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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 20, 1997

(SATURDAY SESSION)

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Taken before William F. Wolfe, Certified Court Reporter and Notary Public in Travis County for the State of Texas, on the 20th day of September, A.D. 1997, between the hours 8:45 o'clock a.m. and 10:30 o'clock a.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

SEPTEMBER 20, 1997

MEMBERS PRESENT:

Prof. Alex Albright
Charles L. Babcock
Pamela Stanton Baron
Hon. Scott Brister
Prof. Elaine Carlson
Gilbert I. Low
John H. Marks, Jr.
Russell H. McMains
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Ann T. Cochran
Prof. William Dorsaneo III
Hon. Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring, Jr.
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Joseph Latting
Thomas S. Leatherbury
Hon. F. Scott McCown
Anne McNamara
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Paula Sweeney

EX-OFFICIO MEMBERS PRESENT:

Carl Hamilton
David B. Jackson
Doris Lange

EX-OFFICIO MEMBERS ABSENT:

Hon. William J. Cornelius
Paul N. Gold
Justice Nathan L. Hecht
W. Kenneth Law
Mark K. Sales
Hon. Paul Heath Till
Bonnie Wolbrueck
Hon. Paul Womack

SEPTEMBER 20, 1997

Doc #11907

INDEX OF VOTES

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

(Meeting called to order at 8:45 a.m.)

CHAIRMAN SOULES: All right. Let's get started. Thank you all for coming here this Saturday morning to wrap up the first four years of this session's work anyway.

Chief Justice Phillips is with us today, and I appreciate your being here, Judge. Welcome.

CHIEF JUSTICE PHILLIPS: I might miss the very last part of your debates today, but I wanted to come individually, and I suspect some other members of the Court will express this to you, either last night or sometime today or in writing, how much we appreciate all the work you've done. I was privileged to be able to go to a conference on the Federal Rules of Discovery in Boston a few weeks ago and listened to their exchanges back and forth, and people from various groups present to them. And I'm convinced the product that you're coming close to fruition on here is going to be the best rules of pretrial practice in the United States.

These rules are going to have the best balance between getting at the ultimate truth in a matter and keeping the costs reasonable enough that average citizens can litigate their claims in the courts of this state. These rules change the existing law quite a bit, but they do it in a way that I think is fair. Everybody's ox gets gored, as it were. And I think that these rules will be a model for what a number of other jurisdictions will do, and we're all very grateful to you for the time and the very careful attention that you've given to all these proposals over the years.

The one thing I think we've learned in this practice is pacing ourselves has some benefits. It allows the bar to get familiar with some new concepts and to start debating some ideas and give us some feedback, and we see unforeseen problems come to the fore. And while I know we've all been frustrated by the slow pace of this process, I think that the final product will be a very good one and that the deliberation that's gone into it will be part of what makes it so good.

Do you want to say something?

So I think I'd best leave, but thank you all. I hope you have a great day, and I'll take some pictures at the air show.

CHAIRMAN SOULES: Thank you, Chief Justice Phillips. We appreciate it.

CHIEF JUSTICE PHILLIPS: Bye-bye.

CHAIRMAN SOULES: Okay. Let's start with -- let's see, this is what we did yesterday. Let me get clear on -- we have a 165a matter on the docket. Apparently it's been done, but I want to be sure that that is the case. Richard, do you know what that was about?

MR. ORSINGER: You know, I have forgotten, but it was my understanding that that had been handled, and I don't remember why it's on the agenda.

MS. DUDERSTADT: It was to be conformed to Hunt's prior 329.

MR. ORSINGER: Well, my understanding was that Hunt was comfortable with it; he was happy with it. But he said that at the last meeting, and so I kind of was

leaving it in his hands. And since Don didn't come, I'm not even sure what the discrepancies were, if any.

CHAIRMAN SOULES: Okay. Well, Bill said that it didn't need to be dealt with again, so I'm going to kind of pass that by.

Carl, were you going to report on Rule 4, this recommendation on Rule 4?

MR. HAMILTON: Yes.

CHAIRMAN SOULES: What is that?

MR. HAMILTON: The Court Rules Committee sent in a request of change for Rule 4 and Rule 21, and they go together. Rule 21 changes the three-day rule from three days to five days on notices for motions. And to make it fit, Rule 4 has to be changed to delete the reference to Rule 21 which says that for Rule 21 you do count Sundays and holidays. And so the net result of the Court Rules change would be five days not counting Saturdays, Sundays or holidays for notices on motions.

And I think Richard was telling me yesterday that it may be in the rules that Susman's group worked on. They changed that

by deleting the reference to counting Saturdays, Sundays and holidays on the three-day rule, which would in effect give you a couple of more days if you get notice on Friday evening. It means you don't have to be there Monday morning but it would be Wednesday morning. And if that's true, I don't think it's any big deal, because Court Rules was kind of half and half on whether it ought to be five days counting Saturdays, Sundays and holidays or not counting it. And it doesn't make that much difference. We just want to get rid of the problem of getting notice at 5:00 o'clock on Friday afternoon for a hearing on Monday.

MR. ORSINGER: Well, let me confirm, Luke, that we have already voted as a full committee to adopt the proposed rule, new Rule 6a, which says that Saturdays, Sundays and legal holidays are not counted for any time period less than five days. So with that, then perhaps we don't need to address this.

MR. HAMILTON: Well, wouldn't Rule 4 still have to be changed to delete that

reference to Rule 21?

CHAIRMAN SOULES: Don't we carry that forward in the new rule? Rule 21 is the three-day extension that is added to any period for response.

MR. HAMILTON: That's 21a.

MR. ORSINGER: That's the old rule. You're talking about three days for mail or fax service?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: That's in new Rule 6c now. That's still there.

CHAIRMAN SOULES: I know. But that three-day period does not get extended. For that period, only for that period do you count Saturdays, Sundays and legal holidays. But you do count them on that three-day period.

MR. HAMILTON: On 21a you do count it. But Rule 21 is the three-day rule on motions, and it remains as is, shall be served on all other parties not less than three days before the time specified under current Rule 4. On Rule 21 you do count Saturdays, Sundays and holidays.

CHAIRMAN SOULES: Okay. Well, that ought to be deleted.

PROFESSOR ALBRIGHT: And Luke, we discussed this a long time ago. It was in the Rule 6 subcommittee discussed between Steve Yelenosky and myself, and we fixed it. And I assume it's now in Bill's draft of the new rules somewhere.

MR. ORSINGER: I don't happen to have that Rule 6 with me.

CHAIRMAN SOULES: I think I have it. I think this has all been taken care of, but let's look at the rule.

PROFESSOR ALBRIGHT: I know we voted on it because I remember the discussion.

CHAIRMAN SOULES: I'm sorry.

MR. YELENOSKY: Been there, done that.

PROFESSOR ALBRIGHT: What we did was we took 21, Rule 21, out of Rule 4, and then I assume it has been put into wherever Bill Dorsaneo thought it needed to go in the new set of rules.

CHAIRMAN SOULES: The only issue here is do we go three days or five,

because -- and we voted to not count Saturdays, Sundays or legal holidays for any period of five days or less except for the three-day period that response gets extended by service, certified mail or facsimile. That's the Rule 6 that we passed.

And does that get pretty close to what Court Rules wants, Carl? Okay. Does anybody want to make any further changes in what we did under Rule 6? Okay. Well, that fails for lack of a second.

MR. LOW: So we stick with the three days, is that right?

CHAIRMAN SOULES: Right.

MR. HAMILTON: Bill's current Rule 10 still provides for three days. It's just like old Rule 21.

CHAIRMAN SOULES: Right. It's three days.

MR. HAMILTON: And his current Rule 6, apparently in his current Rule 6 he's attempting to carry forward the same thing as Rule 4, which would be incorrect now.

CHAIRMAN SOULES: That's something that I'm going to have to get with

Bill about. I see what you're saying. Rule 6 still carries two rules and still may have the problem of Rule 4.

MR. HAMILTON: All right.

CHAIRMAN SOULES: And Bill will get this record. And particularly we want to send him, Holly, this discussion because the three-day period in Rule 4 should not be -- the Saturdays, Sundays and legal holidays should not count in that three-day period. It's only the period extending service or response.

And actually the new Rule 6 says that expressly, except for purposes of the three-day periods extending other periods by three days when service is made by registered or certified mail or by facsimile, and for the purposes of the five-day periods in (f), (b) and (d).

MR. HAMILTON: And see, his Rule 6 refers to except for purposes of three-day periods in rules blank and blank. That first blank needs to be eliminated, and we only need to deal with 21a.

CHAIRMAN SOULES: Okay. So his

blank that refers to current Rule 21 shouldn't be a blank for that?

MR. HAMILTON: Right.

CHAIRMAN SOULES: It should just say Rule blank, current Rule 21a. Any disagreement with that? Okay. I'll get that to Bill.

Anything further on Rule 4? So we're going to make the change that the Court Rules Committee recommends in Rule 4? We're going to recommend that.

PROFESSOR ALBRIGHT: Are we going to do the five days instead of three days?

CHAIRMAN SOULES: And not recommend the five days. We voted on three days before. Do we want to reopen that?

MR. ORSINGER: No. And the subcommittee is against reopening it. And since the chief vice was over the weekend, that's going to be six days if you do it on a weekend.

CHAIRMAN SOULES: You cannot get a hearing the same week that you file a motion if it's five days.

MR. ORSINGER: I know. We're against five days because it will just slow everything down. But if you're going across a weekend and you give a three-day notice and you exclude the weekend, you're going to get five days anyway. Saturday, Sunday. Do you see what I'm saying? And that was the vice primarily that needed to be cured anyway, and so the subcommittee is against revisiting the vote. Okay. Any disagreement with that?

MR. McMAINS: Luke.

CHAIRMAN SOULES: Okay. Stick with three days. Rusty.

MR. McMAINS: I'm trying to figure out, are you saying that the three days, the additional three days you get if it's by mail is what is obviously excluded? You don't count -- you don't say weekends don't count for that?

CHAIRMAN SOULES: Just for that one thing.

MR. McMAINS: Then the problem that I have is that I'm not sure that our rule really contemplates whether you put that three days at the beginning or the end, because, you

see, if it counts for the three days of the notice, with regards to giving the notice, then, I mean, you're only entitled to six days really basically, see. You're already getting six days if it's mailed or whatever. But if you add -- if that three-day's notice is either mailed or hand delivered or let's say mailed or faxed on a Friday and you don't count the weekends, then you get the additional -- and you get the additional three days at the end, then you've picked up the extra three days. Do you see what I'm saying?

CHAIRMAN SOULES: Well, for the record, it's --

MR. McMAINS: On Friday, if I send something on Friday, and this happens all the time and we need to know, I send something on Friday by mail or fax for a hearing that I want to give three-day's notice to, then the question is, can I get it the next week? And if you say that the weekend doesn't count in the three-days' notice rule and you started from the front, then the notice doesn't even start until Monday, and then you get three days more because it's mailed and then the

date becomes a weekend and you can't get a hearing that week either.

PROFESSOR ALBRIGHT: No. Rusty, the weekend counts for your three days mailed --

MR. HAMILTON: I think we're talking about apples and oranges.

MR. McMAINS: But the question is --

CHAIRMAN SOULES: I'm sorry. Look, this is a problem that's in the rule today and we're not going to fix it. For the record, the period, the response period is extended. The three days are added at the end. They don't come at the front. The period is extended. The response period is extended, and it's not extended for three days not counting Saturdays, Sundays and legal holidays. It's extended for three days counting those at the end. But we can't fix that.

MR. McMAINS: But if that's what you're saying, when you send it on Friday, three days' notice by definition, if you're saying that you -- because if you hand

deliver it, you can't count the weekend.

CHAIRMAN SOULES: Right.

MR. McMAINS: If you mail it, why do you count the weekend if he's trying to make this change?

CHAIRMAN SOULES: You don't. If you serve something on Friday by certified mail, you cannot have a three-day hearing, a hearing three days later. The soonest you can have a hearing is six days later because certified mail adds three days to the three days.

MR. McMAINS: Yes. But what I'm saying is if you're --

CHAIRMAN SOULES: And if the Saturday, Sunday or legal holidays falls on the second three days, they count. In the first three days they don't count. It's pretty simple.

MR. YELENOSKY: Well, I think I hear what Rusty is saying, but I don't think it's a reality. I mean, I haven't heard it interpreted that way. I think what Rusty is saying, if I understand him right, is that you get six days and it starts on Monday, because

what Rusty is saying is if you put in the front end, well, okay, the three-day notice period under 21, not 21a, if you look at that first, you skip the weekend. So you start on Monday with your 21 notice, and then when that's over, you add your 21a notice on, so your first day starts on Monday.

But I thought it was interpreted just the reverse, that your 21a notice would come first; therefore, it would run over the weekend. Your three days would be gone, and you 21a notice would start Monday, I guess. And then you would be set for Wednesday.

MR. McMAINS: But when he does this rule, when he changes this rule and says -- because we haven't had an exception for Saturday and Sunday when we change that, and we also say that doesn't apply, the Saturday and Sunday doesn't apply, weekends or holidays doesn't apply to the three-day extension rule, but does apply to the three-day notice rule otherwise, then it does make a difference as to which one you start with. And we don't have anything in the rule that says where you start.

MR. YELENOSKY: Well, it seems logical to me that the receipt portion of the notice, which is this 21a provision, come first, but if you think that's not apparent to everyone, then you're right. It's not apparent to Luke.

CHAIRMAN SOULES: Well, are we going to let Saturdays, Sundays and legal holidays count in 21, in the three-day motion rule?

PROFESSOR ALBRIGHT: Would a compromise be that we delete the -- I know we've gone over this umpteen years ago, but if you could fax and not have to add the three days --

CHAIRMAN SOULES: No, we're not going back to that.

PROFESSOR ALBRIGHT: That would --

CHAIRMAN SOULES: I've fought and lost that battle, and we spent half a day on it.

MR. MEADOWS: But Luke, it seems that the problem is which order you apply 21a. Can we just clarify that?

MR. YELENOSKY: Yeah. Just say 21a comes first.

MR. MEADOWS: Because the way you articulated it, you add it at the end, which obviously lengthens this whole process. If you add it at the beginning, then it shortens it, so we just ought to be clear.

CHAIRMAN SOULES: It depends on where the weekend falls. The period is extended. The three days are added at the end. That is the extension. How do you extend something from the beginning? You extend it at the end. That's the three days. The three days that occur as a consequence of certified mail or fax delivery is an extension at the end of the response period of the otherwise response period when it's due.

MR. YELENOSKY: So you have interpreted, Luke, that to mean that if 21a, if as proposed under the rule, and you send certified mail notice on Friday, you could not set a hearing until the next week at all. You would have to set it for the following week.

CHAIRMAN SOULES: Right.

MR. YELENOSKY: And that's how

you would interpret that. Is that how you would want it?

CHAIRMAN SOULES: Well, that's the way it is now.

MR. YELENOSKY: Well, I guess I had the -- I remember when we discussed this. I can barely remember it now. It's been three years or something. But Alex, wasn't there a sense that it wasn't -- perhaps it wasn't being interpreted consistently, but people were surprised to read that 21 was included in Rule 4. And in fact, people were reading Rule 4 as if 21 wasn't in there. And the way they were practicing was to include the weekend only with respect to 21a and the mail notice.

So what you're saying was the rule or is the rule now, Luke, is certainly correct, but I don't think that many lawyers were reading it that way. They thought it was a mistake that 21 was in 4 or they just didn't notice that 21 was in 4, but they were giving certified mail notice on Friday saying one, two, three over the weekend and set my hearing for Thursday. And that was, as I understood

it, a fairly common practice. So what we thought we were doing was making the rule to conform to the current understanding. But you're telling me now that at least that isn't your current understanding of the rule, and your understanding is certainly literally correct, but I thought that the practice was otherwise.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I agree with Steve. I never thought you had to give more than six days' notice. If you were going to give a hearing on minimum notice by cert mail, that was six days.

MR. YELENOSKY: And moreover, you're also correct, Luke, that an extension goes on the end. But when you look at the purpose of the extension, which is to make sure that it gets there because it's being sent by mail, that actually logically makes sense to me to be on the front end, because it gets to you before you have your time to work on it, which is the 21-day rule or to prepare for it. The 21a takes care of getting the

notice to you, and therefore that is actually at the beginning. But we obviously needed to say one or the other, and I would recommend that we say it's at the beginning.

CHAIRMAN SOULES: I'm not sure we want to delete 21.

MR. YELENOSKY: My understanding was that's what we -- well, we would have to go back to the record, but I think that's what our subcommittee essentially proposed, and we took it as a cleanup and that that was taxed. Alex, is that right?

PROFESSOR ALBRIGHT: No, this problem was not discussed.

CHAIRMAN SOULES: What we passed has both Rule 21 and 21a three-day periods.

PROFESSOR ALBRIGHT: That we passed years ago?

CHAIRMAN SOULES: Yeah. Here is Bill's book.

PROFESSOR ALBRIGHT: But that's not right, because I remember specifically spending the draft to Holly with a strike-through on 21.

MR. YELENOSKY: So Bill's might reflect that, but ours didn't, and what we voted on was not controversial at the time.

CHAIRMAN SOULES: All right. Well, we're going to approve, as I understand it, we're agreeing with the proposed change to Rule 4 and rejecting the proposed change to Rule 21.

MR. YELENOSKY: Say that again, I'm sorry.

CHAIRMAN SOULES: Do you have your fourth supplemental agenda?

MR. YELENOSKY: Yeah.

CHAIRMAN SOULES: Page 1, on page 003, I guess it is, the deletion of 21 we approved. And you go to page 008, which changes from three to five days, and we reject that. And the Court Rules also has change time to date. Which of Bill's rules is that? It is 21? 10?

MR. HAMILTON: Bill's Rule 21 is Rule 20, tab 3.

CHAIRMAN SOULES: Now, where is -- here it is right here. On Bill's redraft of 5-6-97 at page 38 under Rule 10,

change the word "time" to "date." No opposition to that, I'm assuming? And does anyone favor the words "for good cause" at the end? Okay. Then that's rejected.

Okay. That takes care of 4 and 21.

Next, Carl.

MR. HAMILTON: The next one is Rule 166b on Page 14 of the fourth supplemental. Okay. This is a response to a question by I believe it was Judge Hecht that we continue to try to develop some standard discovery requests in other areas, other specialty areas, and one of them was family law. And these are additional disclosures upon written request to be added to the previous rule that we submitted to the Supreme Court in connection with our discovery requests. And this adds to what we've already submitted, paragraph 12 and the various subparts, which requests information from the preceding 36 months are not prior to marriage unless the other dates are specified. And then it asks for health information, health care providers on the person and the minor child. It asks for information about any

child abuse. It asks for contentions, why they should be the sole or the joint managing conservator or possessory conservator, periods of possession, and asks for inventory and appraisements. It asks for production of documents relating to financial statements, pay stubs, one of the contracts, fringe benefits, tax returns, health insurance, wages and financial information about child support, what the contentions would be, whether there's any contention about separate property or grounds for divorce and whether there's been any gifts made.

These are standard requests that were put together by two or three people on the Court Rules Committee that work in this area, and I think some of them may have been taken from Richard Orsinger's committee that looked at this some time ago.

There are a couple of typographical mistakes. And page 15, paragraph (e), left out a line that says "If conservative minor child is an issue," and it continues, "should be appointed sole managing conservator." They left out "State the reasons you believe the

appointment would be in the best interest." That was left out. And on Page 19, subparagraph (d) just above the "k," the words "in line contribution" should have been contention.

MR. PARSLEY: Carl, could you tell me the first one of those changes again? I didn't get it.

MR. HAMILTON: Page 15, paragraph (e), where it says, "When conservatorship of a minor child is at issue," and you continue "shall be appointed sole managing conservator." Then there needs to be a sentence that says, "State the reasons you believe," and strike the word "of." State the reasons you believe the appointment would be in the best interest of the minor child.

CHAIRMAN SOULES: Discussion Alex.

PROFESSOR ALBRIGHT: Well, I think this goes in the bin of we've given our stuff to the Supreme Court on discovery. The Court Rules has given their stuff. And this is very consistent with their approach on discovery. The Supreme Court has it all. And

I just don't think it makes sense for us to spend a lot of time talking about things like that because we don't know if the Supreme Court wants us to do these more detailed standard requests or the broader standard requests that we have in our proposal.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: I generally favor these kinds of giving of information upon requests, because I think that a lot of the reforms of our Discovery Committee that have been filtered forward are going to affect the larger lawsuits but not the smaller ones.

And I also understand that the Supreme Court is considering adopting area-specific questions and requests along the lines of what we did with the jury instructions yesterday; that they'll be part of a miscellaneous order that is subsidiary to a general rule giving the court authority to do that so that their more flexible.

And I don't know, Lee, have you heard any discussion about that area of area specific questions that are not built into the rule with you hang off of the rule like the jury

instructions do?

MR. PARSLEY: That's accurate. There's been no decision made. But that was a discussion when we talked about discovery earlier this week.

MR. ORSINGER: Okay. So as a result of conversations I've had with members of the Court, I advised the chair of the family law section that the Supreme Court was amenable to this aspect or this approach toward getting more specific discovery, particularly in the cases that are not affected by our overall maximums and time limits.

And our section chair is Anne McClure, a court of appeals judge in El Paso, and she is going to put together a committee that's going to do something along these lines. We have not seen this work that Carl's committe did. I sent to Carl some work that I had done in this area because the Family Law Council did move in this direction initially and then, after the discovery rule proposals took a different turn on this Committee, they abandoned that work. But they're prepared to

start it back up.

I think that these are generally satisfactory, but I would prefer that we don't recommend this specific wording; instead, we take this recommendation which I will do to the Family Law Council, and let's run by a consensus of 35 practicing lawyers and see if we can come up with some compromises, additions or subtractions that represent a consensus, and then either return that to this committee, if this committee is functioning, or return that to the court.

CHAIRMAN SOULES: Other discussion? Okay. Well, this looks like a good piece of work. But you feel that the Family Law Council wants to -- has this been submitted or passed on by Family Law Council, Carl, that you know of?

MR. HAMILTON: I don't think it has. I think I sent a copy of this to Richard when we first did, but that's all.

MR. ORSINGER: And Carl, I don't remember getting that. I knew that Carl was working on the project, because I sent in my work product, some of which I see in here.

But I would hesitate first of all to try to impose my views on the family law practice without having a consensus built of those section representatives.

And additionally, I think that there's something to be gained by taking a group as diverse as that and trying to hammer out a consensus, because, you know, people will make suggestions. People will complain about things. And after a while you end up with a pretty good work product.

So I like this direction, and I think that it's good to supplement it. I'm glad the Supreme Court is thinking about doing area-specific things in a more informal way by hanging them off of a rule where they're more flexible, and so I personally, if our committee is going to vote on this, I would vote against endorsing this right now, but I'll going to represent to you that I will take this back to the Family Law Council and ask them to hammer out a set, because we have a specific invitation from the Court to do that too.

MR. HAMILTON: I think that's a

good suggestion, Luke, because on our committee we really only had maybe one or two people that practiced in this area, so really it ought to go to them for their input before.

CHAIRMAN SOULES: Well, why don't we -- then if there's no objection from the committee, we will submit this through Richard to the Family Law Council and suggest that they come to a consensus, if they can, on on a guideline similar to this, either to be put in a rule or to be put in some administrative order as may be appropriate. Any objection to that? Okay. That will be our action on this item.

The attorney general, we've got this letter or opinion, as it were, that does not invalidate 143a. That's the rule that requires that an appellant from JP court or county court pay the fees within 30 days or just remand it back to JP court. So I think our action will be to preserve 143a in the rules that Bill is doing, unless there's objection to that. No objection? Okay. Then that will be our recommendation. That needs to be given to Bill as well.

And what's next?

MS. DUDERSTADT: 166a.

CHAIRMAN SOULES: Page 9 is a letter to me from Alan Smyth.

MR. ORSINGER: Luke, I just got through reading that. He's basically sent us an excerpt from a form book that he publishes, is what I gather. And I don't really feel like it's an action item, other than he wants us to recommend that the comment be revised, which of course, is not going to happen. So I feel like we ought to read it and think about it but I don't think, but I don't think there's any purpose in sending a recommendation to the Supreme Court to change a comment on the summary judgment rule.

CHAIRMAN SOULES: I think the summary judgment rule is history as far as that's concerned or maybe modern history.

MR. LOW: I think you're right. I think he's just saying when you're outlining it, it's got to be something that would summary judgment proof, you know, not, well, I've got somebody over here, in written form, so when you refer to it -- but again, I

agree with you that it's history, and history usually never changes.

CHAIRMAN SOULES: Okay. Does anybody recommend any action on Professor Smyth's letter? No recommended action on that, so we'll take no action.

We'll go to page 34. Let's see, these are big problems that come up in cases that I thought we'd try to ought look at before we quit. This is an odd thing that -- I think this is a juvenile case, yeah. In criminal cases, a defendant can file a motion to suppress, and then if that's denied, agree to a judgment and still appeal the denial of the motion to suppress. And if that appeal is successful, then the conviction is reversed, or I guess the case is remanded back. And then the prosecutor decides whether or not to prosecute the case without the suppressed evidence, so there's a remand.

Under the civil practice, which is the practice that governs juvenile cases, if a juvenile, whatever, files -- I guess it's some equivalent to a motion to suppress, and it's denied and then enters a plea bargain, that

cannot be appealed because the judgment is a judgment by agreement and there's no error. So for a juvenile to have a review of the civil equivalent of a motion to suppress, there has to be a trial where the evidence is objected to at trial. And I don't know whether we can fix that or not.

Have you had any cases like this Judge Brister?

HON. SCOTT A. BRISTER: I don't do family and I don't do juvenile.

MR. MARKS: Would this be statutory?

CHAIRMAN SOULES: Well, the Code of Criminal Procedure is what governs the adult prosecution, and this is accommodated in that Code of Criminal Procedure.

MR. ORSINGER: Juvenile proceedings are controlled by the Family Code, and I don't think that any of the procedures in the Code of the Criminal Procedure apply to juvenile proceedings. I think that they're under the civil rules. And a possible place to fix this is in the Family Code, but that requires the legislature. And I don't know

why you couldn't do it in the rules, because the Court would have jurisdiction over it as long as there's a bona fide case in controversy. And so I would presume we could adopt a rule that said that the judgment would be appealable to this extent, even if it's a consent judgment. I don't know. I've never thought about it.

CHAIRMAN SOULES: Well, I guess maybe we can refer that to the --

MR. ORSINGER: I'll tell you, a logical place to refer it to would be to Professor Dawson at the University of Texas Law School, because he's the editor of the juvenile report, you know, that goes out to the lawyers who practice juvenile. And he is the shepherd for legislation that relates to juvenile prosecution. "Prosecution" is the inappropriate word for that, but the juvenile proceedings. And I think he is probably the leading visionary on juvenile law in Texas and I think he would be an excellent resource if we want to do this, and he could very easily draft something that would get the job done. That's Professor Robert O. Dawson at the

University of Texas Law School.

CHAIRMAN SOULES: Okay. We'll write to Professor Dawson and ask him for his guidance on how, either by rule or by legislation, whether this should be addressed, and if so, how. Any disagreement with that?

All right. And then, let's see, the next one is -- I guess this is probably history too because it's in the TRAPs. Let's see, the Supreme Court --

MR. MARKS: Which one?

CHAIRMAN SOULES: I'm sorry, we're on page 43. And I don't know whether this got fixed, Richard, and maybe it has been. The Supreme Court can assess sanctions for frivolous appeal whether or not the court renders a judgment, but the -- let's see, the court of appeals cannot. So if an appeal is taken to the court of appeals over which that court has no jurisdiction, according to this opinion, the court of appeals cannot impose sanctions because it cannot render a judgment. I don't think we can fix it, if it's not already fixed. I just mainly wanted to track it to see if it did get fixed. If

not, we'll carry it to another year. Does the rule say that?

MR. ORSINGER: I don't know. Lee, what do you think?

MR. PARSLEY: 45 and 65, I think, are your rule numbers, and I think it's fix. The appellate rules say that the court may assess sanctions if the appeal is frivolous in both the Supreme Court and the court of appeals.

CHAIRMAN SOULES: It doesn't say as a part of the judgment in either court?

MR. PARSLEY: Right.

MR. ORSINGER: It doesn't say it has to be part of the judgment. It says it can be on the motion of either party or on its own initiative.

CHAIRMAN SOULES: Okay. So we don't have this problem anymore. Next is -- that's done. What else? Okay. So we've done 4. We've done 21. We've done 166a, 166d. That's 173, we've done that. 177b. TRAP 40 and TRAP 182, we just did that. We did Evidence 503.

So that completes the fourth agenda and, as far as I can tell, all of the inquiries that we've had over the past many years.

The last item is a rule proposed by the Family Law Council regarding expert witness reports. Richard Orsinger.

MR. ORSINGER: Thank you, Luke. There has been a group, a task force that is a self-appointed task force that's been sponsored by or at least interfaced with by two Supreme Court Justices, Justice Owen and Justice Abbott, to consider ways to ameliorate the effects of the litigation process in family law. And a lot of ideas have been kicked around. Nothing specific has been done, but one of the ideas that was discussed was the idea of allowing evaluation experts to testify or to present evidence in family law proceedings through verified reports as opposed to having the witnesses come in live. And the Family Law Council has considered that issue in the last two weeks and has come up with this rule, which we voted on by telefax this past week, and the vote was about 15 or 16 in favor of this proposed rule

and about eight against. So it's running two to one in favor of this rule.

And the gist of this rule is that if you have a divorce suit, which is what Title 1 covers, is divorce and annulment, you can put the evidence of a qualified valuation expert on in a trial or hearing through a verified report. Now, there are several different instances where that procedure exists in Texas that we have as paradigms. One is the reasonableness affidavit under the Civil Practice and Remedies Code, which requires you to file the affidavit and then the other side has to file a controverting affidavit, and if they do file a controverting affidavit, the original affidavit is not admissible. If they don't file a controverting affidavit within a certain time, the original affidavit comes in and you cannot object to it, nor can you controvert it. That's my understanding of that procedure.

Another paradigm is the one that we adopted in our foreign translation where you have an affidavit supporting one translation, you have an affidavit that's either objecting

to that or supporting a different translation, and it's elective with the trial judge whether to let in one affidavit, both affidavits, or require both witnesses to testify live.

The third paradigm exists in the Family Code in paternity cases, which are now called parentage cases, and there's a specific Family Code provision that says a verified report of a parentage testing expert is admissible in evidence of the contents of the report for the truth of the matter stated. There's another provision in the Family Code that says that the experts have to be qualified. So the court has to say these people are qualified, but the verified report comes in without a sponsoring witness. Additionally there's yet another provision that says that in those cases you can prove up pre- and postnatal care expenses with unauthenticated bills and they are presumed to be reasonable and necessary, and they come in for the truth of the matter stated. So basically you have completely unauthenticated bills coming in for those purposes, and the other side is free to controvert it, if they wish, but anyway, the

exhibits speak for themselves.

So we floated some of these alternatives around and ended up with this alternative which allows the proponent of a valuation expert in a divorce to file a verified report. It's stipulated that the expert has to be qualified. And this is limited to the value of an asset or property right, so it will not go beyond valuation testimony. It has to be filed at least 60 days before evidence is first presented at the trial or hearing of the case, and that's the phraseology that we borrowed from the reasonableness affidavit in the Civil Practice and Remedies Code, and you have to serve copies on everybody else. That's subdivision (a)(i).

(a)(ii) says that the report is not subject to an objection that it is hearsay, but they're subject to subparagraph (c). The contents of the report, the report and the contents, are subject to all other objections to its admissibility, which could be made if the contents were offered in evidence through the testimony of an expert at trial. So what

that means is that the report is supposed to replace the testifying expert, but that doesn't mean that stuff in the report could come in if it was inadmissible were the witness live.

And an obvious instance of this would be an expert report that contains hearsay that's coming into evidence. There will be certain instances in what an expert says that's hearsay may come in. For example, if the expert talked to one of the parties and wrote into the report what they said and it's offered by the other side, it might be admission of a party opponent. There is also case law that an expert is entitled to develop to some extent on direct examination the basis for his or her opinion, and some cases have held that hearsay can come in as an explanation of how the expert arrived at his opinion. In the Birchfield case, the Supreme Court says that you shouldn't wholesale let in hearsay, but apparently there are instances in which it is proper.

We're not attempting to predecide that. We're just saying that if there's stuff inside

the report that would not be admissible were the expert testifying live, it's not any more admissible just because it's in the report.

Under subdivision (b), within 14 days of service of a copy of a verified report, you can give notice to the proponent that you desire to depose any expert whose opinion is reflected in the report. And that particular notice is not necessarily a deposition notice, but it's notice that I intend to depose your expert, and you don't have to specify a date, time or place. When you give notice, you would schedule the deposition according to the ordinary rules of discovery, and the party who filed the verified report has to produce the expert in the county where the lawsuit is pending. So if the expert is from across the state or from the across the country, the proponent has to offer the expert up at their own expense for cross-examination in the form of a deposition.

The purpose behind this is that right now, if you want expert testimony to come in at trial, you have to put him up on the witness stand and subject him to

cross-examination. If we're going to let the verified report in and the witness is beyond the subpoena power, the only cross-examination the other side is going to get is through a deposition. And we didn't want to put the cost of bringing the expert to the deposition on the party who is opposing the testimony, but the deposition expense is at the cost of the party who is taking the deposition. At any rate, this preserves the right to cross-examination for witnesses that are not within the subpoena power of the court. And the parties by agreement can establish a place to take the deposition outside the county where the suit is pending. It doesn't say "pursuant to court order" and perhaps it should, as well as another alternative. And if the proponent of the report doesn't produce the expert for deposition, then the report cannot be admitted. So it's our view that we preserve the right of cross-examination in some respects there.

Subdivision (c) has to do with objecting to the report. It has nothing to do with cross-examining the expert. Within 21 days of

service, which is an extra week beyond notice of intent to depose, the opposing party, if they have objections, they have to file written objections to the report or any specific parts of the report with the clerk. And those objections have to be determined by the court before the report is admitted into evidence. Nobody can object to the report or its contents other than in this manner. And that cutoff is there because the proponent of the report, we felt, would be entitled to know whether they're going to have to bring their expert to trial or not. Is the report going to come in? Is it going to have parts of it that are cut out that are so serious that the report is not functional, in which event you can arrange to bring your witness. So we want the objections to be done after the report is filed and on the record, but we don't want people to be able to sandbag their opponents and make the objection for the first time in trial when it's too late to get the evidence in in the conventional fashion. Okay. So that's (c).

Now, in (d), (d) says that no matter what

happens to these verified reports, anybody can offer sworn testimony for or against any report. Now, under the Civil Practice and Remedies Code, if you don't file your sworn objections to the reasonableness affidavit within the specified time, you cannot controvert it at trial even with your own live witness.

HON. SCOTT A. BRISTER: That's not right.

MR. ORSINGER: Is that wrong? I thought that's what he said.

HON. SCOTT A. BRISTER: If it's enough evidence to support a verdict.

MR. ORSINGER: So you think it still comes in but it has no eveidentiary import?

MR. McMAINS: No. It has evidentiary import and is sufficient in and of itself to support it.

MR. ORSINGER: If it's controverted by an affidavit, I thought that was neutralizing.

HON. SCOTT A. BRISTER: If it's controverted by an affidavit, canceled. If

the affidavit is filed, then it's enough to support a verdict. That doesn't mean that I can't argue against it. I can't call witnesses against it, and the jury can't award less than that.

MR. ORSINGER: Oh, so even if I don't object, I can still controvert it?

MR. McMAINS: Yes.

MR. ORSINGER: Then I misstated that. I withdraw my comment.

HON. SCOTT A. BRISTER: Just the last sentence?

MR. ORSINGER: Yeah.

MR. BABCOCK: You don't have to go over it again.

MR. ORSINGER: The idea is that you can controvert it freely without any advance notice, so everyone is just going to have to live with the fact that the other side may bring in a witness to controvert. Now, there are some people that just think this is a horrible idea. But my view of it is that in cases where there's a lot of money on the table on valuation issues, that people are going to bring their witnesses in live

anyway. And especially if you're the opponent of a report, I would likely, as a matter of strategy, not try to force them to bring their live witness. Let them have a report. Let me have a report. And then I'll bring my live witness, and I'm the only guy there with a live witness. So both reports are coming into evidence, but I've got live testimony. So I don't see that it's ever to my advantage to force the other side to bring their people in, and I can cross-examine them on a deposition.

MR. BABCOCK: Richard, is there a requirement, and I may have missed what you said, in this proposed rule that the final report that is submitted to the court has to be available to the opponent prior to the deposition?

MR. ORSINGER: Well, it follows, because the whole timetable starts with the filing of the report. So when the report is filed, you have two weeks to give notice that you intend to take a deposition. You have three weeks to file objections to the report. So you should never be in a situation where -- now, if you take the expert's

deposition just in the ordinary course of practice and then after that they file a report, then --

MR. BABCOCK: -- you have another shot at it?

MR. ORSINGER: -- things are out of sequence, but you have another shot at it.

MR. BABCOCK: And if you took a deposition and then he filed an amended report after that and filed it with the court, then you would have another shot at him again, right?

MR. ORSINGER: Well, the rule doesn't say that specifically.

MR. BABCOCK: But that's what happens, because you take a deposition and you punch a bunch of holes in his report, and then he does another report, and that's what winds up on the court's desk.

MR. ORSINGER: All right. Why don't we say under (b), "any other party may, within 14 days of service of a copy of a verified report or amended verified report." That makes it clear that if you have an

amendment that you have a whole new timetable on the amended report.

So at any rate, it's my expectation that this is going to find most of its activity in the cases where there's not as much money at stake and where the burden of bringing your appraisers down, which I think are largely going to be real estate appraisers, is just not warranted. And people don't mind having appraisal reports in and letting the judge look at them.

MR. McMAINS: Is this limited to family law?

MR. ORSINGER: Yeah, Title 1 of the Family Code, so you may not care.

MR. BABCOCK: That was the point of his question.

MR. McMAINS: No. The only other question I have was, I mean, are you trying to just have a deferential treatment or trying to get a recommendation that there be a deferential treatment in the Discovery Rules for the family law cases?

MR. ORSINGER: Well, let me put it this way: It's our view that this might be

too controversial to adopt for general civil litigation. But if it's not, we're not saying that this procedure would not be worth trying in ordinary civil litigation. But we don't want to fight enemies that we don't have to fight.

MR. McMAINS: But you're just talking about -- is it limited to valuation testimony?

MR. ORSINGER: Only valuation experts.

MR. McMAINS: Because all I was thinking of is, you know, in, quote, property damage cases, lost profits, et cetera, a similar procedure might conceivably be apt to be -- might work in a civil case, an ordinary civil case, a general civil case.

MR. ORSINGER: I'm perfectly prepared to extend this or to treat this as an experiment and revisit it in a year or two. And if we've ruined everything, then don't do it. And if it works well, then expand it to all civil litigation.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: I've got three questions. Why do you have to give 14 days' notice that you intend to take the deposition and then later on do the deposition notice? What's the purpose of the 14 days?

MR. ORSINGER: Well, are you saying why do you have to say within 14 days that you want to take a deposition?

MR. HAMILTON: Right.

MR. ORSINGER: Well, I'll have to say I don't remember the rationale for that. In other words, why couldn't you do it three days before trial?

MR. HAMILTON: Well, or just do it by normal notice.

MR. McMAINS: My guess is, Carl, the purpose of the notice of intent to take it is so he can make arrangements for the deponent to come, so that he has in essence, you know, some notice with some time left before trial.

MR. BABCOCK: That's not what the rule says, though, I don't think.

MR. McMAINS: So they have dates.

MR. BABCOCK: The rule says you just have to give notice of intent that you're going to take his deposition because they filed the report, right?

MR. HAMILTON: That's just notice that you intend to take it at some time in the future.

MR. McMAINS: No, I understand that. All I'm saying is, but isn't that -- I mean, the only reason it made any sense that you would want to know that early is because you're down to 45 days from trial based on their timing, I mean, you've got 14 days to give notice of the intent, and that's after -- and you have got to file the thing within 60 days before trial, so you're down to 45 days before trial to arrange a deposition, and I assume the idea is that if you -- otherwise, if you just want to notice a deposition and you're entitled to it and you bring him there and you just give him five days' notice.

MR. ORSINGER: Well, if they can't get the expert for the deposition, they can't use the report. So if someone were

artful about the way they did this, they would issue a deposition notice seven days out and they would be in another trial or hearings for for every single day between then and trial and then the expert report couldn't come in because the deposition didn't get taken or something.

MR. HAMILTON: Is that a prerequisite, though? I mean, if you don't give the 14 days' notice, you don't get the deposition if you notice it later?

MR. ORSINGER: No.

CHAIRMAN SOULES: What's the consequence for missing this 14-day period?

MR. ORSINGER: Well, I think the consequence is that you're falling under the regular rules that would not put the obligation on them to deliver the expert for your deposition in the county of the lawsuit.

In other words, if the guy lives in California and you do a normal deposition notice, you're either going to have to fly out to California or get a court order that makes him fly in.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I just have a general concern about special rules of discovery being developed outside of the General Rules that apply to all cases. That's one problem. And secondly, it's something that was alluded to earlier, I don't like the idea of something like this being put in because I think it would be a real bad idea in the general litigation sense. And I would hate for it to be looked upon as a precedent, you know, look at what they've done in the Family Code, or that sort of thing, because that may have some impact down the line and people will forget that when it was passed it was specifically intended only for family law. That's my problem with it in general.

CHAIRMAN SOULES: Buddy, and then I'll get to Judge Brister.

MR. LOW: Richard, you talked about putting in a supplemental report, you know, a 14-day supplemental report. But one of the problems is it doesn't key back to the 60 days, you know. You've got 60 days back here. Would this supplemental report have to be, then, 60 days prior to trial? I mean, you

could crowd yourself if the supplemental report came in 14 days and it's not but 20 days till trial. So if you're working something out, you may need to work out something in regard to the 60 days. And is there any requirement in there that the person who files the report, unless it's objected to or something like that, waives his right to call that person? Because you may lay behind the log and file the report and somebody says, "Man, that report is crazy. I'll just let that in. And my man is going to testify how crazy he is." Well, but you're going to call him live. And if the other lawyer knew you were going to call him live, he would probably have told you. Isn't there an element of being able to lay behind the log that you're talking about? Is this in lieu of being able to call him live, or was that discussed?

MR. ORSINGER: No, it's not intended to be in lieu of that, because we wanted people to be able to have traditional litigation if they wanted to. But we wanted them to have the opportunity to bring in the expert reports without sponsoring the

witnesses they weren't willing to.

MR. LOW: But it seems to me you should then come forward and let them know so they can then make the decision of whether they want to take his deposition. You've got two things that you want to take their deposition for. One is in regard to the report; the other is if he's going to testify live.

MR. ORSINGER: I'm fearful, though, that people won't use the report at all if they have to make a decision months before trial.

MR. LOW: I understand. I don't disagree with you. But there is that element. That's all.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: I like the concept because I think experts are the most expensive part of litigation. And as I understand it, because I don't do family cases, but these are experts, I would assume, you have got to have in every case?

MR. ORSINGER: If you don't

agree on the values. The spouses can testify to their opinion of value, but typically -- I mean, the classic example is that I've got a real estate letter opinion or I've got an appraisal report that I paid $250 for. And the question is, do I have to pay the guy to drive down there to testify for five minutes to get his appraisal into evidence anyway?

HON. SCOTT A. BRISTER: I would think there would be a distinction between tangible and intangible assets.

MR. ORSINGER: Well, I can tell you that part of our controversy was the idea that someone might be valuating a business in an appraisal report, and so there were some people that would have felt better about it if it was just real estate or furniture. But what's wrong if somebody is willing to live or die by an appraisal report on the value of a business? Why not let them?

HON. SCOTT A. BRISTER: Well, the reason we got Civil Practice 18 on medical expenses, there are several reasons. Number one, they're routine. They're almost all personal injury cases. Number two, they're

out of pocket or covered by insurance, which means out of pocket people don't usually just pay stuff out of pocket, so they'll have the right to recovery at trial. That doesn't make sense. Or if it's hospital or other stuff paid by an insurance company, you can go to jail if you defraud those people. In other words, there are built-in protections that tend to make people not want to fraudulently run those up. And number three, they're usually not really contested, because the fees are what the fees are.

But we don't do that on anything other than expenses because it got to be a waste of money to make the plaintiff routinely on small personal injury cases bring somebody down at $200 an hour to prove up a bill that wasn't really going to be anything other than just harassing them saying you can't say it was caused by this wreck or not. So it wasn't cost effective to prove those up, and that's why we did this.

It seems that me that real estate stuff, you know, you have pictures of comparable properties or tangible properties, I'm saying

the jury can look at that and see does it look like the same or look a lot different, and there's probably not much value in having the people come down.

It just seems to me that tangible -- intangible property like a valuation of a business is a whole other thing, but you know, most of your colleagues feel it's fine. I do think it makes sense to try to make the family law cases reasonably more accessible to people and cheaper to try, if they need to. But I'm just concerned about how well that's going to work on intangible assets.

MR. ORSINGER: Well, I could be wrong, Scott, but I think that if you had an intangible asset that would require a business appraisal, that there's going to be money in the case and that people probably won't forego bringing their sponsoring witness in. That's just an assessment. Without having had any experience with a procedure like this, I can't say that for sure. But those usually involve money, and I think that lawyers that have the money are going to want to bring a live witness down. And so I think this is kind of

a self-correcting mechanism, and it's going to end up getting used most in the cases where the testimony is not worth paying for but you need to have it in order to get some evidence in. I could be completely wrong. There may be a new cottage industry of artfully writing reports, you know, that I don't know because we just don't have experience with it. But my personal view is that we ought to try it as an experiment at least. And if it doesn't work, we can try it get rid of it. And if it does work, then we're way ahead of the game.

MR. LOW: But what you are going to find is evaluating a lawyer who gets divorced, and that kind of hits closer to home. And they start evaluating the practice and everything. I've had them evaluate some off-the-wall stuff; and a doctor's practice. I mean, I think that your smaller cases, and I've had plenty of those, where, you know, you've got chairs and tables and stuff like, that usually the people testify as to value. They don't even bother with experts. It's generally the cases where there is money, something -- I mean, you're not going to --

really, a car, people don't -- the ones I've been involved in don't get into too much disagreement, a couple of hundred dollars is of the difference in the value of a car. But I think you're going to find it used more in big cases where you're valuating a Ford dealership or you're evaluating a law practice or a medical practice. That's what I believe.

MR. BABCOCK: It seems to me, Richard, that the evil that this rule is seeking to cure is expense in small cases, and it does seem to me that this rule will ameliorate some unnecessary expenses, so that's good. It also seems to me, though, that in the big cases that Buddy is talking about that this rule can probably be manipulated by both sides to increase the costs. So I think our Committee has to decide whether or not the benefit that will flow to the small cases is worth the potential harm in the big cases.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: Did you say earlier that the expense of the expert has to

be paid by the person taking the deposition?

MR. ORSINGER: No. I didn't say anything about the hourly rate. All I said was that the proponent has to pay to get the expert there in the county of suit. But the party taking the deposition has to pay the cost of the deposition like they would in any circumstance.

MR. HAMILTON: The proponent of the expert has to pay?

MR. ORSINGER: Yeah, to get the expert there in the county of suit.

MR. HAMILTON: And any fees the expert may charge?

MR. ORSINGER: No, we're not talking about fees, because local practices are different about that. Sometimes you have an agreement that I'll pay for your experts and you pay for mine, or I pay for my experts and you pay for yours, or sometimes we don't have any agreement and we have a hearing and the judge does something. We're not attempting to predecide that. All we're saying is that if you're trying to get an affidavit in and the other side is going to do

their cross-examination in a deposition, it's the proponent of the report's expense to get the expert there in the county.

CHAIRMAN SOULES: My curiosity, I guess, is as follows: This has got a lot of procedure built in. This has to happen in this many number of days and who has got to pay who has got to come. Wouldn't this work okay if we just said that these value reports will be an exception to the hearsay rule and have on whatever terms, not hearsay within hearsay, but the opinion evidence itself, and then do something like a 902(10) affidavit? And then just try to make it fit other practice, fit the business records practice.

I mean, this expert who writes this report is going to come and say, "I relied on this information and this is my opinion." And why should he have to come to court to say that to just make a record just like, you know, we've got the business records exception to the hearsay rule and then we've got 902(10) affidavits, because everybody knows that this testimony is going to be given anyway, so you can do if by affidavit and not get into it.

And so if that's done, then these valuation reports are not hearsay except they're subject to objection for hearsay opinion within their content, except as that may be alleviated by, what, 702 or 703, that an expert can rely on hearsay. So we've sort of got a fabric in the Rules of Evidence that would be accommodating of this practice if the report itself were not hearsay.

MR. ORSINGER: Well, two responses to that. Number one, that doesn't preserve any right of cross-examination for the expert that's outside the subpoena power.

CHAIRMAN SOULES: Well, but if you want to disagree with the 902(10) affidavit or the business records and you want to take the custodian's deposition, you can go and do that. That practice is available. I don't think that's unique to this issue.

MR. ORSINGER: Well, as I understand the policy behind the business record exception, it's presumed that people keep accurate records in business because you have to have accurate records in order to do business well. And if the recordkeeping that

businesses keep in the ordinary course of business is based on personal knowledge, then if it's good enough for commerce, it's good enough for legal evidence. This is different. These guys, these are experts who are hired to value specific cases, and you can't say that there's --

HON. SCOTT A. BRISTER: They don't have a business apart from litigation.

MR. ORSINGER: Okay. So the expectation of reliability from the ordinary course of business in my view is absent when you have a testifying expert. Now, that's just a policy argument, obviously, but I can tell you that people are a little bit nervous that these testifying experts, you know, are constrained only by their own opinions basically; and that we're talking about some very subjective things here.

We're not talking about a business record that contains information that's based on personal knowledge. I don't know. I mean, on the other hand, if they're medical records, if the business records are medical records, you're going to have expert opinions in there

but they're going to be expert opinions of physicians and other people and they have to be based on personal knowledge, I believe, to come in under a business records affidavit. You couldn't have somebody relying on a bunch of hearsay in a business record affidavit and bring that in as expert testimony. Is that right? I don't know. This is a little qualitatively less reliable, I would think, than business records.

CHAIRMAN SOULES: Well, I understand that, but of course, a lot of things are. And most of the hearsay exceptions where they are declaring it is immaterial are situations where there's unusual or exceptional reliability of the information. Of course, representation as to character, that's just what somebody says. That's just about as amorphous as anything could be. Then there's the hearsay objection where the availability of the declarent is immaterial. So there are some that are just off the wall. What would be wrong with just making these reports a hearsay exception under 803?

MR. ORSINGER: Well, part of the cost of doing that is that because presently to get that expert testimony in, I have to put my witness up. And he gets to cross-examine him free of charge by the other side. They don't have to fly to California or anything. I either have to take the deposition on my nickel or I've got to bring him to the courtroom where the cross-examination happens for free. If we bring the expert report in on an affidavit and I'm not required to ever offer him up, then the burden is entirely on the opponent to the report to undertake the expense of getting the expert into Texas or going to California or wherever they are and taking the deposition.

So what's happening here is that we're shifting the cost of cross-examination, which is basically now on the proponent of the testimony, and now it's going to be on the opponent of the testimony, and I think that's a pretty significant factor.

CHAIRMAN SOULES: I'm sorry, we'll go to Rusty, and then back to you.

MR. McMAINS: I sympathize with

the issues, I think, that are presented with regards to the high cost of experts and such. But I tend to agree with John that we have resisted for all these many years in the Committee to make separate rules for different areas of practice apart from the justice court. I mean, basically, everybody -- I mean, a lot of people here represent different contingents of the bar that have different concerns in the types of practice they are. And we've struggled mightily to make the rules conform for everybody basically. And I just think that it's not just a question of experimentation. I think we'll in essence fractionate the process if we begin making special rules for special segments of the bar on the civil side. And I suppose, therefore, unless it were to be something of general use in the valuation area that would apply in other cases other than family law, I would oppose this. And I don't have enough time to try and conform it to make it generally applicable.

MR. LOW: Richard, if one of the concerns was the smaller cases, was there

any discussion as to any limit? I mean, you know, we have certain jurisdictional limits, monetary amounts and so forth. I mean, were there any, and I would assume there probably weren't, but the property that didn't exceed a certain value, you know, to make room for your smaller cases where somebody doesn't have to bring down a car appraiser or something like that as distinguished from your major pieces. Was there any discussion like that at all?

MR. ORSINGER: No. But remember that what we're talking about here is probably 99.9 percent bench trials, not jury trials, and that sometimes it's real speculative whether it helps a judge a lot to hear the proponent of the report come prove it up and then go through the cross-examination on it. And if you were to try to differentiate in terms of money, you know, the terms would be arbitrary.

MR. LOW: I was just wondering. I merely asked the question. You don't need to justify to me why.

MR. ORSINGER: Well, it wasn't, and I could be wrong, Buddy, and it may be the

opposite is going to happen. But I think if there's a really big business involved that both sides are going to bring live witnesses anyway. So I think this is a self-correcting mechanicism. The more money is in the case, the less likely these reports are going to be used by both sides.

CHAIRMAN SOULES: John Marks, go ahead.

MR. MARKS: What is the practice in smaller cases? I mean, are there stipulations that are done with respect to valuation? Is that a common practice?

MR. ORSINGER: It happens often, but there are a lot of lawyers who will refuse to do that. And because of the acrimony that exists in some divorces, sometimes there's no cooperation on any aspects of the case, even though absent those feelings you might see a practical advantage to a mutual agreement.

MR. YELENOSKY: Well, in that case, then, aren't they going to just end up all in person anyway? I mean, if it's due to the acrimony of the other attorney, then this

mechanism isn't going to work.

MR. ORSINGER: No. The acrimony is I'm not going to let you put this evidence on without taking maximum advantage of all my procedural alternatives.

CHAIRMAN SOULES: Let me get back to this: Suppose we considered just taking (a) and making it -- and there would have to be a little bit of rewriting on it, make that an exception to the hearsay rule. Now, I understand what you're saying about the deposition, but if the parties are going to rely on this report -- if a party is going to rely on this report, the other party has a lot of alternatives. They can take the deposition of the person who made the report. They can wait for trial and bring their own witness live to controvert this rather dull report.

MR. ORSINGER: And if he's within subpoena power, they can subpoena the adverse expert to come and cross him.

CHAIRMAN SOULES: Or subpoena him and cross him. And it seems that all the procedural, I call it baggage and I'm not necessarily being critical of it, to me seems

as a practical matter really unnecessary because there are so many other practical ways to handle that just in practice. And I see no problem, if we want to make it -- if we made it a hearsay exception under 803 for suits under Title 1, value reports under Title 1 of the Texas Family Code, and see how it flies, without loading it up with the baggage that goes here and see if it works. If it works, fine. If it needs to be revised later, revise it later. If it doesn't work at all, repeal it. If it works great in family law cases and we can see that it ought to be generalized, we can generalize it later.

But most of these things in (b) and (c) and (d), there are other mechanisms in the rules already and in the practice already that would take care of the same issues that these are trying to get at, and just take (a) and make it -- if we make it an exception under 803, you don't need to say "as defined in 801" and some words could come out, and it would be a pretty simple rule, and it would only apply to Title 1 and it would probably not be a bad experiment to try.

MR. ORSINGER: Well, would you be concerned that the proponent of the report will never know if it's going to come into evidence until he's in the middle of trial? Because when they make the offer and when objections are made, that's when you find out that you need to get the witness down there.

MR. BABCOCK: From California.

CHAIRMAN SOULES: Well, the lawyer that supervises the preparation of the report needs to make sure that it's not otherwise defective or flawed from admission in evidence.

MR. ORSINGER: Well, I mean, as a practical matter, the issue is going to be how much of the hearsay in the report is going to come in, and that's going to depend on your trial judge really.

CHAIRMAN SOULES: Right.

MR. ORSINGER: And you won't know that until the objection is made. The idea is, and I'm not fighting against making this an exception to hearsay under 803, I'm just saying the proponent is going to always have to have his expert on call for fear that

in the middle of trial some essential part of the report is going to get redacted and then we can't get there with the report any more.

CHAIRMAN SOULES: Well, when do you have to make the objections to the report under this rule?

MR. ORSINGER: Within three weeks of when you receive it.

CHAIRMAN SOULES: In other words, if you're going to object to hearsay within hearsay, you've got to make that objection within three weeks?

MR. ORSINGER: And the trial judge has to rule on it before -- well, actually the trial judge has to rule on it before the report is admitted into evidence, so the court could actually defer ruling until the middle of trial if they wanted to.

CHAIRMAN SOULES: I think that offers more mischief than just worrying about whether you get it into trial. Some good expert and some good lawyer crafting this report writes up all kinds of stuff into the report, and his or her opponent doesn't catch it and do something within three weeks, then

you've got all this stuff in the report that is now going to be in front of the jury that should never have gotten there but for the fact, or never would have gotten there, but for the fact that a lawyer with a docket of 200 family law cases, that some of them don't even know who their client is when they come to make proof --

MR. ORSINGER: It's a trap. There's no question.

CHAIRMAN SOULES: You've been there in the courthouse in Bexar County when they start calling some of these family cases and the lawyer has got 10 cases and 10 files in his hands and he can't pick his clients out until the judge calls the docket and somebody stands up, and "There's my client." Up to that point the lawyer has never met his client. It's all been a paralegal deal.

MR. ORSINGER: That is a trap.

CHAIRMAN SOULES: That is an unfair trap. Well, any further discussion on this?

Okay. Richard, you're going to stand on it the way it is, up or down?

MR. ORSINGER: I am. And I wish I could tell you that I had the authority to horse trade to another result, but I don't know what they would do with a straight 803 exception. But for me personally, I would like to try something and see if it works. And if that's the something, then I'm willing to try about it.

But maybe the council would not want to give up some of these safeguards. So my first proposal is to vote on that.

CHAIRMAN SOULES: All right.

MR. ORSINGER: And if that fails, then let's try something that's not going to ruffle too many feathers. And if that works, then we can expand it out.

CHAIRMAN SOULES: Okay. On the proposal as written, those in favor show by hands. One, two. Those opposed --

MR. ORSINGER: Wait.

CHAIRMAN SOULES: I'm sorry.

MR. MEADOWS: I just want to say, along with the vote, I think if the Family Law Council wants to try this, and that's who it affects, then we ought to let

them try it, so that's why I'm voting the way I am.

CHAIRMAN SOULES: Okay. Show by hands. Five.

Those opposed. Six.

Six to five it fails. Now, would somebody entertain making a substitute motion that this part (a), subject to rewrite, be made a hearsay exception under Rule 803 for Title 1 family law cases?

MR. ORSINGER: I make that motion.

CHAIRMAN SOULES: Discussion.

MR. LOW: I want to add that I join Rusty and John in the sense that I think it's a stepping stone to something we shouldn't do, so therefore I don't feel -- if I thought it could be just isolated from the rest of the practice and just family law and say that's not the way the law goes and it's different, I would agree to let them control it. But I think it would affect the other law practice as well. Thank you.

CHAIRMAN SOULES: Any other further discussion?

MR. McMAINS: You're talking about on the hearsay part?

CHAIRMAN SOULES: Yes.

MR. McMAINS: My concern is that our hearsay exceptions are longstanding recognized. They're all in codified form now, but they are based on general exceptions to the hearsay rule that we acknowledge had common law basically as to why there was some reliability and trustworthiness and/or necessity. Now, if we start willy-nilly dealing with exceptions to the hearsay rule as mere policy things for convenience purposes and expense purposes without any of the safeguards with regards to some basis for reliability, I mean, it's something you can do, but I think it is a bad place to start and sets a bad precedent, because the next time somebody is going to come in and say, you know, in cases under $20,000 or $10,000, we should have an exception to the hearsay rule where people should be able to testify by affidavit, and you know, that the affidavit should be admissible as live testimony.

I mean, there's kind of no stopping point

when you start tinkering with hearsay exceptions. From that standpoint you have just basically said hearsay is an arbitrary rule that we will adjust accordingly. I happen to be a purist, I'm afraid, in regards to that part of the jurisprudence, and there are reasons for the hearsay rule because it is unreliable, and I think that there is nothing more unreliable than a hired expert's report, and I do not think it should be given reliability by a simply arbitrary act on an expense grounds.

CHAIRMAN SOULES: Anything further? Okay. Those who would support this with some rewriting as an exception to the hearsay rule under 803, show by hands. One. Only one.

Those opposed. 10. 10 to one, it fails.

MR. ORSINGER: Thank you.

CHAIRMAN SOULES: Do you want to try to do anything else with this Richard?

MR. ORSINGER: No.

CHAIRMAN SOULES: I guess there's nothing else we can do.

Are we done? Well, that completes four

years of work. I thank all of you for all your dedication and hard work, and I know the Court also thanks you. We've heard from some of the justices here in the last day and a half. They've all expressed their thanks themselves. I think we've sent to the Court some good information, as Chief Justice Phillips remarked this morning. And I hope they consider it fully. I believe they will, and we'll see what happens. I guess we're adjourned subject to recall, those of us who may get recalled.

MR. McMAINS: I think we've all been recalled.

HON. SCOTT A. BRISTER: Some may be retreaded.

CHAIRMAN SOULES: I hope the Committee is not changed much, other than maybe the chair. If they want to change the chair, they can certainly do that. But I have enjoyed working so much with all of you and I really appreciate all of your hard work. Thank you.

MR. MARKS: Well, I think we've had a great leader in Luke Soules.

(Applause.)

(Meeting adjourned 10:30 a.m.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, WILLIAM F. WOLFE, Certified Court Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on September 20, 1997, and the same was thereafter reduced to computer transcription by me.

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Given under my hand and seal of office on this the 2nd day of ~~September~~ October, 1997.

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