ORSINGER: Yeah. There was
7 a reference in 21b to Rules 21 and 21a, and
8 one of those crossreferences was nonsensical,
9 and right this second I can't remember which
10 one.

11 PROFESSOR DORSANEO: Well,
12 let's leave that on the agenda, and we will
13 fix it.

14 CHAIRMAN SOULES: It doesn't
15 need to be on the agenda because you have got
16 a new rule for service, so you are going to
17 refer to your own rule. It's going to be Rule
18 10a, right, in accordance with Rule 10a?

19 MR. HAMILTON: Is that (f)
20 supposed to be a (c)?

21 PROFESSOR DORSANEO: Yes.

22 MR. ORSINGER: And I think the
23 problem will drop out because we are
24 renumbering, and we will do a correct
25 crossreference.

1 CHAIRMAN SOULES: Right.

2 MR. McMAINS: Luke, what
3 happened to 10(b)? Is it on the --

4 CHAIRMAN SOULES: 10(b)(1) and
5 all of its subparts will be revisited, but
6 10(b)(2), (3), (4) and (5) are passed, and (f)
7 on 26 is going to be (c), and it's passed
8 unless there is objection.

9 MR. McMAINS: Is there anything
10 specific we are revisiting on 10(b)(1)?

11 MR. ORSINGER: Well, for sure
12 we are redoing (a) which has to do with the
13 fact that it's unclear now whether you can
14 serve a party even though they have an
15 attorney of record, and we want to make it
16 clear that you don't serve parties when they
17 have an attorney of record.

18 MR. McMAINS: Yeah. That was
19 the one I was concerned about.

20 CHAIRMAN SOULES: That's why we
21 have got to go back to that particular one.
22 Okay. What's next?

23 PROFESSOR DORSANEO: That takes
24 care of 2 except for these little minor items.
25 That means we have Sections 1, 2, 3, and 4

1 largely done. Section 5 is discovery, which I
2 guess Justice Hecht said they will not really
3 get back to us until May or something, huh?

4 So what I would plan to do is to estimate
5 the number of rules in Rule 5 and do a
6 Section 6 and then shortly thereafter 7 and 8
7 and also probably 9. 8 would incorporate Don
8 Hunt's committee's work product. 7 would
9 incorporate the rules concerning the charge
10 and other trial rules. 6 would be a pretrial,
11 165a, and some of these other things that we
12 have on our committee's list, and the last
13 part would be the miscellaneous rules that
14 Bonnie Wolbrueck is particularly concerned
15 with, involving costs and other technical
16 matters, and that will take care of the first
17 330 rules, and I believe all of that can be
18 done before the Supreme Court gets back in
19 draft form -- before the Supreme Court gets
20 back with this part 5, because much of it has
21 been done.

22 MR. ORSINGER: Well, what we
23 are talking about now is mainly just
24 assembling the various subcommittees' work
25 product?

1 PROFESSOR DORSANEO: Right.

2 Right.

3 MR. ORSINGER: And putting it
4 in a numerical order with a hole for
5 discovery.

6 PROFESSOR DORSANEO: Uh-huh.

7 CHAIRMAN SOULES: That's right.
8 And we don't need to go back to old votes.

9 PROFESSOR DORSANEO: Well, some
10 may need to, but we will resist the temptation
11 so. It's 80 percent done, the revision of the
12 first 330 rules of the Texas Rules of Civil
13 Procedure.

14 CHAIRMAN SOULES: Yeah. I
15 would prefer to have this come back presented
16 in truncated, you know, rifle shot pieces as
17 opposed to --

18 MR. ORSINGER: Don't bring the
19 whole Section 3. Just bring (b)(1)?

20 CHAIRMAN SOULES: What's been
21 reserved, and we will look at it, and that's
22 all.

23 MR. ORSINGER: Well, now, at
24 what point should we target a comprehensive
25 side-by-side comparison of the rules, because

1 that's a monumental thing?

2 PROFESSOR DORSANEO: Well,
3 that's being done by Ray Rodriguez at Gibson,
4 Dunn; and they have, you know, purchased
5 additional machinery and have agreed to do
6 this for the Court and the state of Texas.

7 CHAIRMAN SOULES: I plan to
8 deliver that to the entire Supreme Court
9 Advisory Committee for their review and then
10 not take it piece-by-piece, a sweep through
11 again. If somebody has got an issue, they can
12 raise it. Read them and tell us, like the
13 appellate rules basically went back. Give us
14 something specific, fine. If not, it won't
15 even be on the agenda.

16 MR. ORSINGER: And is that
17 going to happen -- we can't probably do that
18 by the May meeting. We probably have to do
19 that by the July meeting?

20 CHAIRMAN SOULES: Yeah. I'm
21 not sure we can do it at all until we know
22 what the Court does with discovery because
23 that could back-flow onto the rest of this
24 stuff.

25 MR. ORSINGER: Well, then we

1 may not have much of an agenda for the May
2 meeting then; is that right?

3 PROFESSOR DORSANEO: We need to
4 do section -- our committee needs to do that
5 Section 6, do the pretrial stuff and the other
6 stuff that's in the middle of this.

7 CHAIRMAN SOULES: Oh, yeah. We
8 have a volume about this thick of new stuff
9 that I have never sent to you-all.

10 MR. ORSINGER: Okay.

11 CHAIRMAN SOULES: The subchairs
12 have received these as I get them. So if you
13 have got a file, if the subchairs have a file
14 of new stuff, that's all going to be combined,
15 and we will have to trek through that next
16 time, and it's what has come to me since the
17 second supplement.

18 MR. YELENOSKY: Well, is there
19 a cut-off at some point? Otherwise we will
20 never be done.

21 CHAIRMAN SOULES: The cut-off
22 is the last meeting. I think we want to -- I
23 mean, we can debate this, but I think we want
24 to close the book on all receipts when we
25 adjourn this time, and if that takes one

1 cleanup meeting, we shouldn't leave something
2 dangling. Do you-all agree with that? I
3 mean, after all of this work we ought to leave
4 the book closed on what everybody seems to
5 want at this point in time, and we will
6 adjourn and see what happens.

7 PROFESSOR DORSANEO: Have a
8 party.

9 CHAIRMAN SOULES: Have a party.
10 The JP rules. Oh, yeah.

11 MR. PARSLEY: Let me ask a
12 specific question so that we don't really open
13 up that can of worms too much.

14 CHAIRMAN SOULES: All right.

15 MR. PARSLEY: I think in Bill's
16 drafting it is important for Bill to know at
17 some time whether we are going to adopt a JP
18 rule book or whether we are going to fold the
19 JP rules into the main book and say, "In JP
20 cases X, Y, Z, and in all other cases A, B,
21 C," and I think Bill needs to know that. Am I
22 right, Bill? At some point don't we have to
23 decide for you whether JP is going to be in or
24 out of the rule book?

25 PROFESSOR DORSANEO: Yes. The

1 current status is the JP's are among
2 themselves of two minds.

3 MR. PARSLEY: And I'm not even
4 saying decide that today. I'm just saying at
5 some point Bill has got to have that, I think.

6 MR. YELENOSKY: Is that on the
7 agenda? Because we haven't seen -- Judge Till
8 hasn't done a presentation on that, unless I
9 missed it.

10 MR. ORSINGER: No.

11 CHAIRMAN SOULES: It's not only
12 not on the agenda, but we don't even have
13 jurisdiction. That's a political question,
14 and somebody on the Supreme Court of Texas or
15 the Court itself is going to have to tell us
16 the JP's are going to get a rule book or they
17 are not going to get a rule book and we are
18 going to put special JP rules.

19 MR. PARSLEY: Okay. That
20 answers it.

21 CHAIRMAN SOULES: We cannot
22 make that decision.

23 MR. PARSLEY: That answers my
24 question. If you view it as a Supreme Court
25 decision then I will put it on the Supreme

1 Court's agenda.

2 CHAIRMAN SOULES: We have got
3 to know what they want on that.

4 PROFESSOR DORSANEO: And they
5 have to be willing to tell us the same thing
6 that they tell the JP's.

7 MR. ORSINGER: I would like to
8 comment that I think they ought to have a
9 separate set of rules, because remember that
10 in JP court there is a lot of pro se
11 appearances.

12 MR. YELENOSKY: Yeah, but if we
13 are going to get into this debate, which we
14 are going to need to get into it, because
15 there are Legal Aid attorneys who strongly
16 feel just the opposite.

17 MR. ORSINGER: Well, then you
18 require all the laypeople know the entire
19 rules then.

20 MR. PARSLEY: I'm not saying we
21 ought to debate it, and I'm not opening that
22 up. Don't get me wrong. I didn't want to
23 debate that. I have just said that's an issue
24 we have got to resolve. The chairman says the
25 Supreme Court has got to resolve it. My

1 suggestion is you-all write us a letter if you
2 have got strong feelings if this committee is
3 not going to take it up, and I will tell the
4 Supreme Court.

5 CHAIRMAN SOULES: Given the
6 history of some of our rule changes when the
7 Court was made up of different members, at
8 least on one occasion we did a tremendous
9 amount of work. It even got passed and then
10 it got rescinded because there was some group,
11 I don't know how big it was, of judges who
12 didn't want it. So the Supreme Court backed
13 off, and unless I'm told by the Chief or by
14 Justice Hecht to take this on in ignorance of
15 whether or not it's going to be fruitful, I
16 don't intend to put it on the Supreme Court
17 Advisory Committee agenda.

18 MR. PARSLEY: I understand.

19 CHAIRMAN SOULES: If I'm told
20 to do that, obviously we are going to have to
21 deal with it without knowing whether it's
22 going to bear fruit, and we will I'm sure
23 willingly do so. I would prefer, though, to
24 have direction from the Court, firm
25 conviction, either they are going to have a

1 rule book or they are not, have that decision
2 made up-front once and for all and then we
3 will do what we do.

4 We will either probably get their rule
5 book, send it to everybody and have a meeting,
6 and then half a day decide whether we think
7 there are some real problems with it without
8 plowing through it piece by piece; or we will
9 identify where they have special needs; and
10 that's going to be a bigger job for us because
11 we are going to have to write the rules for
12 the special needs, because as I understand
13 what the JP's have done is they have written a
14 new rule book, and I haven't seen it; but
15 whichever way it goes, I think we should have
16 up-front -- or I ask that we get up-front
17 direction. Does anybody disagree with that?

18 MR. YELENOSKY: No. Except
19 that Lee and I have talked, and, you know,
20 there is a document which has been presented
21 to the Supreme Court, and I guess I thought
22 that the Supreme Court had wanted us as a
23 committee to see that at some point, but maybe
24 that's not the case. Do you have any
25 understanding on that?

1 MR. PARSLEY: I'm just going to
2 go back to the Court and ask for direction, is
3 the answer to you.

4 MR. YELENOSKY: Okay.

5 MR. PARSLEY: David has seen a
6 copy of it. Luke has received a copy of it as
7 well. We did receive it from the JP's, but
8 it's sitting still. It's on hold, and Bill
9 and I have discussed it that we need -- at
10 some point it's got to be decided before
11 Bill's rules are really final whether we are
12 voting in JP or not, and how we deal with that
13 I think is up to the Court, and Luke wants the
14 Court to decide it, and I think that's
15 appropriate, and so --

16 MR. YELENOSKY: Yeah. I just
17 need to know where to direct the -- you know,
18 Fred, for instance, was sitting on that
19 committee and I guess is in the minority and
20 would want to make his views known in whatever
21 form they need to be made known. If that's a
22 letter to the Court then I just need to tell
23 him that.

24 MR. PARSLEY: I think that's
25 appropriate, and at this point I'm going to

1 tell the Court that the advisory committee
2 wants direction on it and then it's up to the
3 Court to give whatever direction it wants to
4 give. So that's where we are on that.

5 CHAIRMAN SOULES: Or to say
6 it's up to us, but I would prefer it have
7 some -- I would rather have a political
8 conviction that would define before we start
9 to work if possible.

10 MR. PARSLEY: I understand.
11 That's fine.

12 MR. BABCOCK: Luke, if Steve's
13 got any thoughts about this, he may want to CC
14 the members of the JP subcommittee because --

15 MR. YELENOSKY: Yeah. My
16 thoughts on it are going to be to convey Fred
17 Fuchs' thoughts because legal services
18 attorney forever, JP court, very well
19 respected, and anything that he says on it
20 is -- I'm going to pair it, but I would be
21 happy to share that.

22 MR. BABCOCK: Yeah. I will
23 just tell you that in the JP subcommittee all
24 we heard was that the JP wants this and Judge
25 Till thinks it's great, and, you know, it's

1 hard for those of us who don't practice in JP
2 court to know whether --

3 MR. YELENOSKY: Well, I think
4 one of the things is the difference between JP
5 court and small claims court and we shouldn't
6 confuse the two because most people pro se are
7 really in small claims court, JP court in
8 evictions and some other things. So there may
9 be reasons, you know, the Rules of Evidence
10 don't apply to small claims court and the
11 differences, but anyway, I will give you
12 whatever Fred makes available to the Court, if
13 that's the correct forum. I will just copy
14 the committee.

15 CHAIRMAN SOULES: If anyone
16 wants input into what I hope will be a
17 decision by the Court politically which way
18 are we going to go, write me a letter and I
19 will get it to Justice Hecht.

20 MR. YELENOSKY: Okay.

21 CHAIRMAN SOULES: If you favor
22 a whole set of rules or you don't favor a
23 whole set of rules and why and I will try to
24 get that in. Try to get me any information of
25 that nature next week because once we ask the

1 Court for direction they are going to need to
2 have whatever input we want to have in that
3 decision.

4 MR. PARSLEY: And I believe
5 Judge Hecht said yesterday that we had our
6 next rules conference at the Court coming up
7 in the first week of April. Is that what he
8 said? He said something to us yesterday about
9 that, and so I intend to put it on their
10 agenda pretty quickly because I think Bill
11 needs an answer.

12 MR. ORSINGER: Luke, before you
13 go on I would like to raise an issue.

14 CHAIRMAN SOULES: Richard.

15 MR. ORSINGER: Rule 166,
16 pretrial orders, is technically in Steve
17 Susman's committee's jurisdiction; however, I
18 don't believe his committee has looked at the
19 rule.

20 PROFESSOR DORSANEO: They have.
21 They have.

22 CHAIRMAN SOULES: We voted not
23 to change it.

24 MR. ORSINGER: Oh, pardon me.
25 They have?

1 CHAIRMAN SOULES: Yeah. And we
2 had a report and voted not to change it.

3 MR. ORSINGER: All right.
4 Well, then I stand corrected.

5 CHAIRMAN SOULES: It was go to
6 a short list or keep the complete list, and we
7 voted to keep the complete list.

8 MR. ORSINGER: Okay. Then we
9 are going to take that vote and then just plug
10 it into our rule structure.

11 CHAIRMAN SOULES: Right.

12 MR. ORSINGER: Okay.

13 PROFESSOR DORSANEO: That
14 Section 6 will not have many rules in it.

15 CHAIRMAN SOULES: Depositions
16 in foreign jurisdictions, David has given us a
17 rewrite here. It's before you. David, what
18 have you done here so we will know and then we
19 can vote?

20 MR. JACKSON: Okay. I
21 incorporated your change, Luke, on the
22 flipping of the words in the first sentence
23 from "written or oral is to be taken of any
24 person located in a sister state" and then
25 Carl's changes. Past (3) I added a (4), "by

1 agreement of all parties."

2 MR. BABCOCK: Should be "to the
3 litigation."

4 MR. JACKSON: "To the
5 litigation," to get it right, and added a (5).
6 Instead of lumping those together I made a
7 fifth one of "by the court." And that covered
8 Carl's two -- first point, and the second
9 point was to take out "the clerk" under (c) of
10 letter rogatory, and that's out; and then
11 Rusty's point about videoconferencing, I added
12 an (f) that still has a red flag in it that we
13 are saying it's okay for them to do it from
14 this end, but they still need to check and
15 make sure that it's okay to do it on the other
16 end.

17 MR. BABCOCK: David, you have
18 got an inconsistency, it seems to me, between
19 (a) and (c) because you still have the clerk
20 issuing the letter rogatory in (a).

21 CHAIRMAN SOULES: Yeah. "Must
22 be issued by the court." Take "clerk of" out
23 of right about in the middle.

24 MR. JACKSON: Okay. "Issued by
25 the court."

1 MR. ORSINGER: Well, I don't
2 want to revisit anything, but I thought a
3 court just signed orders, and the clerk issued
4 the process.

5 CHAIRMAN SOULES: Well, the
6 court is actually the judge --

7 MR. ORSINGER: And the clerk?

8 CHAIRMAN SOULES: -- and the
9 people under the judge's control.

10 MR. ORSINGER: So it's
11 conceived that there will still be some kind
12 of formal document prepared by the clerk
13 reflecting the act of the judge, presumably?

14 MR. MARKS: I think it's
15 contemplated that they will sign it.

16 PROFESSOR DORSANEO: What
17 really will happen is the clerk will stamp it.

18 MR. ORSINGER: Well, see, I
19 don't think the judge -- I don't want to bog
20 anybody down here, but the judges sign orders.
21 The clerks are the ones that actually create
22 the document that reflects the official act of
23 the court. I mean, even a TRO signed by a
24 judge is really not a TRO. It's really for
25 the order for an issuance of a TRO, but I

1 don't want to bog anybody down.

2 PROFESSOR DORSANEO: Just say
3 "by the court," Richard.

4 MR. ORSINGER: All right. All
5 right.

6 PROFESSOR DORSANEO: All of
7 that is changing anyway with the electronic
8 stuff, and the judges are doing their own
9 thing.

10 MR. JACKSON: And that was
11 everything we talked about changing. I will
12 check the record and make sure, but that's the
13 only ones that I wrote down.

14 CHAIRMAN SOULES: I want to
15 just address one concern here on (f), the very
16 last page, where you have got "so long as the
17 terms of any applicable treaty or convention
18 are met."

19 MR. JACKSON: Right.

20 CHAIRMAN SOULES: I think
21 that's helpful to highlight to practitioners
22 that they may need to look at something else,
23 but I think it's burdensome. Suppose this is
24 done -- this deposition is taken by
25 videoconference or teleconference, and it's

1 now in the hands of Texas lawyers and parties,
2 but an objection is raised that because some
3 party doesn't like what got said that it
4 doesn't conform to a treaty or convention. I
5 don't think that should be a restriction on
6 the use of the deposition in Texas, and I
7 would prefer to have the words omitted and
8 leave it up to the lawyers to keep themselves
9 out of trouble.

10 MR. ORSINGER: I agree totally.

11 PROFESSOR DORSANEO: I agree
12 with that.

13 MR. ORSINGER: And they will
14 only be in trouble in the foreign
15 jurisdiction. They wouldn't be in trouble
16 here anyway.

17 MR. JACKSON: Right.

18 CHAIRMAN SOULES: I don't think
19 Governor Bush or the president is going to
20 extradite somebody to Germany for taking a
21 deposition.

22 MR. JACKSON: They will know it
23 at the time, but it's just something that they
24 will need to check, or they will wind up
25 taking a deposition by videoconference and

1 having the plug pulled on them.

2 CHAIRMAN SOULES: Having what?

3 MR. JACKSON: Having the plug
4 pulled on them, if they are hooked up and the
5 other side decides that they are conducting an
6 illegal activity in their country.

7 CHAIRMAN SOULES: Well, then
8 they won't have a deposition.

9 MR. JACKSON: They won't have
10 it. Right.

11 CHAIRMAN SOULES: Any objection
12 to deleting "so long as" and so forth?

13 Okay. That will be deleted.

14 PROFESSOR DORSANEO: What two
15 headings should we put for (e) and (f)? Just
16 pick something?

17 CHAIRMAN SOULES: Pick
18 something.

19 MR. MARKS: Something
20 definitive.

21 MR. JACKSON: There isn't
22 anything definitive.

23 CHAIRMAN SOULES: All right.
24 Rule 188 then now stands passed and is passed
25 and we will --

1 MR. JACKSON: We haven't
2 actually voted on this either day, yesterday
3 or today.

4 CHAIRMAN SOULES: All right.
5 Those in favor of Rule 188 say "I."

6 Opposed? I's are unanimous, no
7 opposition. It's passed, and you are going to
8 roll this into your writing, right?

9 PROFESSOR DORSANEO: Uh-huh.

10 CHAIRMAN SOULES: Okay. There
11 it is, and we won't send it to the Court
12 until -- or do we send it to the Court now?
13 How are we doing that?

14 MR. ORSINGER: It's a discovery
15 rule, quote-unquote. Maybe we ought to send
16 it.

17 PROFESSOR DORSANEO: Yeah. It
18 ought to go like right now. Here.

19 CHAIRMAN SOULES: Okay. Holly
20 and I will send it forward.

21 MR. McMains: But you don't
22 have a heading on it.

23 PROFESSOR DORSANEO: Lee will
24 make up the heading.

25 MR. ORSINGER: Write a heading

1 in, Lee.

2 CHAIRMAN SOULES: Lee is going
3 to write the heading. Okay.

4 All right. Now, we are going to go to
5 Paula Sweeney, her agenda, and try to step
6 through it because --

7 MR. BABCOCK: Has she come here
8 that we haven't seen?

9 CHAIRMAN SOULES: No. But we
10 are going to try to get through this like we
11 got through Tony Sadberry's. We are just
12 going to try to push our way through it. We
13 have got about 50 minutes, and maybe we can
14 get this done and then we will just have the
15 new agenda and cleanup next time.

16 MS. WOLBRUECK: Mr. Chairman?

17 CHAIRMAN SOULES: Bonnie
18 Wolbrueck.

19 MS. WOLBRUECK: I just wanted
20 to make one comment. This is from some
21 previous discussion. Just for the committee's
22 information, the clerks have filed a couple of
23 bills in regards to -- with the legislature in
24 regards to some issues that we have talked
25 about before.

1 One is the jury fee in Rule 216. We have
2 filed a bill to take that jury fee into the
3 statute, and also we have filed a bill to put
4 Rule 119a, which is a copy of the divorce
5 decree to be sent out on a waiver, in the
6 Family Code. So both of those bills have been
7 filed with the legislature to try to clear up
8 some of the issues in the rules. I'll let you
9 know the results of that at the end of May and
10 see if we are successful in that.

11 CHAIRMAN SOULES: If those
12 pass, what would be the consequence to our
13 rules, Bonnie?

14 MS. WOLBRUECK: The only thing
15 that is going to happen, the jury fee is my
16 main concern. The effective date will
17 probably become September 1. As soon as we
18 find out that that's passed I will contact the
19 Supreme Court so that, you know, possibly
20 there could be some comments from the Supreme
21 Court in the fact that that's not a duplicate
22 fee. That's been my concern, that when it's
23 in the rule book and the statute that it
24 becomes a duplicate, you know, to be charged
25 in both places. So I assume that, you know, a

1 contact to the Supreme Court at that time that
2 it is in the statutes so that it can be
3 removed from the rules.

4 CHAIRMAN SOULES: If the jury
5 fee -- as I'm understanding it, the bill that
6 the clerks have filed would be a bill the
7 effect of which would be that all jury fees
8 would be -- all jury fees would be governed by
9 statute.

10 MS. WOLBRUECK: That's right.
11 And we have taken the identical --

12 CHAIRMAN SOULES: Then we could
13 just take ours and say, "as provided by law."

14 MS. WOLBRUECK: That's right.
15 And we have taken the --

16 CHAIRMAN SOULES: Or "as
17 provided by statute."

18 MS. WOLBRUECK: Yes, sir. We
19 have taken the identical fee in here, just
20 added it to the fee that's already in the
21 statute in regards to juries.

22 CHAIRMAN SOULES: Okay.

23 MS. WOLBRUECK: It hasn't
24 increased anything. It's all the same amount.

25 CHAIRMAN SOULES: Well, we are

1 going to see the end of the legislature before
2 we see the end of these rules, I think.

3 MS. WOLBRUECK: Yes. Yes. I
4 take it back. I have requested that that part
5 become effective in January. I just
6 remembered that. We have that bill drafted,
7 and if the drafting is correct, and I'll check
8 it to make sure, that fee would become January
9 next year, which would give a little bit more
10 timing here to get out of the rule book, so
11 just for your information.

12 CHAIRMAN SOULES: Okay. Well,
13 if you will let us know when we need to
14 take -- if it passes, we need to take this out
15 or adjust it.

16 MS. WOLBRUECK: Yes. Yes. And
17 I just want you to know that the bills have
18 been filed.

19 CHAIRMAN SOULES: And the other
20 bill was --

21 MS. WOLBRUECK: The other one
22 is the 119a, which is the copy of the divorce
23 decree to be mailed if there is a waiver,
24 memorandum of waiver of service, and that is
25 being placed into the Family Code, which seems

1 to be the appropriate place for it to be.

2 CHAIRMAN SOULES: And if that
3 passes, you would want this out of the rule
4 book also.

5 MS. WOLBRUECK: Yes. It would
6 just be a duplication, and it's not as
7 difficult, and we could just take that out.

8 CHAIRMAN SOULES: If you will
9 keep us posted on those then we will know.

10 MS. WOLBRUECK: I will.

11 CHAIRMAN SOULES: Thank you.
12 Okay. What do we start with here?

13 MR. HAMILTON: May I ask a
14 question about jury fee?

15 CHAIRMAN SOULES: Yes, sir.
16 Carl Hamilton.

17 MR. HAMILTON: This says \$10,
18 and our clerks are charging \$25.

19 CHAIRMAN SOULES: They probably
20 have a statute that authorizes that.

21 MS. WOLBRUECK: There is one in
22 the statute in the Government Code also.
23 There is an additional jury fee in the
24 Government Code in addition to this one, and
25 that's the reason we have tried to incorporate

1 it all into that same statute in the
2 Government Code so that it's all uniform.

3 CHAIRMAN SOULES: Let's see.
4 We have got Judge Evans' letter on Rule 243.
5 Okay. It says Judge Evans, county court at
6 law judge in Dallas, has asked that we change
7 Rule 243 on unliquidated demands. I think
8 what he's getting at is to prevent affidavit
9 proof and default judgments on unliquidated
10 demands, but let me get there right quick.

11 "If cause of action is unliquidated or be
12 not proved by an instrument in writing the
13 court shall hear evidence as to damages." He
14 says there he would recommend that we add the
15 words "and causation."

16 PROFESSOR DORSANEO: That's
17 half of causation, not all of causation.

18 CHAIRMAN SOULES: All right.

19 PROFESSOR DORSANEO: In
20 connection to damages to -- damages back,
21 not --

22 CHAIRMAN SOULES: How about
23 "resulting damages"?

24 PROFESSOR DORSANEO: Case law,
25 you know, Copygraphic makes it plain that

1 "damages" means damages caused by. Caused, in
2 fact, by the occurrence.

3 MR. HAMILTON: That's right.

4 PROFESSOR DORSANEO: That's
5 damages.

6 CHAIRMAN SOULES: Okay. Is
7 that a statement that we don't want to put in
8 "causation"? He's just got that in the
9 footnote.

10 PROFESSOR DORSANEO: No, I
11 wouldn't put it in because it's hard to put it
12 in without saying a lot more.

13 CHAIRMAN SOULES: Any
14 opposition to leaving that out?

15 Okay. That part of Judge Evans'
16 recommendation, which is only by way of
17 footnote, we won't do because of what Bill
18 just said, the definition of causation has got
19 damages already in it.

20 Then he inserts "either on the record in
21 open court or by affidavit testimony submitted
22 without further record and shall render
23 judgment therefor, unless the defendant shall
24 demand and be entitled to a trial by jury in
25 which case the judgment by default shall be

1 noted."

2 PROFESSOR DORSANEO: Yeah. The
3 more you read that the less you are going to
4 like it.

5 CHAIRMAN SOULES: "The writ of
6 inquiry awarded and the cause entered..."

7 What are you doing with this rule, Bill?

8 PROFESSOR DORSANEO: What he
9 suggests is a sensible starting point, which
10 is we just say how you go ahead and do it,
11 instead of talking about awarding a writ of
12 inquiry, and I think Paula's report covers
13 that a little bit, too. Didn't she have this
14 rule covered in here? 243?

15 Yeah. It's the simplified version from
16 the current rule, and I think we already voted
17 on this, you know, that "courts will hear
18 evidence as to damages and so render judgment"
19 without going into awarding writs of inquiry.

20 CHAIRMAN SOULES: Writ of
21 inquiry was deleted by unanimous vote of this
22 committee already.

23 PROFESSOR DORSANEO: Right.

24 CHAIRMAN SOULES: Is 243 only
25 related to default judgments?

1 PROFESSOR DORSANEO: Yes. Yes.
2 And what we are going to propose to do in this
3 recodification is to make a default judgment
4 rule that will have a paragraph, a
5 subdivision, in it that deals with
6 unliquidated damages. That's exactly why it
7 should be one rule, because you read that and
8 you say, "Is this about unliquidated damages,
9 or is this about default judgments?"

10 CHAIRMAN SOULES: Okay. And
11 you are going to write a default judgment
12 rule?

13 PROFESSOR DORSANEO: Yes.

14 CHAIRMAN SOULES: And that's
15 going to be in section what?

16 PROFESSOR DORSANEO:

17 Probably --

18 CHAIRMAN SOULES: 6 or 7
19 upcoming?

20 PROFESSOR DORSANEO: 6 or 7 it
21 will be.

22 CHAIRMAN SOULES: All right.
23 Let's just get then a show of hands of those
24 who believe that a party should be able to
25 prove damages in a default judgment case by

1 affidavit.

2 Any objection to that? All in favor show
3 by hands. Those opposed?

4 All hands up.

5 MR. MARKS: I have a question.
6 Is that also in connection with situations
7 where a jury has been demanded?

8 MR. BABCOCK: Huh-uh.

9 PROFESSOR DORSANEO: Well, the
10 jury part is really --

11 CHAIRMAN SOULES: No. We have
12 got a Supreme Court case on this. You waive a
13 jury if you don't show up.

14 MR. MARKS: Okay.

15 CHAIRMAN SOULES: They wrote
16 that, and we need to put that in the rule.

17 PROFESSOR DORSANEO: And the
18 reference to demanding a jury is really
19 strange because if it's a default judgment
20 case, how does that happen? And I guess it
21 could happen if you got notice of an
22 interlocutory default and you immediately
23 filed a jury demand.

24 MR. McMains: Well, what
25 happens is if you have -- if the guy sends in

1 or doesn't send it in until a day late or, you
2 know, wakes up at the time, but you have
3 already had the default judgment entered, went
4 down there and had the default, but you may
5 not have had your witnesses lined up and then
6 he appears before you have had a chance to
7 schedule the hearing. You know, you got an
8 answer the next day. So you have had an
9 interlocutory default, and you have an
10 appearance, and he's paid, you know. He
11 answers, pays the jury fee, whatever.

12 PROFESSOR DORSANEO: Well --

13 MR. McMAINS: It happens,
14 unfortunately altogether too many times.

15 CHAIRMAN SOULES: Right. I
16 think the main issue here is, and we voted on
17 it unanimously, that the rule you write will
18 provide that affidavit testimony is sufficient
19 to prove unliquidated demands in default
20 judgment cases.

21 Okay. What's next?

22 MR. McMAINS: Now, you say
23 "sufficient," Luke, what you mean is that you
24 can use an affidavit in lieu of live
25 testimony?

1 CHAIRMAN SOULES: You may use
2 an affidavit to prove, as proof of -- okay.
3 Let's see if I can state this.

4 A party taking a default judgment in an
5 unliquidated damages case may use only
6 affidavit proof of damages.

7 MR. McMAINS: I don't think we
8 want to say "only."

9 CHAIRMAN SOULES: May use any
10 proof, but affidavit proof -- but only
11 affidavit proof is enough. Well, I'm not
12 saying it right. You don't need anything more
13 than affidavits as proof of damages in an
14 unliquidated damage case if you want to.

15 MR. MARKS: Can we use the
16 special appearance language on use of
17 affidavits there?

18 CHAIRMAN SOULES: What kind of
19 affidavit?

20 MR. MARKS: Well, just the
21 special appearance language, the way they --
22 you know, they allow you to use affidavits to
23 prove your special appearance, just plug that
24 language into this.

25 CHAIRMAN SOULES: That's

1 probably good. That would probably work.

2 Huh?

3 PROFESSOR DORSANEO: We will
4 draft some affidavit language because, say,
5 what do you do if somebody shows up and they
6 say, "Well, I want to see -- I want to
7 cross-examine your client."

8 CHAIRMAN SOULES: To me it's
9 all academic anyway. If nobody is there to
10 make a hearsay objection to the affidavit, why
11 haven't you got it done? But now we are going
12 to say so so that if anybody is confused about
13 that, they are successful and will use the
14 models of special appearance or other places
15 where affidavits are usable to put the
16 language together. Carl Hamilton.

17 MR. HAMILTON: So we are now
18 saying that if a plaintiff files a suit, let's
19 say it's a sworn petition that has effective
20 affidavits in it. By the time you get to
21 default judgment you get it on the whole
22 thing, damages and everything. You don't have
23 to wait now for a hearing on the unliquidated
24 damages.

25 CHAIRMAN SOULES: Well, sworn

1 account is usually liquidated.

2 MR. HAMILTON: It's not sworn
3 account. It's an unliquidated amount, but you
4 have an affidavit attached on a sworn pleading
5 to show the amount of your unliquidated
6 damages.

7 CHAIRMAN SOULES: Get the
8 default judgment with damages.

9 MR. HAMILTON: You get it right
10 now without having to wait for a hearing on
11 damages?

12 CHAIRMAN SOULES: Right.

13 PROFESSOR DORSANEO: I wish we
14 had some judges here on the prove up default
15 judgments.

16 MR. McMains: You never have to
17 wait for a hearing anyway.

18 PROFESSOR DORSANEO: Well, you
19 do if they won't --

20 MR. HAMILTON: Yeah. You
21 usually do.

22 PROFESSOR DORSANEO: If they
23 don't have time for you. In Dallas you have
24 to wait.

25 MR. McMains: What I mean is if

1 the judge were hearing it, if they are in
2 default and you have got your people there or
3 whatever proof you want to put on, you can go
4 forward.

5 MR. HAMILTON: Usually what
6 happens is the day comes you find out they
7 didn't appear, so you go get your
8 interlocutory default and then the judge gives
9 you a setting down the line for proof of
10 damages.

11 MR. McMains: I've seen it both
12 ways.

13 CHAIRMAN SOULES: Well, San
14 Antonio you just go to the daily docket on
15 default day and get a default.

16 PROFESSOR DORSANEO: You have a
17 default day?

18 CHAIRMAN SOULES: At 10:05 on
19 Monday you go down to the daily docket, and
20 you take a default judgment and go through
21 this ruse of the judge says, "Go to -- my
22 court reporter is in the next office," and now
23 you didn't do it right because you didn't do
24 it on the record and all of that stuff, but
25 this would fix that. You would offer Exhibit

1 1, which is your affidavit of damages, and
2 it's in the record, and that's it.

3 Okay. Next on Paula's agenda. Bill has
4 got the message on this and will incorporate
5 it into his drafting. We will advise the
6 judge that we are going to incorporate his
7 idea of affidavit testimony.

8 You want this? Here. Okay. And Bill
9 has got the judge's letter to guide him.

10 Next is 221 to 236, supplement page 411
11 to 421, and let's see. This is jury charge
12 stuff, and it's probably all been taken care
13 of. Let's just kind of step through it here
14 right quick. 411 to 421. The first one has
15 to do with jury shuffle. We worked that over,
16 didn't we, jury shuffle?

17 MR. BABCOCK: We talked about
18 it.

19 CHAIRMAN SOULES: Did we do any
20 writing about that?

21 PROFESSOR DORSANEO: Well, it's
22 in 223.

23 CHAIRMAN SOULES: Okay. It's
24 in.

25 PROFESSOR DORSANEO: We voted,

1 according to Paula's memo, on January 20, '96,
2 to keep the shuffle procedure but to make it
3 applicable in all counties, not just to make
4 it applicable in big counties.

5 CHAIRMAN SOULES: Okay. So
6 that will be done, and that takes care of --
7 then we have got the Batson issue.

8 PROFESSOR DORSANEO: We voted
9 on that, too. Didn't we vote to --

10 MR. McMAINS: Well, we made
11 some votes, but they were supposed to be
12 coming back with a rule.

13 MR. BABCOCK: Yeah. Somebody
14 was looking into Batson.

15 CHAIRMAN SOULES: Yeah. I
16 think our vote was that subject to seeing
17 whatever they might bring forward at some date
18 we aren't going to try to reformulate Batson
19 and its progeny into a rule at this time, but
20 there was some desire to still try to do that,
21 and we said, "Well, we will keep an open
22 mind," but we voted if we want to revisit it
23 as a rule, we will go back to it later.

24 MR. BABCOCK: Right.

25 CHAIRMAN SOULES: And I guess

1 they either will or won't bring us a draft
2 before we adjourn finally on some future
3 meeting.

4 Next is 414. What was done about this?

5 MS. DUDERSTADT: That's a memo,
6 and Alex did it in conjunction with her
7 letter.

8 CHAIRMAN SOULES: Have we been
9 over this with Alex? What does it say?
10 Didn't we go over this and decide not to do
11 it?

12 Let me just do this. We will put Alex's
13 June 16 memorandum on the agenda for next time
14 so that we don't --

15 PROFESSOR DORSANEO: We decided
16 not to do that.

17 CHAIRMAN SOULES: I think we
18 did.

19 MR. McMains: What is it?

20 PROFESSOR DORSANEO: We decided
21 that we weren't going to extend Batson on the
22 theory that things weren't likely to be moving
23 in that direction.

24 MR. McMains: Based on the
25 latest U.S. Supreme Court decision.

1 PROFESSOR DORSANEO: Uh-huh.
2 But that still was part of the directive of
3 whoever was going to draft that rule, whether
4 it was Paula or Paula and Elaine or some other
5 culprits.

6 CHAIRMAN SOULES: All right.
7 We are going to table indefinitely this June
8 16 memo. It's not coming back on our agenda.
9 If it comes back at all, it will come back
10 from Elaine or whoever is working on that, if
11 they decide to bring us something.

12 Next is 422. Is that beyond the -- yeah.
13 That's beyond the --

14 MR. PARSLEY: That's been
15 fixed.

16 CHAIRMAN SOULES: That's been
17 fixed.

18 MR. PARSLEY: The jury charge
19 rules came back from the Court to this
20 advisory committee, and the advisory committee
21 reviewed again and generally approved the
22 provision in here for oath or affirmation.

23 CHAIRMAN SOULES: Oath or an
24 affirmation. That's right. Okay. Now we go
25 to conforming Rules 290 to 295 and Rules 296

1 to 331. What is that about?

2 MS. DUDERSTADT: I have no
3 idea. She made a comment on the record.

4 MR. McMAINS: Well, they used
5 to be findings of facts and conclusions of
6 law.

7 CHAIRMAN SOULES: What's that,
8 Rusty?

9 MR. McMAINS: 295, -6, -7 used
10 to be findings of fact and conclusions of law,
11 if that's the rule number.

12 CHAIRMAN SOULES: Let's see if
13 we can figure out what this is.

14 MR. McMAINS: But I thought
15 that was Don's stuff. I thought we had
16 already done that.

17 MR. HUNT: It may have been in
18 those rules that were shifted to my
19 subcommittee.

20 CHAIRMAN SOULES: 290 to 295 is
21 verdict, form of verdict, verdict by a portion
22 of original jury, when the jury agrees,
23 polling the jury, and correction of the
24 verdict.

25 MR. KELTNER: Yeah. The rest

1 of the rules are --

2 MR. McMAINS: Yeah. 296 is
3 findings of fact, conclusions of law. 297 is
4 additional --

5 CHAIRMAN SOULES: That starts
6 the nonjury process. What needs to be
7 conformed between the jury rules and the
8 nonjury rules? Anything? Okay. That is
9 then --

10 PROFESSOR DORSANEO: This
11 report is fine as far as that goes. Paula
12 Sweeney's report is a very accurate reflection
13 of everything we have done on these rules.

14 CHAIRMAN SOULES: Does she have
15 anything on 290 to 295?

16 PROFESSOR DORSANEO: Yeah.
17 Coverage of 292 in terms of what we discussed
18 about alternate jurors.

19 CHAIRMAN SOULES: And, okay, so
20 we have got -- you know, we made changes on
21 292. Has this been sent to the Court?

22 MS. DUDERSTADT: No. The jury
23 charge rules have been, but not the
24 miscellaneous rules.

25 CHAIRMAN SOULES: What do we

1 need to do about this, Bill?

2 PROFESSOR DORSANEO: Some of it
3 could be sent, but I would think it would make
4 as much sense to leave this as, you know, kind
5 of work in progress.

6 CHAIRMAN SOULES: For your
7 work?

8 PROFESSOR DORSANEO: Yeah.

9 CHAIRMAN SOULES: You would
10 just take her report and fold it in?

11 PROFESSOR DORSANEO: Uh-huh.

12 CHAIRMAN SOULES: All right.

13 PROFESSOR DORSANEO: I mean,
14 she's not here, but it's a good report. It
15 saves a lot of time.

16 CHAIRMAN SOULES: That report
17 conforming with this part (c) is referred to
18 Bill Dorsaneo. Then we have got Professor
19 Muldrow's comments regarding 277. Said, "Is
20 it the intent of the subcommittee to change
21 277 so that a general denial would no longer
22 be a sufficient pleading to support submission
23 of inferential rebuttals?"

24 The subcommittee has voted to discuss
25 this with the full committee. Okay. Let's

1 discuss it. Is a general denial sufficient to
2 support an inferential rebuttal instruction?
3 Should it be?

4 PROFESSOR DORSANEO: No. And
5 it's not, and he's wrong.

6 MR. HUNT: What kind of
7 inferential rebuttal can you have that's not
8 an affirmative defense?

9 PROFESSOR DORSANEO: Well,
10 every kind that is inferential rebuttal is not
11 affirmative defense. Unavoidable accident.

12 MR. HAMILTON: Sole proximate
13 cause.

14 PROFESSOR DORSANEO: Sole
15 proximate cause as unavoidable accident has
16 mostly been disapproved. The history of it,
17 and I don't know whether we got our -- you
18 know, this has been articulated before. I
19 don't know whether we got it fixed in the
20 drafts. My belief is we did not, but by
21 switching to the person who has the burden to
22 plead we still have never clarified whether
23 you have the burden to plead an inferential
24 rebuttal matter specifically.

25 MR. McMANS: There are cases

1 that say that.

2 PROFESSOR DORSANEO: Well,
3 yeah, but --

4 MR. McMAINS: I mean, the cases
5 say you are not entitled to a submission of an
6 inferential rebuttal matter that you haven't
7 pled.

8 PROFESSOR DORSANEO: The rules
9 should say that, too. They did say as a
10 result of amendments made in 1940 that you
11 weren't entitled to an inferential rebuttal
12 question unless you alleged that matter
13 specifically. When we changed from submission
14 of inferential rebuttal matters in question
15 form to instruction form, if at all, in 1973,
16 the language was not changed, probably because
17 most people didn't understand what it meant
18 because it was worded funny in current Rule
19 278.

20 So we still have that issue as to whether
21 you should -- whether the defendant must plead
22 an inferential rebuttal matter specifically in
23 the answer in order to get an instruction that
24 the defendant would otherwise be entitled to.
25 Now, all defendants know what they are doing

1 plead those; isn't that right, John? Huh?

2 MR. MARKS: Oh, yeah. I've
3 always believed that I had to plead them.

4 PROFESSOR DORSANEO: But in
5 what we sent to the Supreme Court it's still a
6 little bit vague about this.

7 CHAIRMAN SOULES: Well, we
8 could fix this someplace besides the charge
9 rules. We could fix it in the pleadings rules
10 by making it sure that you have to plead it.

11 PROFESSOR DORSANEO: Right.

12 MR. McMAINS: In fact, the last
13 rules that we just voted on talked about -- I
14 believe we kept the you are not entitled to
15 inferential rebuttal question -- just put
16 question or instruction without pleading.

17 PROFESSOR DORSANEO: It would
18 be better to put in a pleading. John, don't
19 you think it would be better to put it in the
20 pleading rules?

21 MR. MARKS: Yeah.

22 MR. McMAINS: That is the
23 pleading rule. That's what I was talking
24 about. That is the pleading rule.

25 CHAIRMAN SOULES: Which rule is

1 that, Rusty? One of these? Maybe we have
2 already got this done.

3 PROFESSOR DORSANEO: No. It's
4 not in any pleading rule.

5 MR. McMAINS: Oh, no. It was
6 in the amendment rule, wasn't it? I mean,
7 that's where you left that other language in.

8 PROFESSOR DORSANEO: If people
9 will vote it up, I would be happy to say that
10 you have to plead an inferential rebuttal
11 matter, and we could say, "in order to get an
12 instruction" or, you know, rather than in
13 order to introduce evidence and put it in the
14 pleading rules. It doesn't make sense to put
15 it in the charge rules. It was in the charge
16 rules before it got lost.

17 MR. MARKS: I think that would
18 conform with what most people understand the
19 rule to be.

20 PROFESSOR DORSANEO: Yeah.

21 CHAIRMAN SOULES: Well, I don't
22 think we need to say in the pleading rule that
23 you have got to do this to get a question or
24 instruction. Just say you have got a duty to
25 plead it. If you have a duty to plead it, the

1 charge rules take care of the problem without
2 trying to put some kind of instruction
3 language someplace besides in the charge
4 rules.

5 PROFESSOR DORSANEO: Yeah.
6 That would be a good thing to do.

7 CHAIRMAN SOULES: All right.
8 Those who want to have the pleading rules
9 specific that a party who is going to rely on
10 inferential rebuttal instruction -- and I'm
11 just trying to get the concept out here --
12 must plead the predicate for that instruction
13 in their pleadings. Those in favor show by
14 hands.

15 Okay. And those opposed? Nobody
16 opposed. All in favor. So we will do that.

17 MR. McMAINS: What I was
18 talking about, Luke, is on 28(d), which is
19 actually the trial by consent rule, but that's
20 where we talk about the failure shall not
21 affect the trial of the issues provided that
22 written pleadings before the time of
23 submission shall be necessary for the
24 submission of the questions as provided in
25 rule such-and-such.

1 PROFESSOR DORSANEO: That
2 really is right. It ought to say --

3 MR. McMAINS: That is exactly
4 where that always was.

5 PROFESSOR DORSANEO: It ought
6 to say -- it shouldn't be restricted to
7 questions.

8 MR. McMAINS: Right.

9 CHAIRMAN SOULES: Questions or
10 instructions.

11 MR. McMAINS: That's what I was
12 talking about.

13 PROFESSOR DORSANEO: Good
14 point.

15 CHAIRMAN SOULES: Oh, I don't
16 know. I don't know. I think it's question.
17 I think it's questions or inferential rebuttal
18 instructions.

19 MR. MARKS: Yeah.

20 CHAIRMAN SOULES: Because there
21 is lots of instructions that you have got to
22 plead.

23 PROFESSOR DORSANEO: Well, you
24 do have -- well, they are admonitory
25 instructions.

1 CHAIRMAN SOULES: What about
2 damage definitions? What about --

3 MR. MARKS: Mitigation of
4 damages or aggravation questions.

5 PROFESSOR DORSANEO: Yeah.
6 Those are weird.

7 CHAIRMAN SOULES: Definition of
8 a cause of action.

9 PROFESSOR DORSANEO: The
10 mitigation thing is a weird thing because it
11 was never classified as anything.

12 MR. MARKS: You shouldn't have
13 to plead those.

14 MR. HAMILTON: Why don't you
15 put it in the section on affirmative defenses
16 and just change the title of it?

17 MR. MARKS: Affirmative
18 defenses --

19 PROFESSOR DORSANEO: I don't
20 like that proviso in those that Rusty read to
21 begin with, but maybe we shouldn't mess with
22 it.

23 MR. HAMILTON: The affirmative
24 defenses section is where it says what you
25 have to plead.

1 CHAIRMAN SOULES: I think if we
2 put it in the burden to plead, that's a
3 signal. At least it's someplace.

4 PROFESSOR DORSANEO: Yeah.

5 CHAIRMAN SOULES: Okay? All
6 right. So we will do that at the suggestion
7 of Professor Muldrow, and now we go to what?
8 346 to 373.

9 Okay. All right. Now we go to Pat
10 Hazel's input, proposed amendments to 226,
11 226a, 236, and so forth. The instructions
12 part of this has been done and sent to the
13 Court, 271, 272, 273, 274. Oath to the jury
14 panel, oath to the jury, and then he gives us
15 all of the the admonitory language that's in.
16 We have already sent this to the Court.

17 PROFESSOR DORSANEO: Can't you
18 just write them back we have been through this
19 and the Court has got it?

20 CHAIRMAN SOULES: Let me just
21 turn through. I don't think there is -- there
22 is not anything here that we haven't covered
23 in our previous actions, so I think the
24 response to this is that we have sent our
25 rules to the Court and many of these ideas,

1 but I think all of them have actually been
2 struck through our debate. So we have really
3 visited all of Professor Hazel's points, and
4 they are either incorporated into or not used
5 by our work product now before the Supreme
6 Court.

7 What's next? Okay. 756. It's has to do
8 with alternate jurors. We have dealt with
9 that, correct? And then another letter on
10 civil jury instructions and oaths which would
11 be incorporated into what we have sent to the
12 Court. That's been done. Next is 824, 825.
13 That's been done. And Jim Parker, juror
14 misconduct, instruction, we have dealt with
15 that.

16 MR. PARSLEY: I think,
17 Mr. Chairman, as I recall, Jim Parker was here
18 one day. We talked about these, and you asked
19 him if he was satisfied. He said everything
20 in his letter was fairly well covered. That's
21 been more than two years ago. I remember him
22 being here and you asking him, and he said he
23 was satisfied. So I think we have covered
24 that.

25 CHAIRMAN SOULES: Okay. I

1 think we have covered that. Thank you. Then
2 we get to Pat Hazel. This looks like probably
3 the same thing. Yeah. This is the same thing
4 we talked about earlier, I think, from Hazel.
5 Yes. It's a duplicate of what we just talked
6 about.

7 Okay. So we have actually covered then
8 all of these letters related to the charge
9 previously. What's next on Paula's? That's
10 it on Paula? Okay. So we have got everything
11 in Paula's ambit now buttoned up except if
12 they want to bring us something on Batson.
13 What else do we have on the agenda?

14 PROFESSOR DORSANEO: Lee, is
15 there any prospect to the Court getting to
16 those charge rules soon?

17 MR. PARSLEY: Yes. I was a
18 little late in yesterday making copies while
19 the judge was talking to the committee. I
20 assumed, though, that was one of the items he
21 had listed that the Court intended to finish
22 up --

23 MR. McMains: Yes, he did.

24 MR. PARSLEY: -- by July 1st
25 and have it ready to go to the Bar Journal by

1 then. So, yes, I think the jury charge rules
2 are on the list to be finished up.

3 MR. McMAINS: Actually, he
4 listed those rules about the same time as the
5 rules of evidence. He said those two were
6 going to be done real soon.

7 MR. MEADOWS: What did he say
8 about discovery?

9 MR. McMAINS: I think the
10 discovery rules were first.

11 MR. HUNT: Evidence first and
12 then discovery.

13 MR. McMAINS: What?

14 MR. HUNT: Evidence first and
15 then discovery.

16 MR. JACKSON: Is it like
17 December on discovery?

18 CHAIRMAN SOULES: Judge Peeples
19 was going to review Rule 171 on masters, and I
20 think we should probably wait and let him give
21 us his input on that, put that on the agenda
22 for next time.

23 MR. PARSLEY: I think he said
24 yesterday he thought discovery would be around
25 the first of 1998, is what he said yesterday.

1 MR. McMAINS: When the Court
2 would get through with it?

3 MR. PARSLEY: I thought he said
4 when it would be effective. I don't want to
5 misquote him, but I thought that's what he
6 said, discovery would be effective around the
7 first of 1998.

8 CHAIRMAN SOULES: Okay. Well,
9 I think that buttons things up. Does anybody
10 have anything else they want to raise at this
11 meeting?

12 MR. MEADOWS: Luke, I mentioned
13 to Bill at the break when we were finishing up
14 on the amendment rules that there seems to me
15 to be a little of an internal conflict, and I
16 think Bill was going to look at it. If you
17 have got a situation where the plaintiff can
18 add plaintiffs with amended petitions and it's
19 left to the defendant to figure out who they
20 are, just because they have been added among
21 hundreds, perhaps thousands, that's a little
22 bit unfair, given the way we treat omitted
23 plaintiffs in amended petitions.

24 So I was just simply wondering whether or
25 not we might address that in terms of some

1 sort of notice that would accompany an amended
2 petition if there are additional plaintiffs
3 included in it so it's not left to the
4 defendant to plow through hundreds, perhaps
5 thousands, of names to find if there are any
6 newly added plaintiffs, even if it came to you
7 by certified letter. It just seems to be the
8 proper place to put that notice obligation or
9 that disclosure, and I think Bill agreed he
10 was going to look at it.

11 PROFESSOR DORSANEO: It would
12 just be a variation of a fair notice principle
13 but making a little more specific for that
14 specialized type of cases.

15 CHAIRMAN SOULES: What do you
16 have in mind? Making some requirement that
17 there be a paragraph that specifically
18 identifies any newly added plaintiffs?

19 PROFESSOR DORSANEO: Yes. Yes.

20 CHAIRMAN SOULES: Everybody in
21 agreement with that? Anybody disagree with
22 that?

23 All right. We are all in agreement, so
24 that would be incorporated.

25 PROFESSOR DORSANEO: Right now

1 we have a paragraph that's -- we have a rule
2 that says that you need to identify the
3 parties and their residence, and it would be
4 just easy to just work on that a little bit to
5 deal with this modern issue.

6 MR. MEADOWS: Yeah.

7 CHAIRMAN SOULES: Anything
8 else?

9 All right. Thank you all very much. We
10 are adjourned until when, Holly?

11 MS. DUDERSTADT: Right in front
12 of you.

13 CHAIRMAN SOULES: We are
14 adjourned until May 16th here at the Bar
15 center. 8:30 a.m. We will have the same
16 hours, 8:30 to 5:30 on the 16th and 8:00 to
17 noon on the 17th. There may be some
18 possibility that we won't have to work on
19 Saturday next time.

20 (Proceedings adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 8, 1997, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$ 1,107.25.
CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 18th day of March, 1997.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas
Highway, Suite 110
Austin, Texas 78746
(512) 306-1003

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
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