M I N U T E S

ADVISORY COMMITTEE
FOR
THE SUPREME COURT OF TEXAS

NOVEMBER 12-13, 1982 -- 9:30 A.M.

TEXAS BAR CENTER
AUSTIN, TEXAS

merits and requests for offici... at the prehearing conference. A... date prior to the hearing on th... for the exchange of witness list... prospective testimony, and ... documentary evidence pursua...

Interested members of the gen... tend the hearing are encourag... office of the TACB in Austin, ... or the regional office in Odess... two prior to the hearing date i... ting since continuances are gra...

Issued in Austin, Texas, on October 21, 1982.

TRD-828233 Bill Stewart, P.E.
Executive Director
Texas Air Control Board

Filed: October 26, 1982
For further information, please call (512) 451-5711, ext. 354.

Banking Department of Texas
Application To Acquire Control of a State Bank

Texas Civil Statutes, Article 342-401a, requires any person who intends to buy control of a state bank to file an application with the banking commissioner for the commissioner's approval to purchase control of a particular bank. A hearing may be held if the application is denied by the commissioner.

On October 19, 1982, the banking commissioner received an application to acquire control of American Bank of Commerce, Grapevine, by Ronnie Thomas, Lubbock.

Additional information may be obtained from Robert E. Stewart, 2601 North Lamar, Austin, Texas 78705, (512) 475-4451.

Issued in Austin, Texas, on October 19, 1982.

TRD-828118 O. A. Cassity
Assistant General Counsel
Banking Department of Texas

Filed: October 20, 1982
For further information, please call (512) 475-4451.

Office of Consumer Credit Commissioner
Rate Ceilings

Pursuant to the provisions of House Bill 1228, 67th Legislature of Texas, Regular Session, 1981, the consumer credit commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Texas Civil Statutes, Article 1.04, Title 79, as amended Texas Civil Statutes, Article 5069-1.04.

		iction	ommercial(4) over $250,000
			18%
			18%
			22.94%
Annual(5) Rate Ceiling 10/01/82-12/31/82		24%	24.96%

(1) Dates set out above are inclusive.
(2) Credit for personal, family, or household use.
(3) Credit for business, commercial, investment, or other similar purpose.
(4) Same as (3) above, except excluding credit for agricultural use.
(5) Only for open end as defined in Texas Civil Statutes, Article 5069-1.01(f).

Issued in Austin, Texas, on October 25, 1982.

TRD-828194 Sam Kelly
Consumer Credit Commissioner

Filed: October 25, 1982
For further information, please call (512) 475-2111.

Supreme Court of Texas
Announcement of Meeting

The Rules Advisory Committee of the Supreme Court of Texas will meet at the Texas Law Center, 1414 Colorado Street, Austin, on Friday and Saturday, November 12 and 13, 1982, at 9:30 a.m. daily, to consider proposed amendments to Texas Rules of Civil Procedure.

For further information contact C. Raymond Judice, Administrative Director, Office of Court Administration, 1414 Colorado Street, Austin, Texas 78711, (512) 475-2421.

Issued in Austin, Texas, on October 21, 1982.

TRD-828195 Jim Hutcheson
Chief Counsel
Office of Court Administration

Filed: October 25, 1982
For further information, please call (512) 475-2421.

Employees Retirement System of Texas
Consultant Proposal Request

In accordance with Texas Civil Statutes, Article 6252-11c, and Texas Insurance Code, Article 3.50-2, the board of trustees of the Employees Retirement System of Texas

NOTICE OF MEETING
OF
RULES ADVISORY COMMITTEE

Texas Register
November 2, 1982

Present

MEMBERSHIP
SUPREME COURT ADVISORY COMMITTEE

(Terms 1/1/79 to 1/1/85)

✓ McCLESKEY, Mr. George W., Chairman
McCleskey, Harriger, Brazill & Graf
P. O. Box 6170, Lubbock, TX 79413

ADAMS, Mr. Gilbert T.
Law Offices of Gilbert T. Adams
1855 Calder Avenue & 3rd Street, Beaumont, TX 77701

✓ BEARD, Mr. Pat
Beard & Kultgen
1225 N. Valley Mills Drive, Waco, Tx 76710

✓ BULLOCK, Mr. Maurice R.
Bullock, Scott & Neisig
P. O. Box 1763, Midland, Tx 79701

✓ CUNNINGHAM, Mr. Joe Bruce
Hudson, Keltner, Smith, Cunningham & Payne
2300 Fort Worth National Bank Bldg., Fort Worth, TX 76102

✓ DAWSON, Professor Matt
Baylor University School of Law, Waco, TX 76703

✓ ELLIOTT, Dean Frank W.
Southwestern Legal Foundation
P. O. Box 707, Richardson, TX 75080

FISHER, Mr. Wayne
Fisher, Roch & Gallagher
2600 Two Houston Center, Houston, TX 77002

✓ GUITTARD, Honorable Clarence A.
Chief Justice, Court of Appeals
600 Commerce Street, Dallas, TX 75202

✓ JENNINGS, Mr. Frank L.
Jennings, Dies & Turner
P. O. Drawer 809, Graham, TX 76046

✓ MEYERS, Honorable James R.
Office of Attorney General
Box 12548, Capitol Station, Austin, TX 78711

✓ MOORE, Mr. Hardy
402 First National Bank Bldg., Paris, TX 75460

✓ SOULES, Mr. Luther H., III
Soules & Cliffe
1235 Milam Building, San Antonio, TX 78205

TARPLEY, Mrs. Beverly
Scarborough, Black, Tarpley & Scarborough
P. O. Box 356, Abilene, TX 79604

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Supreme Court Advisory Committee
(Terms 1/1/82 to 1/1/88)

√ BECK, Mr. David J.
Fulbright & Jaworski
800 Bank of Southwest Building, Houston, TX 77002

√ BLAKELY, Professor Newell
Univ. of Houston Law Center, 4800 Calhoun, Houston, TX 77004

√ DORSANEO, Professor William V., III
Southern Methodist University, Dallas, TX 75275

√ EDGAR, Professor J. Hadley
Texas Tech University School of Law
P. O. Box 4030, Lubbock, TX 79409

√ JONES, Mr. Franklin
Jones, Jones, Baldwin, Curry & Roth, Inc.
P. O. Drawer 1249, Marshall, TX 75670

√ KRONZER, Mr. W. James
Kronzer, Abraham, Watkins, Nichols, Ballard & Friend
800 Commerce Street, Houston, TX 77002

√ LOW, Mr. Gilbert I.
Orgain, Bell & Tucker, Beaumont Savings Bldg., Beaumont, TX 77701

√ McCONNICO, Mr. Steve
Scott, Douglass & Keeton
12th Fl., City National Bank Building, Austin, TX 78701

√ McMAINS, Mr. Russell
Edwards & Perry, P. O. Drawer 480, Corpus Christi, TX 78403

√ NIX, Mr. Harold W.
P. O. Box 679, Daingerfield, TX 75638

√ SMITH, Mr. Garland F.
Smith, McIlheran, Lauderdale & Jones
P. O. Drawer 1104, Weslaco, TX 78596

√ SPARKS, Mr. Sam
Grambling, Mounce, Sims, Galatzan & Harris
P. O. Drawer 1977, El Paso, TX 79950

√ SPARKS, Mr. Sam D.
Webb, Stokes & Sparks, P. O. Box 1271, San Angelo, TX 76902

√ TUNKS, Honorable Bert H.
Kronzer, Abraham, Watkins, Nichols, Ballard & Friend
800 Commerce Street, Houston, TX 78284

√ WALKER, Professor Orville C.
St. Mary's University School of Law
One Camino Santa Maria, San Antonio, TX 78284

√ WELLS, Mr. L. N. D., Jr.
Mullinax, Wells, Mauzy & Baab, Inc.
P. O. Box 47972, Dallas, TX 75247

√ WOOD, Honorable Allen

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MINUTES OF ADVISORY COMMITTEE

November 12-13, 1982

MINUTES

ADVISORY COMMITTEE
FOR
THE SUPREME COURT OF TEXAS

NOVEMBER 12-13, 1982 -- 9:30 A.M.
BOARDROOM, TEXAS LAW CENTER

Friday, November 12

MCCLESKEY: I would like to call to order the meeting of the Supreme Court Advisory Committee on the Rules of Civil Procedure. We welcome each one of you to the meeting and express to you the sincere appreciation of the fact that you have come here without compensation, at your own expense, and spent time preparing for the meeting and reviewing the agenda. I know that you can find more profitable things to do so far as economics are concerned, but let me point out to you that you have not been chosen casually to serve upon this committee rather you are invited here by the highest court of our State, the Supreme Court of Texas, you have been carefully chosen, a select group, privileged to make some real contributions to the administration of justice. We do appreciate your being here and being on time. I have two announcements I would like to make. The proceedings will be recorded. The notices sent to you indicated that we would meet in a different room for tomorrow, but rather than that we shall continue here because the meeting that had updated us that had been misscheduled for this room prior to the time we had asked for it has been cancelled and we shall continue here tomorrow. I believe you will find this room to be a more comfortable room. If you care to you can leave your briefcases here overnight. So far as parking is

concerned the parking building will be closed and locked at 6:00 o'clock this afternoon. In addition to that it will be closed and locked tomorrow at 12:00 o'clock and so on Saturday it's particularly important that you do not get your car locked up in that parking building, you wouldn't want to stay here until Monday morning.

We have present this morning with us some of the court members and others will be here during the day. I see Judge Campbell back here, I earlier saw Judge Wallace, Judge Barrow is here. Judge Sears McGee is here also. We will recognize Judge Pope in just a few minutes, but before doing that I would like to welcome to the Committee some new members that we have. This is the first time you have attended our meeting, Mr. David Beck of Houston, David would you hold your hand up? Here he is over here. Professor Newell Blakely of the University of Houston; he is here on this side of the table; Professor William V. Dorsaneo, III of Dallas, Bill is up here at the head table, Professor J. Hadley Edgar of Lubbock, Hadley we're glad to have you here. We also have Franklin Jones. Franklin I tell you I'm impressed with these judges but I'm impressed with the good lawyers too, incidentally. It's good to have you here this morning. Mr. Steve McConnico of Austin, he's back here; Rusty McMains, he's from Corpus Christi, formerly of Houston, it's good to have you. Mr. Harold Nix, he's from Daingerfield, Texas and Mr. Sam Sparks of San Angelo. Sam Sparks of El Paso will you hold up your hand to make sure we don't get mixed up? And is Mr. Sparks of San Angelo here? I don't believe he's here yet, but he will be.

At this time I would like to recognize Judge Jack Pope. As you know Judge Pope went on the Supreme Court of Texas in 1965, and on May

16, 1975 became the liaison member of the Court to work with this Committee. Undoubtedly he is the most knowledgeable man concerning the Rules of Civil Procedure that I know. He works diligently upon this as he does all of his other work. He has prepared this agenda that you have before you, and I can assure you that I feel like an expert up here with him at my right side. Judge Pope has been assisted in this by his Administrative Assistant, Peggy Hodges, who sits second chair on my right. She has worked with us consistently down through the years and Peggy you have done a good job and we appreciate it. Judge Pope undoubtedly has a few remarks he would like to make. At this time I would like to recognize Judge Jack Pope.

POPE: On behalf of the Supreme Court we appreciate very much your presence, your work of the past, and your ongoing dedication to this very important project concerning the Rules. I want to say to all of who are here that the party this evening Allene and I will give honoring you, your wives, your bodyguards, or whoever, will be at 7:00 o'clock at the Austin Club. The dress is business suit, dinner dress if the ladies want to wear a long dress that's fine, nowadays everything goes, but those are the general instructions that Allene told me to give you. I know that we have a long way to go. Much work has gone into this. I wish I could say this is my product, but is Peggy's assembly of the work of many names that you have already read in this agenda. I was thinking yesterday, that probably in the history of Rules and in the history of Texas, there has never been gathered together a per capita more qualified, more gifted, more scholarly group than those of you who are right here. We do not want

to get ourselves in the position of making too many rules. I know the Bar and Bench are going to have to have some rest, because we hit them pretty hard on January 1, 1981. Hopefully we can get the bugs out of what we regarded at that time as some far-reaching changes, particularly on the appellate level and this trip we are trying to get the bugs out of that and to smooth things up, and I don't know whether it has occurred to you, but we have now gone through almost all of the rules and have brought them into this century - a thing that has needed to be done. I already can see some areas that my successor and you and your successors will need to attack, but if we can jab at this product that is before us, I think that we will contribute to the simplicity of the trial and appeal cases. The Supreme Court appreciates your work.

MCCLESKEY: Thank you Judge Pope, I feel it hard to stand in response to that but beginning now, we are getting into the work of the Committee, and I think you will find those of you who are attending for the first time, that you'll find open generally frank discussion taking place here today, you will find an attitude of trying to find the right answer rather than to carry a point. Those of you who have served on the committee before can verify with me that when we get through I think you will continue to be proud of the fact that this Committee does have a considerable amount of input in that the Court rather consistently promulgates rules that we can look back upon, and upon which this Committee has acted. With that beginning let me sit down and get to work here. You are already familiar with the agenda, the fact that it's divided into four groups of rules. The general

nature of those four groups is indicated in the material forwarded to you earlier. I would like for us to follow the practice here today of taking one group at a time, and I hope we can finish the first group, this group one on discovery procedures, by noon or shortly after noon. After which time we will go directly to group two, the appellate rules. With respect to this group one you will find that it has been thoroughly worked by the Committee on Administration of Justice and a number of subcommittees that have been there formed, have been in operation. About three years work has gone into the Rules that you have before you, and I have high hopes that it will not be necessary to discuss in detail every one of these rules. On the other hand we are anxious for you to be able to comment on any rule that you feel that it is necessary to be commented upon. The Supreme Court Justices who are here are interested in your comments, the comments and the reasons you give undoubtedly throw light upon the subject for them to finally take action. We do want to work with the rules that you want to work with, but in a effort to get this started, I have asked Luke Soules from San Antonio, to begin our discussion by outlining for us the needs for changes in this group of rules, the goals that were sought to be attained, methods of trying to reach those goals, pointing out the rules that are merely in the nature of editing the old rules without any substantive changes and on the other hand the rules which do contain substantive changes. After Luke makes his introductory remark, we are going to ask you to list for us the rules at that time that you think need specific discussion. We are going to list those and give them priority along with those the group discusses in going through our discussion. Luke, at this time I say to you I

have watched your work your's and Bill Dorsaneo's work, Bill Dorsaneo serves as the spokesman for this task force.

I've watched the work of you and your subcommittees. I have been most impressed by the thoroughness with which you've undertaken the job, the organization that you've set up to handle it, review and continuing review of suggested changes. I feel like a real expert just sitting next to you.

POPE: George will you let me interrupt you just one minute. I neglected to introduce Ray Langenberg at first, stand up Ray if you will over there and Gary Thornton. They are two of the young lawyers over in our Court who try to make me and us look good. If you need anything, a trip out to the airport, or whatever, why call on those gentlemen and they will help you.

MCCLESKEY: You know one other introduction, is Judge Judice still here? Yes, he's back here. Judge serves as the Administrative Director and has set up this meeting here and has made arrangements for the recording. I believe he is in charge of the printing of the materials, and generally sees to it that the work is done that makes the Committee operable and effective. Jim Hutcheson of the same office here will be with us full time, I think Ray Judice is going to leave us before too long to take care of other matters. Jim, we're glad to have you here also. Luke, pardon the interruption.

SOULES: It's really a privilege for me to be here with you outstanding lawyers to take care of this very important business or

try to help take care of this very important business that we're here about with the court. Starting with the discovery effort, I think some background may be helpful. Three years ago the Committee on Administration of Justice of the State Bar responding to some felt need to look into the discovery rules, appointed one subcommittee of about I guess, ten people, and those ten people worked through that -- what would that be 81-82 this last one 80-81 -- 79-80 fiscal year virtually without a report because, the more that subcommittee got involved into looking at the rules, the more it was like, oh like, the tar baby. You could put em down, you couldn't really make a report. We wound up that year stating several problems we felt with the organization of Rules of Discovery, and maybe some problems with the interpretations of the Rules of Discovery and recommending that the discovery effort be given top priority for the following year which was 80-81. In the Committee on Administration of Justice's 80-81 fiscal year, almost the entire general committee made up the discovery subcommittee, and the discovery subcommittee had ten sections. One of which for example, was that headed up by Patricia Hill of Dallas, to make a comparison in jurtaposition of every Federal Rule of Procedure with the counterpart state rule of civil procedure, so that as we went forward with our effort we would have a comparison readily before us. And then we had a section look at interrogatories rules, deposition rules, another for the deposition rules, another for the request to admit rules, another for the request for production rule, one on sanctions, one on protective orders, one on scope, and the scope section turned out to be the one had the largest effort expended overall. Those sections served that year and came out with reports at

the end of that year which became the foundation for the work of the Committee on Administration of Justice in the year 81-82 just over. Those foundation reports then were the subject, together with several other rules which we will get to talk to tomorrow, this miscellaneous group of rules that the committee dealt with. But the primary effort of the entire 81-82 fiscal year was on discovery and what had been done two years ago was just a foundation. We held nine meetings in fiscal year 81-82; that is almost 20% of the Saturdays of the lawyers that served for that entire year. We had tremendous turn out ranging in attendance from 40 approximately 40 to over 50 lawyers which comprised by far the majority of the Committee on Administration of Justice. The participation was very remarkable, and to give you an idea of the cross section of the people that did come almost without exception, and give input into this effort, I'm just going to name a few to give you an idea of the cross-section of the Bar, and the cross section of the State of Texas, which was regularly represented. Judge Curtis Brown of Houston, Jim Milam of Lubbock, Orville Walker, Professor Walker from San Antonio, Jack Eisenberg who now is the present chairman of the Committee on Administration of Justice from Austin, Pat Hill I've named from Dallas, David Kidder from Dallas, Richard Mithoff of Houston, Blake Tartt, Jim Branton San Antonio, Royal Brin of Dallas, Mike Hatchell of Tyler, and Judge George Thurmond of Del Rio. So we had lawyers from East Texas, West Texas, South Texas, Dallas, and North Texas, Houston, we had judges, we had lawyers on the plaintiff side, we had lawyers on the defense side, we had lawyers that engage primarily in business litigation, and because we had high attendance of lawyers from that cross-section, we had a

real active give and take exchange of ideas and a hammering out of understanding of the rules as they existed and a revealing of what problems should be addressed, a culling of those problems that were revealed in terms of deciding that they really were not a problem or they were best handled by the way the rules were already, down to those we felt were problems and are addressed, and there are not too many of those as a matter of fact in terms of real changes in the meaning of the rules as opposed to the organization and verbiage of the rules.

For an example of organizational difficulty, the Deposition Rules that are in your rule book that you are using now, are scattered from rule 176 through rule 215a. They are touched by almost, but by rules that scatter through that 40 odd rules. The Deposition rule that is in your agenda is one rule, and it pulls together, or attempts to pull together those many rules that are scattered through there. It's been awhile since I was a beginning lawyer, I don't know whether I've learned much in the meantime, but, it's very difficult to pull together all there is about depositions when you're first starting into taking depositions if you just have this set of rules that we are using now, because you turn from page to page and read and read and read, and find phrases and words and entire rules that affect the deposition but they're not pulled together. They now have been by the work of the Committee on Administration of Justice reported here.

Scope was partially contained in one single rule, which was supposed to be the Scope Rule, but it was also scattered into the rule on request to admit, the rule on request for production, the rule on interrogatories, and otherwise. So you have to select a procedural

vehicle in some instances in order to reach the information that you wanted as a matter of scope, because you couldn't get it through another procedural vehicle. It was available by way of discovery, but you had to do it right, and so you had to read all the various vehicles to understand and read the scope rules from there in order to know how do I go about getting it. Scope now is contained in a single rule. There are peculiarities of certain vehicles that give those vehicles a little bit of special treatment in some aspects with regard to scope, but those exceptions are in the Scope Rule. Here is the general scope of discovery of Texas, and if you use a request to admit, you can also reach this this, but it's all in one rule. Nothing hopefully has been obscured elsewhere. Sanctions say, there were certain sanctions for one kind, for failure to do some things in discovery and others for failure to do other things in discovery. Now then there is only one set of sanctions, and those sanctions apply to all refusals and failures or abuses of discovery. Texas provided no way in its rules to do foreign discovery. We found through the good work of Doak Bishop, who has written law review articles in the area of discovery in other sister states, in foreign discovery, that there is a Haig Treaty that tells civil litigants how they can make discovery in foreign countries who are parties to the Haig Treaty. But, the foundation for being able to use the Haig Treaty is you must have rules and statutes in your state in order to key into those procedures of international treaty, but we had none, and the Committee on Administration of Justice had written in the rules that are here now which will allow us to reach those international treaty provisions, and with the world shrinking in terms of business affairs

in particular. That certainly seems to be a substantial contribution from the Committee and from Doak Bishop. Later you will also see that he keyed our service rules to meet the same international treaty provisions, so that we can get service abroad.

Certain types of discovery proceedings would be on ten-day fuse, others would be on thirty-day fuse. Responses which to some extent which terminate rights or expose the lawyers or litigants to penalties, if not met. So one had to keep in mind, almost like the old appellate rules, a series of different dates or try to remember to which rule they apply. We have a uniform 30-day rule throughout the discovery process now for responses. Certain things in discovery, started -- matters in discovery started in different ways. Responses to interrogatories, I'm not sure I'm going to get these completely right but you will understand what I'm saying. Responses to interrogatories had to be within thirty days of service, service was hand delivery or by a citation or under the Rule 21, by certified mail or registered mail if you added three days, if it was mailed, and that was service, of course we know what service is. It's very clearly defined, but responses to request to admit had to be within ten days of delivery, so some responses started upon the event of delivery and other responses started upon the event of service. Service as I said is clearly defined in the Rules of Civil Procedure, and now all responses -- response time starts with the event of service. We started with rules that became effective in 1980 with some of the changes that have been carried forward in present rules, for example, we eliminated the motion to produce practice and substituted a request to produce practice in hopes the lawyers would upon receiving a

request to produce respond to it, and of course set out what you were to do. So that you didn't have to first go to a judge on a motion in order to get discovery. Now in the present discovery scheme, there is no event, no requested matter that requires first a judge ruling. The lawyers serves, whenever he serves requesting discovery, and only upon an objection is there any judge time consumed. You can in some instances, for example in connection with interrogatories, and this has been a practice for the last two years but is pretty much true throughout the rules now, when a request is made, the objection must be specific. The objection may go on to only a part of the request, if the objection goes to only part of the request, an affirmative response is required for the balance and that may get the job done. A lawyer, who made the request may find out that what he got is enough and what he didn't get is privileged, and he can't get it anyway and completely eliminates any need for judge time in connection with those requested matters. There have been abuses with the expense of litigation with much discussed, it has been discussed by court members and the meetings of this Committee previously, so we have tried to make everything in the discovery process something that can be easily done by lawyers who have any attitude towards cooperation at all. And it is made difficult primarily only by those lawyers who are really protecting the interest of their clients or being recalcitrant and abusive, and it makes its fairly easy to discover them. We will get to the sanction aspect in a minute, because it is mild to start with and then it get as hard as it ever was. One of the changes for example that we have put into these proposed rules, again as a matter of judicial economy and also, I think, as a matter of allowing lawyers

who will use these rules to effectively pretry a case without the participation of a judge, the scope of discovery now allows us to become witnesses that the other side expects to call to trial. Not just all persons who have knowledge of relative facts, (you don't have to tell me about the ones you're not going to call to trial) but you can actually ask the person to disclose who the witnesses are going to be.

SOULES (continued):

Also, you can by discovery get the other side's contentions. If you have a forepleading, and there are a lot of forepleadings around, you receive that. You're not now required, if these rules are adopted, to first file a set of special exceptions, and go over and use the judge time, spend your client's money if you're on hourly basis or your own if your on other basis, sitting around while other dockets are called and waiting just so that you can go up and have a judge decide which special exceptions are going to be granted and therefore require the other side to depose his contentions. You can ask for those by way of discovery and get them and if you get them there's no judge time involved. If you don't get them, at that point, you can file a motion for a more particular response. You may get a better response, still without judge time. The changes that are in the rules except where revisions have been added to the rules to codify the case law are mild in my opinion such as those that I've just talked about and Bill Dorsaneo who has been introduced to you earlier by Judge Pope or identified by him at least was our reporter and can pinpoint those where there are changes readily for you and will do so in just a moment. In connection with sanctions, it was the feeling of the Administration of Justice Committee that since an awful lot of the

burden of requesting and responding is now on the lawyers and the parties that there should be a mild step of sanctions at first which is beyond which the trial judge cannot go and then the entire scope of sanctions that we've had forever if that first order of the court is not followed. And so the first hearing that you have in court as a result of discovery matter the maximum sanctions that the trial judge can impose under the rules that are composed here are the expenses and costs and attorney's fees involved in the motion. That comes if you object to my request and I set your objection down and I prevail, I could get my cost and expenses. If you prevail on your objections, you can get your costs and expenses, but that's all. It allows us to go over and have real legitimate disagreements and the judge is not required to award costly expenses to either sides of the prevailing parties. It allows us to go over and have legitimate disagreements without substantial risk to the client of being misunderstood and it allows the trial judge to slap us on the chest if we're over there being recalcitrant and then if we continue to be so, we run the risk of striking things, striking defenses, default judgments, the whole spectrum of problem of sanctions that have always been present. I thought we were about through with this project at the fourth to the last meeting that we had of the COAJ in the '81-'82 fiscal year, and I think Bill did too. So we produced the final report, and we spent an hour and a half to two and a half hours on each of the final three meetings fine tuning the language in that final report. We hope to have your input today to fine tune anything that we haven't gotten fine tuned yet, to tell us of any glaring errors or omissions that we've made and to help us put together a scheme of discovery in Texas that will now be better organized, and to which, for example, a

starting lawyer can go and get guidance without having to read an enormous series of cases that may have surprising judgments in them. One last comment, we have received attention from the American Bar Association on our effort and members of the State Bar have been invited to the ABA National Conference on Discovery Reform which is next week here in Austin to reveal some of the effort that's been done in Texas over the past three years. And we did correspond with the ABA's effort, its task force, went through reams of material that they have produced about the problems of the federal rules and other state rules and tried to address them so they're interested in our experience too. With those opening remarks, I'd like Bill Dorsaneo to disclose to you specifically where we perceive that there have been changes.

DORSANEO: Thank you Luke. If I could direct your attention to page 20 of the booklet. You can see there a summary of the revisions which you may want to use to follow along. I'm going to resist the temptation to tell you everything that's happened over a three year period and try to hit the highpoint, but this outline will give you basically the general structure as proposed. With respect to the overall structure our current rules begin essentially the subject of discovery with number 167 which is production of documents and things. The rules do not begin with a general rule which sets the guidelines or standards for what can be discovered and things of that nature. I'm sure you're familiar with the federal rules which take a different approach and begin discovery with one general rule. The Committee on Administration of Justice virtually unanimously voted, I think it was unanimous, that we ought to have one general rule which is thought of

for the most part as one general scope rule and that ought to be the first rule. And that rule as proposed is number 166b. It would be inserted before rule 167 and would provide a lot of the information that any lawyer would need to know about discovery in general matter. With respect to 166b and what it combines is general scope of discovery information now set forth for the most part in present rule 186a but in addition to 186a scope like information is sprinkled throughout the other rules. 166b attempts and purports to combine all that information in one place. The second thing that is combined in this general rule 166b is protective order information which is now set forth in rule 186b. As you well know, both 186a and b are drafted in the context of deposition practice and not drafted as general propositions although they are incorporated in other types of discovery practice, and you have to interpret the language because it's slightly out of context when cross-referenced. The third thing that is contained in this general rule is supplementation. The principles that are now embodied in part 7 of rule 168 are made generally applicable to all forms of discovery. At present, supplementation responsibility applies to interrogatory practice by virtue of subpart 7 of current rule 168 and by virtue of a sentence neatly spliced into the middle of rule 186a supplementation responsibility also applies to depositions. The 166b rule puts supplementation at the beginning as the last part of the general rule. So in summary, the general rule includes all scope information, all protective order information, I say all you can put that in quotes, whether you quibble about whether that is something that could be called that or not and all supplementation information. One remark with respect to all supplementation information as is generally the

case in this package all information concerning what happens to you if you don't follow the rules. All sanction or so called sanction information is put in a revised version of rule 215a. So to the extent that supplementation language taken from 168 included what happened to you when you didn't supplement information, that instead of being in 166b is in part 4 of 215a. Start out with the general rule, and as I just mentioned, there is also a general rule concerning non-compliance, 215a and talk about the details of that last to the extent that it is necessary to talk about it. In one sense you could think of these proposed rules as beginning on the one hand with a general rule concerning the matters mentioned, ending with a general rule concerning sanctions of non-compliance and everything else sandwiched in-between, such that the bench and bar can look at one rule for scope plus and one rule for sanctions and the details in-between are sandwiched in-between. Now with respect to 166b itself, it's largely mild on 186a as mentioned, and if I can go through it quickly hitting the highpoints for you, I think I can point them out by page and by importance, at least identify their subject matter. On page 23 where the proposed rule begins, the scope of discovery is set forth in general in part 2a and the general scope idea relevant to the subject matter which is embodied in 186a is retained. As Luke mentioned, the subject of contention interrogatories, are interrogatories that involve so called mixed questions of law and fact is addressed in the middle sentence in the largest paragraph on page 23. By virtue of the statement that it not objection that an interrogatory involves an opinion or contention that relates to the fact or a mixed question of law and fact need not be answered for that reason if that objection is not sound. Presumably someone will not be

able, under this language, to quibble about whether they're asking about facts or whether they're asked about something that could be characterized otherwise. However, the sentence makes it clear that under some circumstances it may be appropriate to delay the time when the answer to be broader question would be required, to a later time in the case. A similar idea is added with respect to request for admissions in the second sentence in that large full paragraph. Both of those ideas are modeled upon changes made in 1966 at the federal level, according to the commentary, to avoid arguments over whether we're talking about facts or something else which are probably fruitless, and if not that, they are certainly time consuming. The subject matters mentioned in 2b and c are really moved from current rule 167 and requires this process of putting all scope information in one rule. The only change of any importance though don't hold me to this I think the only change in language involves the last sentence on 24 of 2b and c and the change is the addition of the word "superior." And this deals with the question when someone has possession, the right kind of possession. In 1981 or 1981 rule they had a section called constructive possession rule 167 and it was defined as when a person had a right to compel from a third person, well under those circumstances the person from whom discovery is sought has constructive possession. The suggestion was made and voted favorably that really what that should say is that the person has a superior right to compel a third person to permit, etc. Then there is a possession as opposed to an equal right superior to the person making (unintelligible). The d part, Potential Parties and Witnesses, on page 24 makes one significant change by the addition of the language, "including a specification of the person having knowledge of relevant facts who are

expected to be called to testify as witnesses in the action," would require an identification of trial witnesses not merely experts. But all persons having knowledge of the relevant facts are expected to be called to testify as witnesses. The information concerning experts is set forth in e. This consumed quite a lot of time at the committee level and relatively simple terms the change that is made is really an extension of what current rule 186a says. A clarification if you prefer to think of additions that way under which the identity and other information concerning an expert who is not going to testify but who has played a role in preparing testimony is made discoverable. The language that you can consider in this respect is at the bottom of e1 and e2 and is again in part 3 said for a third time to make it clearer. The part that I'll quote to give the idea is, "if the experts work product forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness." Well then he's fair game and that language should be familiar to some of the members here who basically at our committee level came up with that language. Otherwise, I think e in terms of experts is codification of Warner vs. Miller, Barker vs. Dunham, and in cases with which you are familiar. Moving on f2 says what probably is required presently anyway that the existence and contents of any settlement agreement is discoverable but as in the case of insurance agreements under the current language of 167 information concerning the agreement is not by reason of disclosure admissible in evidence at trial. It might be or it might not be, depending upon other things. The medical records, medical authorization part h down here, is a redraft of the injury damages part of rule 167. The redraft is principally for the sake of clarification. The thirty-day part down here relates to

responsibility for providing copies of records that under the current rule the responsibility is fairly broad, and as a fourteen-day standard. That's worked up with the subject of attention by both sides docket dealing with that matter in some detail. Really aside from some language changes for example, the proviso in current rule 186a dealing with party communication which has always been somewhat inscrutable because of the wording that's used in it. Talking about the same for example without saying whether it's the same this or the same that have been redrafted for clarification sake as part d of part 2 of 166b as proposed. You might want to mark that and look at it. The protective order portion begins at 4, in essence not anything substantially different in substance from 186b yet 186b is more specifically in the deposition context as mentioned. This is broader. The duty to Supplement information on page 29 in part 5 of 166b is essentially taken from 168, yet we have 30 days involved as a time table and that really in 166b in thumbnail form as a proposed general rule. Now it won't take all that long to go through 167, 68, 69. I cannot do that or do it.

McCLESKEY: Let me interrupt just a minute. This may be contrary to the outline that I have previously submitted to you for our procedures, but as thoroughly as this has gone into, I believe we'll stop here and let's talk about 166b before we go on to the other part. Does that meet with your approval? What do you have to say about 166b that might be helpful?

McMAINS: I don't know what the procedure is, Mr. Chairman. Do I need to hold my hand up or something? The principle change as I see it in

terms when you first go down the list is under d which is on page 24. The other stuff is just kind of general BS frankly that I think is already in the rules, but as Bill mentioned, it talks about the ability to discover witnesses, lay witnesses now, who are expected to be called to trial. I think that's what they testify in the action. There's no question that the people with knowledge of relevant facts, which would include any lay witness, would have to be disclosed. But I'm not sure of what legitimate discoverable value the question is as to what witnesses a particular party intends to call at the trial. Particularly since he may well intend to call some of the other side's witnesses who might conveniently be outside subpoena range if you told them that you expected to call them. And you also have additional give and take, as I understand it, with regards to the duty to supplement. You may have witnesses that you would expect to call only as rebuttal witnesses in the event the other side took a position which you really didn't know whether they were going to take or not. I don't see any real advantage to, or any utility from a discovery standpoint. The names and identity of the witnesses have got to be disclosed. There's no problem with that, but maybe you can answer the question, Why does the committee see that this is a relevant facet of discovery, because it seems to me that your list of witnesses and your strategy and what order you intend to call them in and that kind of stuff is a matter of trial tactics and that's more work product than anything.

SOULES: Your witnesses, if I stop there, and then you talk about your strategy and the order you're going to call them, there is no requirement _____ about discovery. One of the problems we

have now in terms of discovery abuse as it were, although it's imposed on one, is that I cannot find which of these fifty people have been listed as having knowledge of relevant facts are going to be witnesses and therefore which ones I need to depose. But I have to interview and depose all of them. Or perhaps we'll have to depose all of them rather than limiting that discovery to who are going to be the real people to testify at the trial. That is the primary purpose of it.

McMAINS: Now as I understand the existing rule there's no impediment to being able to ask what the subject matter or what the relevant facts are in your possession that are known by that witness in which case you can then make a decision whether that happens to be something you think is relevant or not. As I say, the problem that I have is that we have penalties here that are all discretionary and I think we all know how difficult it is to reverse a trial judge on abuse of discretion, that you can't call a witness that's not disclosed and you may have a party that takes a position that you had no idea that you needed to get a witness for. For you know, like what the minimum wage is or something else that you had no idea that somebody was going to take a position that you had to call a witness in order to establish the testimony. And it seems to me that that's very clearly covered in the rule, and I don't see how that ought to be related to the discovery.

SOULES: The question is those witnesses who are expected to be called. The trial judge does not have to limit the people who take the stand to those who were expected to, for example, to prove

something that was never anticipated, and I don't have a problem with modifying that language to say, "knowledge of relevant facts other than parties who are expected to testify in the action.

McMAINS: That's not really the issue. The issue is whether or not we need to supply a witness list.

KRONZER: Mr. Chairman. That's the same thing. I'm feeling Luke that it has to do more with not just strategy and tactics, but it seems to me it also has to do with the game playing that goes on and causes problems that we fight. All the time that's what ya'll worried so much about. If I was going to try to conceal, and I'm not saying I'm that kind of lawyer as you know, the problem of disclosure, the ones I really was going to call because you're not going to require me to name the ones I might really do it with, I'd just say I May call these witnesses and name all fifty. I May call them, because that under the current discovery rule, would, I can do it and you have then had a disclosure from me. These may be witnesses. Now how are you going to deal with that unless you directly invade the trial tactic or the work product. It seems to me you're directly invading either side's tactical decisions on the eve of trial. And what about the witness that you don't make your mind up until you're really getting ready to go to fist city.

McCKESKEY: Jim, let me ask you this. You and Rusty apparently have the same thought on this. How would you change this? Would you delete that provision?

KRONZER: Well, I don't know that I agree fully with Rusty on the question of your right to discover what a person having knowledge of relevant facts you know he knows, to the extent that your investigation is private work product, you don't have to disclose that in my (unintelligible). So in that sense you may not be tipping them off when they ask that, under the current practice but I think in most instances, discovery and you're not left with a great deal of doubt when you name those that have knowledge of the relevant facts of that occurrence, to be able to go out and make a sufficient investigation to know which ones you want to depose. I can't see that there's a hue and cry against the current rule. I haven't heard it, and the federal rule doesn't provide for this.

SOULES: Oh yes it does.

KRONZER: No, it does not. You're just talking about the heavy hand of the federal judiciary. That's all. You're not talking about what the rule said. The rule says the same thing as our rule.

WELLS: May I ask a question? Have your researchers found any jurisdiction that flatly provides a rule for the disclosure of prospective witnesses? Any other jurisdiction where it's done? I agree with Jim that federal judges sometimes do it but I don't read it in the rule.

SOULES: I don't know. I can't give you an example.

KRONZER: This precise copy of the federal rule, knowledge of the

relevant facts, there is no addition named to the witnesses. Now I don't say that federal judges don't do it Luke, but _____

DAWSON: Let me give you a little insight from personal experience. As some of you know, I'm a professor and don't often get in the courtroom, except every four years when I have a sabbatical, which I had this past summer, and my law firm usually on such occasions unloads on me, so that I end up trying lawsuits all summer. One of the law suits I tried last summer was a will contest, and the lawyer on the other side, while very astute, was not an experienced trial lawyer, and I wrote him a letter saying that in accordance with the rules I wished he would furnish me a list of his expected witnesses, which he complied with apparently thinking that the rule so provided. But then, he turned around and wrote me such a letter. I felt obligated, but it presented a real problem because I didn't know whether I ought to list all the people I wanted to call, and I also was confronted with the problem of how about his, he had to put on his case on first, he was the contestant, and I was confronted with the problem of listing people that I hoped he had listed or he had listed, and all I can say is it presented some real problems with strategy. And I ended up listing a whole bunch of people like Rusty suggested, that I might call, and who had knowledge of relevant facts, I went ahead and put that in my letter. But quite frankly, I avoided and evaded as much as I possibly could in response to his letter, and I think that will be the natural inclination of any trial lawyer. I don't believe he is going to shell out or if he, -- unless you put some teeth in it _____

MCCLESKEY: Buddy Low has been having his hand up, but let me say this, when we get through with Buddy's comments, I'm going to come back to this question, how would you change the proposed rule or how would you change the existing rule? Or leave it the same, and I would like some comments upon that after Buddy finishes.

LOW: I was just going to say it's better to know who they might call than not have any idea at all, and the rules of discovery are so that you can better meet the issues in the courtroom and doing nothing is not going to help us better meet the issues in the courtroom anyway. We that practice in federal court, particularly in my area, you better list the ones you might better call, and if you start listing a whole bunch of people that have nothing to with it, you might find yourself facing the big eagle. So, they pretty well tow the line and the cases move a lot faster, and move a lot more swiftly, so I think it is a good rule to list those people that you might call even if it might, because you are in better position to meet the issues in the courtroom than you are not even knowing who they might call. That's the purpose of the rules of discovery, is complete clarity, and knowing the relevant facts so that the issues might be met in the courtroom and even though it might not be the complete answer, I haven't heard the complete answer yet.

MCCLESKEY: You would be in favor or the rule as proposed?

LOW: Yes, I would.

MCCLESKEY: All right somebody tell us, how would you change that?

Rusty, you and Jim?

MOORE: Mr. Chairman, may I ask a question?

MCCLESKEY: Yes Hardy.

MOORE: It was suggested by Matt Dawson, that at it. What if you know, that you know of someone having knowledge of a relevant fact that is adverse and hostile to your position in the case. What are you going to do about answering the interrogatories?

KRONZER: Hardy, I believe you're required to do that now. I don't see any escape.

MOORE: You know the other man doesn't know .....

KRONZER: That's correct, I believe you owe that obligation right now.

MOORE: ... .

KRONZER: I don't accept you could play games with that part under the present rules.

MCCLESKEY: Put his name way down the list Hardy.

McMAINS: And misspell it.

DAWSON: There is this added on about it, suppose you list those

witnesses and then you don't call 'em. What's the guy on the other side going to do, is he going to parade before the jury, that he said he was going to call so and so, and so and so, and so and so, why didn't they show up?

McMAINS: Moreover, you may have motions for continuance, but predicated on the fact that he said he was going to call them. I just....

LOW: Well, you can do that know, you can claim you know people with relevant facts. Are you going to say, "well why didn't he call 'em?" The rules are, you can't argue if they're as available to one as they are to the other. You can take care of that in the argument, you can't take care of everything in the rules.

McMAINS: Oh, I agree. I wasn't talking about that. I'm just saying that, if you do say, the rule says who you are expected to call, and if you say I expect to call 25 people and some of them don't show up, I can see a party who really isn't ready to go to trial anyway, saying Judge, I want a continuance, because these people aren't here and he told me they were going to be here, that he was going to call them.

McCLESKEY: Joe Bruce, did you have a comment on that?

CUNNINGHAM: Yes, with regard to your question of how it could be changed, I would move that that 2d be changed in the first sentence by putting a period after the word "facts" in the 4th line, omitting the rest of that sentence. I think that would take care of it.

DAWSON: I would second that motion

MCCLESKEY: And delete the words, "including a specification of the persons having knowledge of relevant facts who are expected to be called to testify as witnesses in the action."

CUNNINGHAM: that's correct, the rest of the sentence.

MCCLESKEY: We have that in the form of a motion, but I'm going to entertain further discussion before we vote on it.

WELLS: May I ask a question?

MCCLESKEY: Yes, Nat.

WELLS: If the rule as proposed is adopted, what sanction is available under the amended rules? I may have misunderstood Luther, I thought he said it left discretion in the hands of the trial judge, if I've failed to list somebody, that he could, we could go on and nobody would be hurt. But...that's not the way I read the sanction rule later on. It looks to me like that judge can lower the boom.

SOULES: Well the first rule I think we need to look at in response to that is the duty to supplement rules. Where a party who has responded to a request for discovery, that is the same language we have now, must supplement not less than 30 days prior to the beginning of trial so you've got up to 30 days, and unless the court finds that a good

excuse exists for permitting or requiring later supplementation, there is no limit to that. It can be supplemented during trial. Another one is on what page?

MCCLESKEY: Page 74

DORSANEO: Page 78 deals with failing in ? 215a subparagraph 4, deals with failure to make supplementation. And basically it says that the testimony of that person can be excluded unless the trial court finds that good cause sufficient to require admission exists.

KRONZER: But, I don't think that's the way the game would be played Mr. Chairman. You would list first all your people having knowledge of relevant facts, that would be your... and then you'd list everybody but some rinky dink, might be him as a witness, I might call these guys as witnesses, and what's going to be the penalty if you call some and don't call others? That's the question.

DAWSON: We certainly need somebody ..... well, that's really the rule.

SPARKS: I've been listening to the argument for eight years now, I guess, and my, .. I think we all generally know when we are going to get down to a trial in a case that we think is significant, who are witnesses are going to be, and I'm not a advocate of the federal system but it does move along a whole lot quicker, and I find in our part of the country, there are some judges who interpret the current rule as in a pre-trial conference saying, All right I want to know who

your witnesses are and let's have the witness list because I'm going to paper voir dire these people on Thursday or Friday. There are other judges who say, just like you do, Jim, the rules really don't specify that you have to identify your witnesses, and in that instance either side to do an adequate job, must voir dire on your whole list. So, I don't see that Matt's problem is cured, because you still have parading in front of the jury and the voir dire panel a large list of people who may be witnesses to see who may or may not know 'em and the extent of their knowledge. I just don't understand why we have been so reluctant to tell 30 days before trial or before trial who your witnesses are because as a practical matter, if you are in trial with a good lawyer, you've already done it and the only reason I see not to do it is still, not that you practice that way Jim, but some do, to sneak somebody in, which the whole purpose of the rules are not. In a major case, like a malpractice case, I may have eighty people who worked at a hospital and you put them all down, because normally you don't know which ones you are going to use 30 days after trial anyway. I like this rule and I think its long in coming.

MCCLESKEY: Rusty.

MCMAINS: Well in response, number one there is no sanction for putting down everybody anyway, that you expect to call. There is no sanction provided in the existing rules as proposed anyway. So, you aren't going to learn anything more from a lawyer who wants to hide the ball than you get now. On the other hand, if you early in the game, fire off an interrogatory saying list your witnesses you expect to call to trial three months after the petition is filed, it's the

lawyer who doesn't dot his I's, cross his T's, who's liable to wind up at the courthouse with a bunch of witnesses that he forgot to supplement. And lay witnesses, somebody who is an eyewitness to an automobile accident the other side may have perfect knowledge of and know about and not be able to put on at the discretion of the trial judge. I'm not suggesting that will happen with any regularity, but it's going to catch some folks flat footed, and that in my judgment enhances the games playing with the rules, and does not really facilitate bonafide discovery.

MCCLESKEY: Alright, do we have any further additional talks upon this? You may have made up your mind as to which side you are on, but do you have any further, any new information, new light to throw upon this discussion?

SOULES: I've had one experience with the situation where a person having knowledge of relevant facts was not disclosed and was called to testify. The trial judge handled it very effectively, he took a recess, asked me how long I would need to interview the witness, told me to interview the witness, I told him, he gave me the time, he said go interview the witness and when I came back, that we would either proceed to have the witness on the witness stand or he would hear my motion for mistrial and continuance, and that I had best be severely surprised if I intended to make such a motion, and be able to explain just why it was that I was so surprised. If I needed more time to prepare cross-examination, he might give me a little extra recess to do whatever it took to get the cross ready before he allowed the witness to go on the stand, or he might put the witness out of order.

Well I went out and talked to the witness. It was testimony we expected to hear anyway, and I told the judge that I didn't like but I was going to have to take it, and he went on. So, judges, when they've got a jury in the jury box and they've got several days of state time being paid for and their own, they are going to be very reluctant to prohibit a witness from testifying unless there is a real reason for that. I think that a failure to, in Rusty's instance, where, this inexperienced lawyer, the lawyer claimed to be inexperienced, doesn't disclose an eyewitness to the event that caused the injury that brought about the lawsuit, I don't see why he needs to be saved.

KRONZER: Insofar as the motion, as I understand it, was made by Joe Bruce, I'm not suggesting in the slightest that I'm not for the full and fair disclosure of all witnesses that you know have knowledge of relevant facts. I believe that myself. I mean the persons that have knowledge of relevant facts. It's just the tactical problems relating to whether they are going to be called as witnesses or not that I say is where we get into a can of worms.

MCCLESKEY: Steve do have some comment?

MCCONNICO: Mr. Chairman, two years ago with rule 168, the court stated that you had to give your expert the names of all your experts 15 days prior to trial. Well, the opinions that I have read since then, and I haven't read all of them where folks have brought in a surprise expert, it appears to be what Luke said. The courts have allowed those folks to testify. Courts seem to be very reluctant once

they have a jury in the box and the trial has been going on to say it is a surprise and we're going to give you a continuance. I think that has been the experience with the expert from what I've seen in the Advance Sheets.

SOULES: Unless there is a real problem.

MCCONNICO: Unless there is a real problem.

MCCLESKEY: Alright you have heard the discussion. Are you ready to express your choice and vote?

MOORE: I'd just like to hear what Joe Bruce Cunningham's motions is, I'd like to hear his statement is again. .....level of discussion.

MCCLESKEY: He goes to page 24, subparagraph D, and he goes down in line number four after the word relevant facts, he puts a period after facts. Then he strikes the rest of the sentence.

MOORE: That's what I thought I wasn't sure, thank you.

MCCLESKEY: Is that correct, Joe Bruce?

CUNNINGHAM: Yes.

MCCLESKEY: Alright those in favor of recommending this subparagraph d with the change that Joe Bruce Cunningham has suggested indicate so by

raising your right hand. I count eight in favor of it. Those not in favor of the change made by Joe Bruce Cunningham, raise your hand. I count thirteen against it. So that we can get, to move along a little bit here, let me ask you the question, are you favorably impressed with the suggestion that all of the sanction scope, no not all of the sanction, but all of the scope material be included in one 160, in one place, such as 166d. Do you have any trouble with that concept? I take it from the silent consensus that .

KRONZER: Mr. Chairman I would like to ask both Luke and Bill about the 2a and the operational effect they perceive for the interrogatories addressed to opinions or contentions regarding the application of law. What kind of responses they think they are going to get, what kind of objections they are going to get to such interrogatories, what kind of help they are going to get in the discovery process, from those types of interrogatories?

SOULES: Well, I get 'em. They say that this does not inquire into a fact, it inquires to the next question of fact of law, therefore, it won't give a response.

KRONZER: Well, what questions are you contemplating asking and getting answers to?

MCMAINS: What do you contend my client did wrong?

SOULES: What do you contend my client did wrong? That's true!

KRONZER: You give me everything you know that he did and said and all the witnesses you got and all that, or what, and how do you come to that legal conclusion? I'm serious, what do you want him to say?

SOULES: Alright, for example if you are getting into the issues of whether or not a corporation has been managed in such a way as to comply with the Texas Business Corporations Act, whatever you are after, an alter ego issue. You get into what has become, if he kept the proper minutes. You've got to apply the statute to it.

DAWSON: Give us an example Jim. If client is totally and permanently disabled. .....

KRONZER: I can answer that. Sure!

SOULES: This has just been a law that people will think.....

KRONZER: Well, you know I remember the practice of where they engage in ? and scope of his employment for some of those old cases. They say that is a mixed question of law and fact. If that's all were talking about, but I get some interrogatories where, you said in your pleading we were negligent, state how we were negligent, the ways we were, the people who got that supported, the names, addresses and all the supporting information investigation of materials you have that the witness supported and why you believe that constitutes negligence and the basis for there being cause and everything else. We could go down the list of those things. Is that what you are contemplating this sort of ....

SOULES: Well, I think the answer to that would be if it takes more than forty answers to answer it.

KRONZER: It's not the answers, it's the questions.

SOULES: Oh, the answer to the interrogatories which I never have quite understood, but if people want to leave it that way. It's the best example we have around the table whenever this was being discussed was the one you brought up. The cause and scope. Now why can't you ask that question and get a response?

KRONZER: That's not really where I'm, I just don't know that you got any parameters to your type of question. Whether you are given any guidelines. What I've noticed over the years I've been around here gathering, has been the court's constant attempt to try to make some rules that trial courts can follow, and that they can know where we're going, rather than leave these rubbery stretches, kind of things that people can play against. And that's where I see the kind of question, what do we got to work with, where is the limits of it? That what was worrying me.

SOULES: You get pleadings back, defensive pleadings to one of your lawsuits, and you want to know, what are the defendants real contentions. You can ask, do you contend that the party was not in the course of scope of this employment when the accident occurred. You'd get an answer to that under this rule. Without having to go to court and say the pleadings don't tell me even whether he is

contesting it. You see, it does actually serve not only discovery functions, but a pleading function without involving the court. Judge Walker wrote an opinion sometime ago that said the only way you could get contentions was by special exception to pleadings. This, what changes that rule and allows the lawyers to work back and forth on contentions by discovery to try to get the pleadings cleaned up without involving a court and if they don't succeed then they can't involve the court either by a special exception or motion to compel. Either vehicle would get to the same place.

KRONZER: How much involvement of the so-called work product are you getting into when you are asking the lawyer to spell out why he thinks he is getting where he is and going where he is legally. From any set of given facts?

SOULES: You can't get into it at all.

KRONZER: Well, aren't you cutting across that grain with this kind of inquiry?

SOULES: I think anything that you have to disclose in the pleadings in order to argue, is not a work product, if the laws require you to plead it.

KRONZER: The basis whereby you get there; the basis of how you get there.

SOULES: It's just a matter of how you get there. You can do it with

interrogatories or you can do it with special exceptions and you can argue, you see over under number 3 on page 27, 3a, "The following matters are not discoverable: a. the work product of an attorney;"

KRONZER: Yeah, I understand that.

SOULES: So, that would be an objection to the interrogatory except for the foregoing any further disclosure would be involved in the work product.

KRONZER: I don't have any objection, I just don't see where you'd draw the line.

TUNKS: I have to give the Committee an honest.... leave 3a in there and yet compare and compel the lawyer to reveal the witnesses you're going to call, or he might call.

SOULES: I think we've past it.

MCCLESKEY: Judge Tunks, I think that's probably part of the argument made and was voted on in the earlier matter that Joe Bruce Cunningham suggested. I think it's a valid argument, and I'm willing to go back to it if you would like.

TUNKS: Let's never go backwards.

MCCLESKEY: Are there other comments on 166b. Yeah, Rusty.

MCMAINS: I'm afraid so Judge, Mr. Chairman. On page 28, in d, now this has been in the rule for a long time. 28d is part of the exemptions or privileged matters. The last part of that paragraph in d, says or, it's at the or, it's on the second line, two and a half lines up, it says, "or information obtained in the course of an investigation by a person employed to make such investigation." I've been confronted recently with a situation in which a private investigator was hired and essentially burgled my clients house, and I had been declined from being able to discover what was obtained on the basis that it's a private investigator. And that the Supreme Court has written some years ago in a habeas corpus case, in Ex parte Hanlon, that there is an independant investigator privilege apart from the other material that is contained in here. Frankly, I think anything that's legitimately protected is protected above that, and I don't see how there should be an independent, absolute bar, particularly to sanction or prohibit you from getting information, that is illegally obtained. If we don't make an exception on it being illegally obtained, I personally think that if you just strike it out, that entire part,

MCCLESKEY: Beginning with "or."

MCMAINS: Beginning with "or information obtained in the course....." See the rest of it is communications that's protected, but this protects information, anything that he obtains, the work product of an investigator, and Ex parte Hanlon has been held absolutely privileged. You can't find out what it is. And, in spite of the fact that it might have been unlawfully obtained; you could have

wiretapping, you could have any number of things, you can't find out. He could have planted a bug, you can't find out what he did, or so a trial judge has told me.

MCCLESKEY: I preside, and don't become an advocate here Rusty, but let me ask you the question. What if you had an investigator that goes out and obtains information which you had asked him specifically to obtain. The information he seeks is part of your thinking, part of your plan for trial. Do you feel you ought to have to disclose that, no burglary involved, no violation of any kind?

MCMAINS: I think it's covered. I mean I don't think there's a problem. You see, the problem is that the Supreme Court is, as I understand the rule in Ex parte Hanlon, has determined that the rule as written, everything before the "or," is a work product aspect on limitation of scope. However, all of a sudden there is an independent investigator privilege that does not depend per se on work product of the attorney. I personally do not perceive that there is any reason for that type of an independent privilege, particularly when insulates what may be illegal conduct.

KRONZER: Rusty, couldn't you just say, information "lawfully" obtained, just add the word "lawfully," in front of the...

MCMAINS: Well then you get a question, as to what is lawful. I mean are you talking about under the civil law, or criminal law.

KRONZER: Well that would proscribe the comment.

MCCLESKEY: Franklin,

MCMAINS: I mean I see, I can find nothing that should be privileged that isn't already privileged prior to that rule, and that is controlled by work product. I feel fairly confident that the courts are not going to construe work product to include criminal activity.

MCCLESKEY: Franklin Jones.

JONES: I would like to make a point of inquiry here of Luke Soules, if I may please sir. Luke, what has been the position of the Administration of Justice Committee, in regard to this rule, vis-a-vis the total adoption of the federal rule?

SOULES: We've felt that the, well there are differences, particularly with regard to experts. There's a broader discovery of experts in connection with experts in Texas, than there is in federal law, and there was a .....

JONES: No, No, I'm speaking specifically of, of this whole proviso in d.

SOULES: Oh of d?

JONES: Of this whole provisal in d, that insulates communications between the party and his agents after the cause or after the event.

SOULES: I don't know the comparison with the federal practice, Franklin I've just kind of lost it, I can't get it in my mind right now.

MCMAINS: I don't think there is any.

SOULES: To retain this proviso was voted specifically on by the COAJ after a couple of hours or more of discussion of the reasons why these types of communications should be protected. Free investigation but, and the last, the words after "or," the words in the last two, three lines, that Rusty's talking about, are put in there because we have a Supreme Court case, Ex parte Hanlon, I believe that's the name of it, and it is the law, and it is the law with the rest of this being the only written part of the rule. What comes from "or" forward was not in the rule, but it is in Ex parte Hanlon.

SOULES: The exception was sought to be retained. I don't have really a problem with it one way or the other.

KRONZER: Hanlon is the reason that the court subsequently changed the discovery of witnesses. It's what brought that change about.

MCMAINS: Hanlon was a case in which they couldn't find out who a party, the real party that they needed to sue within the statute was, because it was found out by an investigator.

MCCLESKEY: I believe what we have is a suggestion that the information or the language after "or information" in the third from the last line of section d on page 28 be deleted, or in the

alternative, well I don't believe that Jim's suggestion fully satisfied you, did it?

MCMAINS: Not really. I mean I just think it makes it ambiguous.

MCCLESKEY: Rusty is suggesting that we delete the information that the wording that I've referred to beginning with "or information." All in favor of deleting that language from the rule indicate by raising your right hand. One, two, three, four, five, six, seven, eight. And those opposed to it indicate by raising your hand. One, two, three, four, five, six, seven, eight. Somebody's not voting. Let's try it again. Those in favor of deleting that language raise your hand. One, two, three, four, five, six, seven, eight, nine, ten. And those against deleting that language raise your hand. One, two, three, four, five, six, seven eight. By a vote of 10 to 8 it's favored to delete that language from paragraph d on page 28.

POPE: Specifically, what is it we deleted?

MCCLESKEY: In the third from the last line of paragraph d, subparagraph d, there are the words "or information obtained" and we go all the way to the end of or down to the semicolon, as I understand it. We delete the words "or information obtained in the course of an investigation by a person employed to make such investigation." Is that correct, Rusty?

MCMAINS: That's correct.

KRONZER: Mr. Chairman, may I ask two questions about earlier in that proposed rule and not necessarily to change, but to ask Luke and Bill why it was done. On page 25.

SOULES: Jim, on that same rule before we leave it, excuse me George if I'm dumping in here, I'm concerned about whether or not this gets communicated to the Bar what we did. Is it the advice of this Advisory Committee of the Supreme Court that they abandon the Ex parte Hanlon rule? Is that what we're doing? And if so, then there should be a comment at this point that if the Court does that, that's what they intend to do, because this language, once it's out, will never be known to the Bar that it was ever in.

CUNNINGHAM: I think it's much broader that what he's talking about. To me, it means that communications you can't get, but some of the information they obtain you can. I think what we've done goes far beyond what Luke is talking about.

: I think what you're saying is very apropos, but I think what we've done completely changes it.

MCMAINS: Let me explain. That is anything that would ordinarily be protected by work product is under a. It's protected under a. That's the work product of an attorney. That anything you got a right to claim is a work product by investigation is there. And if it's work product under the cases then it's work product and it's protected. We haven't abandoned any privilege that's legitimately

work product. Supreme Court in Ex parte Hanlon said because of the way the rule is written, we not only have a communication protection between post accident communications made in reference to investigation, we have a private or employed investigator exception that's independent. And you can't do anything to find out about what that information is, because, just because, that's an investigator. Now if it's work product, it's already protected, and if it ain't work product, it ought not to be protected, and that's the reason that I argue that it ought to be taken out. Just because we give a guy a license to investigate, don't give them a license to burglarize.

SOULES: I respect the 10-8 vote. I mean that's not what, I'm just trying to find out for sure if that's, so that we communicate to the Bar that we're changing Ex parte Hanlon if that's what we're doing, or do we want that communicated at all. Should there be a comment or not? Here we go. Let's tell them what we're doing, whatever it is we're doing.

KRONZER: Sure.

MCMAINS: Sure.

POPE: We'll put it in the comment.

SOULES: Okay.

BECK: May I ask a question about what the comment is going to say? I mean because if there are any questions which arise about

what this Committee has done or what the Supreme Court is going to do because someone's looking into the legislative history, I want to be absolutely clear about what the comment is going to say, because that's going to be relied upon by a court, and there seems to be some difference of opinion here as to what the significance is and what we have just done. And I think before we all go agreeing on putting a comment in there that it's reasonable that we know what the comment is going to say.

MCCLESKEY: My judgment is that if the Court sees fit to follow this recommendation that the Court will just be relying upon to clarify it's action. I don't believe we can do that here in this Committee, David.

POPE: Let me say this. The comments that we make are not the usual type of comments that you see in some books and publications. If you have your desk book before you, they really just pinpoint where a change is made, and I would welcome the wording that might be used. I would have to go back and read Ex parte Hanlon, but they really just pinpoint where there is a change to advise the court that there is a change.

BECK: I misunderstood. I just thought we were talking about a comment such as those that follow after _____.

POPE: No, no. Those would not be. If you just thumb the desk book in front of you, they just really point out where there is a change.

BECK: You're talking about the Court's comments?

POPE: Yeah, that's right.

BECK: Okay.

SOULES: That's all. And because we're not just striking out language that's was there where you can put a little sentence down here that says what we did, since there apparently is going to be, or we hope that there will be, a big overhaul, you're striking out a big expanse of language; the fact that this had been taken out may be lost unless it's made a specific example of, that's all.

MCCLESKEY: Do you have comments on other sections of 166b.

KRONZER: I'm interested in just two questions that perhaps they can answer on page 25 in e1, second line, saying "the identity and location of a expert who is to be called as a witness." I'm wondering, I regard the current rule under Barker and Allen , Miller and those cases to be "may." That you don't escape the required production of witnesses under "may." And I'm wondering why ya'll put that hard a burden in there on the party seeking to inquire of who your expert is.

SOULES: Should be "may."

KRONZER: The other one is, even though I recognize the Werner , and the Miller case does go back to the old City of Houston case and say the identity of an expert called for consultation purposes is not

discoverable. The current rule 186a does not so provide. You don't find it in the rules, and on page 27 you are eliminating that now by the rules. I think if you read Miller and read the earlier decision upon which it's based you will see the court really was never saying that if you had to have the factual material and that's the only guy that has it, the consultative person. If you look at rule 186a, it does not say the identity is not discoverable, and I'm wondering why ya'll are now making that an insulated fact.

SOULES: It is not, if the work product which that.

KRONZER: I'm talking about his work product may not be used. It's just some information he's got, the consultation witness, and they're going to disclose it or his name or anything else and me, the same way with me. I'm not trying to make this a unilateral thing. I understand that Miller made the statement that the identity is not discloseable and that's based on an earlier decision, but the rule does not say that, 186a. And I'm asking why you're putting that in concrete and leaving the court locked up that way?

SOULES: So that a lawyer can read the rule and know what the law is.

KRONZER: Well....

SOULES: If this is not what the law is, then we changed something that we didn't intend to change.

MCMAINS: No. it's not.

KRONZER: I think the rule clearly at the present time the rule on its face only limits inquiry into the opinions and the other matters the consultation witness has.

SOULES: Bill did most the work on this.

DORSANEO: I agree with what you say about 186a and what it says. It doesn't say anything ....

KRONZER: We're adding a lot into what ....

DORSANEO: Exactly. Well the last proviso in 186a talks about.... It starts out and says okay including experts and talks about identity. Then we have the main proviso, and then we have the proviso to the proviso, and it is unclear, I agree with you in the context of the middle proviso, the main thing, which doesn't speak about identity, what's going on. As I read in Werner v. Miller I thought that it says identity ....

KRONZER: There's no question that Werner --and in the courts that's pure dictum, and you go back and read the case they cite for that. Because they were talking when, whether the court was right in his order, his late order, in requiring the witnesses be disclosed for deposition purposes. That was the issue before the court. The way the rule reads now, and that's all I'm asking, why are you now ....

DORSANEO: Because of the five votes in Warner v. Miller.

KRONZER: Here is what the rule says, "Where made subsequent to the occurrence or transaction and made in connection with prosecution" etc. etc. and "shall not require the production of written statements of witnesses or disclosure of the mental impressions and opinions of experts used solely for consultation and who will not be witnesses in the case." It says nothing else about disclosures of any other aspect of their testimony or their knowledge or anything else.

DORSANEO: Well the second proviso says that information relating to the identity of persons including experts having knowledge of relevant facts is discoverable. Now I will agree with you that I don't know what that means, in the second proviso, and might not include the person you're talking about, but it might. I don't understand the current rule, and this is an attempt to make this rule understandable and say when the identity of an expert is discoverable and when it isn't.

MCCLESKEY: Jim, do you have something you would change in that paragraph?

KRONZER: I would respectfully move that the language of the current rule be kept as it is. That we do have Supreme Court interpretations of the language at this time that could be considered to be controlling and to the extent the court may itself want to relax it for purposes of discovery in these hardship cases, it seems to me they could. The rule does not impose that sanction against discovery of factual information in the hands of a witness, and to me one of the

most evil parts of the expert game is the internal shopping for a guy that you want to use and shoving all the rest of them off until you finally come down with the guy you're going to use. I really think that the names of the witnesses and the potential identification of information they have. I see one change you've made, Bill, having to do with whether information is going to be used by some other witness. And that's a good change. I'm for that. But where they just shopping through our witnesses or we are. I feel that those names ought to be discloseable or discoverable or at least the rule ougnt not to be changed so that you don't even have the opportunity to identify the persons who have been consulted. They've finally found some old boy that would sing the song.

MCCLESKEY: What part of this portion of the rule are you objecting to, Jim. The disclosure of information?

KRONZER: It's 3c (p. 27). I would eliminate the identity and just say "the mental impressions and opinions of an expert."

MCCLESKEY: I'm not following you, where?

DORSANEO: On page 27. The word "identity"

MCCLESKEY: The identity in mental impressions and opinions.

KRONZER: The identity is the add on.

DORSANEO: You would strike "identity?"

KRONZER: Yes sir.

MCCLESKEY: Anybody have any trouble with striking "identity?"

KRONZER: If the court continue to adhere as in Miller, why they can do it.

SOULES: I don't have any problem with that, do you?

MCCLESKEY: Page 27 at the bottom of the page 3c.

KRONZER: 3c.

DAWSON: Are you just talking about the one word or the name and location? Name and address.

KRONZER: Where's the name and address?

DAWSON: The one word?

KRONZER: Where's the name and address?

POPE: Now we're focusing I believe on page 27. I'm just trying to see where we are and what we're talking about. Jim?

KRONZER: By eliminating the word "identity," "the identity," and just leaving the word "identity." You don't say they can identify or they

cannot identify.

POPE: How will it read?

KRONZER: It will just read, "the mental impressions and opinions of an expert who has been informally consulted ...." and that's the way the current rule reads.

POPE: Okay.

MCCLESKEY: So far I don't hear any objections to that change. Are there objections to that change? David?

BECK: I have a question and depending upon the answer, I may have an objection to it. May I ask Mr. Kronzer a question?

MCCLESKEY: Surely.

BECK: If you discover the identity of the opposing party's consultants but yet you cannot discover their mental impressions or opinions, then what good is it?

KRONZER: To discover other information they may have.

BECK: Like what?

KRONZER: Their investigation or materials they may have gotten early after the accident.

BECK: You're talking about factual type investigation?

KRONZER: Yes, that's right. And the rule clearly permits that, on its face.

MCMAINS: The current rule. I think it's a retreat.

KRONZER: It does not permit you to ask them, David, you know what did you think about that, and what are your conclusions about it.

MCMAINS: The word "identity" is also mentioned on the next page.

KRONZER: It runs counter to the rules in eminent domain cases where you can call the other side's experts but you just have to say he was yours, in other words.

DORSANEO: Ordinarily, I think if we did away with identity twice, it wouldn't do any harm to the structure here.

MCCLESKEY: Alright, so we'll understand what we're talking about, on page 28 in the third line from the top of the page the line ends with the language "except that the identity" and as I understand it, Rusty, what your saying is that we need to delete the word "identity" and let that read "except that the mental impressions and opinions of an expert who will not be called" and so forth.

KRONZER: Yeah, that would be back on bottom of 27 too, George.

MCCLESKEY: And also the word "identity" would be deleted from the first line of 3c on page 27.

KRONZER: Yes.

EDGAR: Mr. Chairman.

MCCLESKEY: Yes.

EDGAR: Would that also require some modification number. I'm not sure how, but on page 25, e1.

MCCLESKEY: 25 what?

EDGAR: E1, where we start out saying that "a party may obtain discovery of the identity and location of an expert who may be called," and then we come down about five lines from the bottom and say, "The disclosure of the same information" which necessarily includes identity concerning an expert used for consultation is discoverable

SOULES: Is discoverable.

ELLIOTT: Only if it's going to be made the basis of somebody elses opinion.

KRONZER: That's right.

EDGAR: I think we need to take a look at that. In glancing at it here at first hand it seems like it might require some modification to tie with this change. Now I'm not sure how.

MCCLESKEY: Is everyone in agreement?

ELLIOTT: -----some modification, because they say you obtain only that way over on page 25 and then at pages 27, 28, you're saying you can obtain it. You've got a conflict within ....

EDGAR: It's going to require some modification.

MCCLESKEY: Is everybody in agreement with the concept that we delete the "identity" from 3c on page 27, 28? Any objection to that? So that concept and that change is approved, and now Hadley we need to get back to determining what changes need to be made.

EDGAR: George, I'm not really sure that maybe ought not do it at this juncture as long as there is a sense of the committee that it ought to be changed. Perhaps we could just leave it for someone to do it.

MCCLESKEY: You're talking about in e1 on page 25?

EDGAR: Yes.

GUITTARD: Mr. Chairman, I suggest that we ask Mr. Dorsaneo to draft

something and submit it to the Court.

SOULES: Is this the sentence "that a party may obtain discovery of the identity and location, name, and address of any expert consulted, and may further discover for an expert who may be called as a witness" the rest of it? We can polish it but is that the sense of it? Okay.

MCCLESKEY: Any objections to that? Everybody's in accord.

DORSANEO: You mean people informally consulted or specially retained or both? Somebody I call up and say, "What do you think about that?" And they say, "that's a lousy idea. Good-bye."

KRONZER: Well, anybody that you're not going to say may be called in my opinion falls out of the cracks. She's not a witness. In other words, if the party won't go so far as to say I may call you is not discoverable for any purpose other than the purpose ya'll have said now or for factual information.

DORSANEO: Add another sentence -----

MCCLESKEY: Are you in accord that we'll let the wording of this be worked out as a suggestion by the Committee to be worded by Bill Dorsaneo?

KRONZER: Yeah, that's fine. He's done a good job here.

MCCLESKEY: Alright.

ELLIOTT: What do we do about changing the words "may be called" or "is to be called?"

MCCLESKEY: We changed it from "is" to "may". Changed it from "is" to "may". Frank, did you have a comment?

ELLIOTT: No, I just wanted to be sure that I was clear in what was going on there. Now we have in the rule as it's presently suggested Bill has two types of witnesses. The one who's going to testify, or may testify, and two, the disclosure of one who's used for consultation not expected to be called a witness but it's going to form a basis of the opinion of the expert who is to be called, and three, we've got the one that we're talking about, an expert witness who has been talked to but doesn't fall in either of the other categories. And that the identity of all three categories needs to be subject to discovery.

DORSANEO: And it required one section so we could figure out how to word it.

ELLIOTT: Yeah.

SPARKS: But this will eliminate your ability to go, for example, to a medical specialist and say "I know that you will not go to court, but I need some education here, would you review that?"

DORSANEO: That's right.

SOULES: Now that was Jack Eisenburg's complaint whenever we talked at the COAJ. He said, "Look, I have experts that I consult with who wouldn't talk to me if they knew that their identity had to be disclosed. And they're important to me, and I need them. And I want to be able to have those kinds of relationships so that I can serve my clients. I can't have those relationships if that word 'identity' isn't in there."

SPARKS: I'm hesitant to be aligned with Jack but I agree with him 100%. Particularly in medical malpractice.

LOW: I think the thing is that part of the situation and that is that we're attempting to protect, as a question what we protect, what we don't protect. I don't believe we're attempting to protect the guy that has a hospital bed examined, the expert says it's bad, and then they say well designate him as a consultation expert. There ought to be some method through which the court can determine whether this is a true consultation expert or somebody that's just come up with a bad opinion and you won't to designate him that way, and the court could do that. I'm not proposing any changes here. I'm just saying in concept I think our rule misses a lot. And you could take care of that situation. I think his opinion ought to be relevant and ought to be admissible if you've had him examined and now you can just designate him as a consultation expert and you can get his findings. You can't get his opinions and so forth and I think the thing Jack's talking about ought to be protected, but I think we missed part of it.

MCCLESKEY: Could you do that by having some method of designating him as a consultation expert before he's ever contacted?

LOW: You possibly could and also, for instance, they say well "did it affect the expert's opinion?" How do you determine that? Without getting some opinions or conclusions, do you have to accept the other expert's conclusion? No, nothing he said had anything to do with me. You know, how do you, as Franklin calls it, sift the beer from the milk, you know. I may have changed his language, but what I'm saying is that, and I realize we couldn't do right here, but I think we ought to strive towards protecting a true consultation expert and strive toward having to reveal the opinions and conclusions of a guy that has examined it and then you want to make him a consultation expert simply because his opinion is not what you want to hear.

KRONZER: If anybody can devise that, they've got my one million percent vote.

SOULES: We tried.

KRONZER: Let me say the answer to what Eisenburg is saying under the existing practice, I'm not asking that the court overrule Miller and the City of Houston case. Striking the word "identity" does not change those holdings that are there now about that identity factor with that kind of witness. The further thing is this guy that he's talking with he's got some friend to talk to that knows about it, has no knowledge of facts that would be discoverable under the existing rules at all. Not at all. He hasn't been out to the scene, he hasn't

measured anything, he hasn't gotten any ....

CUNNINGHAM: If people are going to be bothering him, they may want to take his deposition to see if he has all his facts. That's the problem.

KRONZER: If anybodys got the answers to what Buddy is saying, you can have the whole load.

SOULES: In medical malpractice, some doctors will talk to one side or the other, but they don't even want it known that they talk to lawyers.

CUNNINGHAM: Because they're going to have their deposition taken.

KRONZER: If you give lawyers the chance to conceal identity....

MCCLESKEY: I am assured that the court will consider the suggestion made here by studying that possibility, but I don't believe we we're going to have time during this session to work that kind of language out. Yeah, Rusty.

MCMAINS: Excuse me, isn't the remedy if you'd merely disclose the identity, and then they attempt to depose, you file a motion to protect on the grounds that they don't have any knowledge of relevant facts. The court has the power to make that determination here.

MCCLESKEY: Are there comments upon other sections of 166b?

MOORE: Mr. Chairman?

MCCLESKEY: Yes, Hardy?

MOORE: I have a suggestion about one, on the bottom of page 25, subparagraph 3. I'd like to change that wording a little and I will state what I have in mind. Under Determination of Status, say, "The trial judge has discretion to compel a party to make a determination and disclosure whether an expert may be called to testify within a reasonable and specific time prior to the date of trial."

MCCLESKEY: Alright, read that again.

MOORE: "The trial judge has discretion to compel a party to make a determination and disclosure whether an expert will be called to testify a reasonable and specific time prior to the date of trial."

MCCLESKEY: Alright, anybody got any problems with that? I think that clarifies the rule some without making any substantive change. Hadley, did you have a comment?

EDGAR: Well, not on that point. Let's go ahead and take care of this.

MCCLESKEY: Alright. I assume we're going to make those changes because I hear no objections.

EDGAR: I'm just trying to write them down.

MCCLESKEY: Okay. On page 25, e3, near the bottom of the page, in the second line as I understood Mr. Moore, it will read "discretion to compel a party to make a determination" and then insert the words "and disclosure" right after determination, so that will read "discretion to compel a party to make a determination and disclosure whether an expert will be called to testify within a reasonable and specific" insert the words "and specific" after reasonable, within a "reasonable and specific time before the trial."

EDGAR: The question I had, George, went to page 29, number 5, Duty to Supplement.

MCCLESKEY: Alright.

EDGAR: And just a question, the next to last line says "finds a good excuse," and we normally speak in terms of good cause. Now does this mean anything different? Because I don't recall using the words,"a good excuse" in the rules anywhere. That usually does something based on good cause, and I'm just wondering what was in the minds of the three of them.

KRONZER: That's going to clear your pipe, Hadley, to get the words "good excuse" out and put "good cause" in.

SOULES: Guess Eisenburg got it done, I don't know.

DORSANEO: I don't know who did that.

KRONZER: Reasonable excuse ....

MCCLESKEY: What do you propose Hadley? What do you propose?

EDGAR: We've said "good cause" everywhere else. I'm just wondering if this imposes a different standard.

KRONZER: It does.

SOULES: It's a lighter standard, I think.

MCCLESKEY: Franklin, do you have a comment?

JONES: I sure do. I hate to demonstrate how hastily I prepared myself for this first meeting, but on page 25.

MCCLESKEY: I wonder if we could save that. I wonder if we could finish this matter and then go back to that, Franklin.
SOULES: This was a language preference in the AJ to make the burden lighter than good cause.

MCMAINS: I'm not sure it is, though.

SOULES: I'm not sure it is either, but I don't have any problems one way or another, but that was the ....

JONES: I'm sorry.

EDGAR: Well there was an intention then, this is an intentional change, and you're saying "yes" and Bill's saying "no."

SOULES: No, I think it was.

MCCLESKEY: Does anybody want to make a speech in favor of leaving the word "good excuse" in there?

SOULES: Yes, it was Craddock v. Sunshine Bus Lines type test, not necessarily, except they did say a good excuse, instead of not necessarily a good excuse, so they wanted a good excuse instead of not necessarily a good excuse, but they didn't want to have to go to good cause and they thought this was some where in between.

MCMAINS: It seems to me it was either good cause or reasonable explanation.

MCCLESKEY: How many are in favor of retaining the word "excuse" in this rule, the word excuse. How many are in favor of excuse? Got any voters? One, two, three. All in favor of changing "excuse" back to the word "cause" raise your hand, one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen. Fifteen are in favor of cause and three are in favor of excuse. Change that word on page 29.

EDGAR: You would delete the word "a" would you not?

MCCLESKEY: Delete "a" in the next to the last line of paragraph 5 on page 29 there will be a change which will cause that line to read "finds that good cause exists for permitting or requiring later." Now, I want to get back to Franklin. Franklin, you had a comment on page 25?

JONES: I'm sorry to make us go back, George again, I apologize for my lack of preparation. On page 25, paragraph 3, Determination of Status." The trial judge has discretion to compel a party to make a determination of whether an expert will be called." Hell, I don't make my mind up about that lots of times until after the defendant has rested. You know I may want to call somebody in rebuttal. I think it's a little strong, I think we ought to ....

MCMAINS: Change it to "may."

SOULES: Change it to "may?"

MCMAINS: I don't think that changes the determination.

SOULES: Good suggestion. I agree.

MCCLESKEY: In the next to the last line, will it read, "an expert may be called?"

LOW: Yes.

MCCLESKEY: Any objections to that?

JONES: I have two more comments.

MCCLESKEY: Alright Franklin, go ahead.

JONES: Right under paragraph 5, on 5a, (1) on page 29, on duty to supplement interrogatories, I would suggest that we insert between the word "incorrect" and "when" the word "or incomplete" so that we require a party to supplement if he knows that his responses are either incorrect or incomplete.

MCCLESKEY: Incorrect or in complete?

SOULES: Then number 2 would be "though correct or complete when made is no longer ...."

MCCLESKEY: Franklin, would you go over each of the changes there in 5a that you would make?

JONES: O.K. I would drop down to paragraph (2), and I would take out the words "a knowing concealment or misrepresentation" and substitute for that "misleading." I think a knowing concealment or misrepresentation is a little strong.

MCCLESKEY: And what would you put there, "that failure to amend the answer is in substance ....

JONES: In substance misleading.

MCCLESKEY: And strike and "knowing concealment or misrepresentation." Would you also in paragraph (2) make any changes with respect to adding the word "complete" or "incomplete"? For instance saying, "he knows that the response though correct when made is no longer true or complete." Does that need to change?

LOW: Well, one other thing on that might need clarifying. He knows that the response was, "was" speaks in terms of back at the time he gave it. You want his to be current, "was then" or "is now" incomplete or you know, see "was" would talk about he's giving it and it was incorrect. Now we're talking about supplementing it, so your discovery is current, "was" or "is now," or "is no longer" or something, what I mean is you can't use the word "was."

SOULES: Where's that?

LOW: No, I'm talking about (1).

SOULES: Well that's when he finds out either it was wrong when he did it, it was wrong when he did it, two is it was right when he did it, but it is no longer right.

LOW: O.K. alright, you're right.

GUITTARD: Or complete.

SOULES: Or complete; that's a good suggestion.

MCCLESKEY: Alright the changes we have in 5a, in page 29, are in a(1) "he knows that the response was incorrect" and add "'or incomplete'" when made, "and in (2) "he knows that the response though correct when made is no longer true or complete and the circumstances are such that failure to amend the answer is in substance misleading." Does that cover it Franklin?

JONES: Yes sir.

MCCLESKEY: Is there any objections to making those changes? That will be recommended by agreement, since I hear no objections.

EDGAR: George, reread it so that we can make sure we've got it down.

MCCLESKEY: We just had a suggestion here in (2) that we make that read he knows that the response though correct when made is no longer true and complete, instead or complete, and I believe it's good suggestion.

EDGAR: George, well don't you want to say he knows that the response though correct or complete when made is no longer true or complete ....

MCCLESKEY: No, correct and complete when made, no or complete, I guess the or would be proper there.

JONES: Either one, either one.

MCCLESKEY: Let me, Hadley did you want me to go over that again, the changes?

EDGAR: Well, yes.

MCCLESKEY: In (1) it will read, "he knows that the response was incorrect or incomplete when made," and in (2) it will read, "he knows that the response though correct and complete when made is no longer true and complete."

EDGAR: "Or" the second time.

GUITTARD: Both true and complete in order to be satisfied, so if you have to say "no longer true and ...."

MCCLESKEY: I think that's right. I've got "and complete" inserted twice, one at the end of line one of paragraph two and the other one after the word "true" in line two of paragraph (2). So the paragraph (2) will read "he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading." Can that be done by agreement? What other paragraphs do you want to comment on?

MOORE: Mr. Chairman would there be any objection to where they disclose the name and address of witnesses, both expert and lay

witnesses, that they also furnish their business and residence address, and residence telephone numbers ... you could get a name you won't be able to find.

MCCLESKEY: Where, what let's go back.

MOORE: Pages 24 and 25 in d, Potential Parties and Witnesses. A party may obtain discovery of the identity and location (name and address) of any potential party and of persons having knowledge of relevant facts .... I'm suggesting that we make that workable .... should be the name and location, name and address, and residence and business telephone and residence and business address. To locate the man and satisfy them that you're going to get a witness .... .could be required. . . . . .you have the same thing up here with respect to experts under (1) on page 25.

MCCLESKEY: Does anybody have any objections to that concept? I hear none, I believe that is the paragraph Bill Dorsaneo was going to make a suggestion on on page 25, paragraph e(1).

DORSANEO: Yes sir.

KRONZER: 24d says, "location (name and address) of any potential party ..."

MCMAINS: He wants to add "telephone number" basically.

MCCLESKEY: What Hardy was getting to is address both at home and the

office and the phone number. . .

KRONZER: Yes. . . a drivers license, social security number. . . I'll put it on your computer for you, Hardy.

MCCLESKEY: Anybody have any objection to that concept?

KRONZER: I just object to it generally.

MCCLESKEY: Anybody else have an objection? If not we'll ask Bill to include that in his comments as to the exact wording to take care of home and business address and home business phone number. Rusty?

MCMAINS: Mr. Chairman, I just want a point of information. Why on page 29, in 4a, among the sanctions that are available, it says that the trial court may order that "discovery not be sought at all, in whole or in part." Why is that in there?

DORSANEO: That's in the present rule, isn't it?

MCMAINS: No, it is not in the present rules, There isn't any ability of a trial court to enjoin discovery in a case from the inception. I mean they may limit discovery, you're talking about under 186b, of a particular question. I don't have any problem if its limited to category or subject matter, but the rule is ....

MCCLESKEY: Where are you, Rusty?

MCMAINS : Page 29, a up at the top of the page, "ordering that discovery not be sought at all, in whole or in part." It seems to me at that point you have an appealable order, because you can't go forward with your lawsuit. I don't understand why that, under what circumstances that sanction was, you know, what the Committee had in mind as to that. 186b deals with, you know that a particular requested discovery not take place. That's fine, but to be entitled to a sanction or whether it be an abuse or whatever, that there be no discovery. . .wrong.

CUNNINGHAM: I think that's what it means, but maybe a word needs to be added to make sure. I've read it to mean just that. That any particular type of discovery ....

MCMAINS: I didn't, because it says later on, it's very clear that it's different. Because after that it says, "or that the event or subject matter of discovery be limited, or that it not be undertaken at the time or place specified," but the first one is totally unlimited, and I have a problem with the lack of limitation relating to any specific discovery request.

SOULES: Under what circumstances can the court say no discovery in this case by anybody? That is, whenever it protects the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. OK?

KRONZER: Where's that?

SOULES: That's in 4, Protective Orders. That's the first language. Only under those circumstances that any of these sanctions can be imposed. Now, where the parties are horribly mismatched, in a small case, under this rule, and it's a simple case, and one party or the other is just steam-rolling with his lawyers and browbeating the other guy. . .

KRONZER: That's good.

SOULES: A judge can say, "No discovery in this case, and we'll go to trial." Period. But that's the most, under those circumstances can be done, but it's got to be with a situation where . . .

MCMAINS: I don't see that as a very restrictive standard.

SOULES: What?

MCMAINS: Section 4 is a substitute for 186b on protective orders. This is the place where you as a party resisting discovery come to the court and say, "Wait a minute."

SOULES: That's right.

MCMAINS: 186b has no comparative rule at all, no comparative relief that no discovery under any circumstances in any form or fashion can be conducted.

SOULES: There's no protection for the fella in those circumstances

that I just gave that's spelled out in the present rule. But it is in this rule, and a judge can say, "Why do you want to discovery in this case at all?" but he doesn't give any very good reasons. Why do you think he shouldn't have discovery? It's a suit on a note or something, where there's very little issue anyway, it's just irrational, annoyance, undue burden and unnessary expense and a judge says why do you feel he shouldn't, and he tells you it's a simple case and this is all there is to it. What do you say about that? Well, it doesn't seem that way to me, but I really don't what to tell you specifically and the judge says we're just going to go to trial on the pleadings in this case.

KRONZER: I know some judges who would do that, given that power in Rule 18, even as you've now got a drawleg (?) broad enough to handle them. The question is the court has lived a long time with Rule 434, that is permitting a party to make a record to permit him to present error when the trial judge is being arbitrary. What your talking about, it may be a case where the guy can't answer his questions without some discovery, without some permission to do something. A mandamus may be his relief. But how do you do mandamus if you don't have the material? Remember DRT vs. Oler , which preceded Ex parte Hanlon , when they were trying to get the names of the witnesses off the bus, and the Supreme Court said you can't have that because the rules say no and you haven't proved harm, because if you don't have them, you haven't proved what they said. Well, that's the problem your getting into if you can't develop what it is you're saying say, hey baby, you can't do that. Rule 434 has one great part that is rarely used and that is, when the judge is being arbitrary you've got

a right to develop a record on it and to show your grounds for what your being treated. Now, you're cutting into that pretty deep with that kind of language as I see it.

SOULES: That's the purpose of it, it reaches that circumstance, whether this committee wants to advise to take it or not.

KRONZER: Well, as long as everybody knows. I've been a Kicker and a Kickee.

MCCLESKEY: This is a substantially substantive change to the present rules.

KRONZER: It's just no fun to be the kickee!

MCCLESKEY: Are you ready to indicate by a vote what your preference is on this?

KRONZER: I don't like that either, but I don't know what you do.

MCMAINS: I guess what I'm getting at is, I don't have a problem with prohibiting a specific discovery request. I have a problem with a prospective bar to any form of discovery.

MCCLESKEY: Would your objection be. . .

MCMAINS: In other words, what I would say is if you said ordering that the requested discovery not be sought at all, in whole or in

part.

KRONZER: Or the requests for discovery be limited, in whole or in part.

MCMAINS: That's right, but to just say not only am I not going to make him answer these interrogatories, you can't ask any more or I'll hold you in contempt.

CUNNINGHAM: Why don't you make a motion to add those words. You said the requested discovery.

MOORE: Leave off the word "all" ___ "discovery not be sought in whole or in part."

GUITTARD: What's the difference between that and just denying the discovery. Are you saying you're not going to let him seek it, or you just not going to let him have it?

MCMAINS: What they tell me judge, is the rule as it is presently written is that he can't seek it.

GUITTARD: I understand, but does your objection go to the seeking as well as . . . .

MCMAINS: Yes, in other words, as long as we get a right for a ruling on a specific request for discovery.

GUITTARD: But would it satisfy you to put the "requested" in there and so forth, if you still use that word not being sought?

MCMAINS: Oh I see, no I. . .

GUITTARD: You could just say that the requested discovery not be make is what you would do.

MCMAINS: I see what your saying, Judge.

MCCLESKEY: Mr. Moore has a suggestion here.

MOORE: I'm going to make a motion. . . introductorily you're talking about that you request discovery sought, I'm going to move that the a .... be changed, ordering that discovery not be sought in part.

JENNINGS: Well, then it says in whole or in part.

MOORE: That's right, well, more than that, it says not be sought at all in whole or in part, and I'm just saying ordering that discovery not be sought in part or that the event or subject matter for discovery ----

MCCLESKEY: I'm having a hard time following you Hardy, why do you leave out in whole?

MOORE: I just think it's too broad, I'm apprehensive about it I concur in the apprehension of Mr. Kronzer. but I think there might

be part of it that should be -----

MCCLESKEY: Would you accomplish the same purpose by leaving out the words, in whole or in part?

MOORE: Well I think you'd have to leave out the words "at all," don't you?

MCCLESKEY: Yes, leave out, let it read, "ordering that the requested discovery not be sought. . .

MOORE: In part, now I think that perhaps there might be an occasion where part of it shouldn't be permitted, because you go on to say or that the event or subject matter of discovery be limited, or that be not be undertaken at the time or place specified. I think they should, there might be some of it that would be objectionable, but just to say you can't do it at all, I think that's dangerous. A judge gets mad or he closes his mind to presentation or matter.

MCMAINS: Judge, I think in answer to your question about the sought part, that mirrors pretty much with what 186b is now and since it's a motion for protective relief, as opposed to a response necessarily to the discovery request, I think that it's proper that the sought, that it be related to the sought, because generally it's when for instance they want to dispose someone or do something else and you, or require you to produce a bunch of things, you file a motion for protective relief saying they should not seek this or be allowed to seek this. So I don't have a problem with that aspect of it. As long as it's

limited to the requested discovery, so we have a specific ruling on it.

MCCLESKEY: Hardy, would your point be made if we let that read, "ordering that the requested discovery or any part of it not be sought, or that the. . ."

MOORE: The thing that bothers me about that is in the introductory statement it says, "on motion by any party against or whom discovery is sought," so it seems to me that you, that what you are saying is that sought, what's the difference between saying your seeking it over here and saying your requesting over here in paragraph 8, I can't, I don't see it as sufficient.

MCCLESKEY: Well no I would leave that in, "not be sought," I would leave that in, I'm just trying to. . .

MOORE: What I'm saying is that, what Russell is saying that he'd be satisfied to say that the discovery, or in that the requested discovery not be sought, but already you're seeking a discovery by . . . I don't know that adds anything to it. In other words, I'm in accord with what his views are; I don't think that putting in the word "requested" is going to help any.

MCMAINS: Well,I think it does in that unless there is an initiated discovery process, there is no generic power of the district court to walk in and say, in response to no discovery motions, O.K. discovery is over, and that's what I'm . . .

KRONZER: I'd like to suggest the adding of this to Russell and to Hardy, on page 28 before or after the second line after the words, "under these rules," "specifying the grounds therefor" after the words, "under these rules," so that if the court acts to knock out everything, you at least have something to turn to, to see a basis, whether the action is arbitrary or not.

MCCLESKEY: I wonder if we could come to that after we finish with a.

KRONZER: I'm relating it to a, I'm saying that "on motion by any person against or from whom discovery is sought under these rules, specifying the grounds therefor," because you see over here it says, "Specifically, the court's authority as to such order extends to, although not necessarily limited by any of the following," well if you tie that type of a just-knock 'em out order to a specific motion setting out grounds alleging harassment, the court on appeal would have to assume that he was operating within those grounds to do it, and that does give some control of his ruling. That's all I'm saying.

MCCLESKEY: So you would have that first two lines of 4 at the bottom of page 28 to read, "on motion by any person against or from whom discovery is sought under these rules, specifying the grounds therefor the court may."

MOORE: Yes, that's right and then putting request back in.

MCCLESKEY: Anybody have any problem with that?

KRONZER: Then the action could be measured by extraordinary ....

MCCLESKEY: If we have no objections, that will be recommended by agreement.

SOULES: The only suggestion I have is that, is placing the language. You're modifying the motion, aren't you? The motion specifying the grounds therefor and not the rules under which it is sought." I'd say on motion specifying the grounds therefor.

KRONZER: That's right.

SOULES: And then on a, if we put ordering that the requested discovery not be sought. . .

JENNINGS: How about even denied, it's already been sought.

SOULES: Well, not be sought again, I guess. . . And then in whole or in part the requested discovery may be one question only.

MCMAINS: Why not just jay, "not be sought in whole or in part." Just leave the "at all" out.

SOULES: "Not be sought in whole or in part" ....leave "at all" off there. So, "ordering that the requested discovery not be sought," strike "at all" "in whole or in part," and finish the sentence.

MCCLESKEY: Any objection to that? That meets your problem, Hardy?

MOORE: That's fine.

MCCLESKEY: Alright, if there are no objections to that, we'll recommend that by agreement, any time you want to vote say so. Any other suggestions on 166b, David?

BECK: I have a question, Mr. Chairman. Under h on pages 26 over to 27, and specifically the provision dealing with that charge. What was the reason for putting that in there? Was it to allow the parties to informally handle matters which historically had been handled more formally, and if that's the case by requiring the requesting party to provide the medical records free of charge, are we in effect creating an incentive to use the more formal means. In other words, it may be cheaper to use the formal means if you got to supply the other side with copies of records. Was the sense of the Committee in putting that provision in there?

DORSANEO: David, we have to look at what the old one was, and you have to figure out what really the change is. This is one, frankly, that was left to people more in this business in terms of the exact wording.

MCMAINS: I don't think it's much different than the ------- rules.

DORSANEO: I'm not exactly sure what your asking, or whether the Committee did it, making more things available without charge or fewer

things. My recollection is that there's more without charge in the current rule. The current rule, "copies of all medical records, etc., shall be furnished without charge to all parties as soon as possible," Now what does this present one say?

BECK: Basically, the same thing, I guess my question is what was the experience under the rule. Were people resorting more to the formal means simply because this charge provision was put in there or not? I guess I'm just really asking is how the rule worked.

KRONZER: . . . not that we want to give it to them but they just invariably use the discovery service as a . . . and they bring them up I say, do you want a copy? And then they pay for our copy and they pay for theirs. That's the way it goes. But you have to pay more than you do by this, because you have to pay that reporter.

BECK: That's what we do.

DORSANEO: David, this says furnished by the requesting party to the party who furnished the authorization, and then it says they'll be made available to all parties and then the last sentence says making them available doesn't involve actually giving everybody one, but the mailing of written notice by the requesting party that he's got them within this time period constitutes making them available. So it really makes you have to make them available less, but you have to make them available to the person who gave you the authorization. . .

SOULES: The concept was that the party who has control of the

records can get them probably cheaper, and he can run them down to copy machines probably cheaper but how many copies should he have to run, one now and give that to the fellow who asks for them and then the requesting party notifies everybody else he's got them, presumably they're on the same side and they can xerox their own copies.

CUNNINGHAM: I think under definition of what he has superior control under, you can get it under the other rule without even resorting to this now.

SOULES: ... the copies free, instead of giving you the original for you to copy.

MCCLESKEY: Are there any suggested changes in the proposal? Hearing none I assume that "h" is alright as it is. Comments upon other parts of 166b? If not, are you ready to recommend 166b as proposed, and as amended by the suggestions here this morning? All in favor of doing so raise your hand. Any opposed, I see no opposition. Bill do you have any comment on ....?

DORSANEO: Well the others, that's two years or more of work right there, 166b, and the others really have, until we get to the non-compliance rules don't have the same, wouldn't have the same kind of ..... at this point, with one thing in one and one thing in another.

MCCLESKEY: Alright then let me make this proposal, you have had the agenda in hand with everything as stated. Are there other rules in this group one that you desire discussion upon at this time or are you

ready to recommend them as submitted?

SPARKS: I have a couple questions about some of them. I wanted to ask a question on rule 200 page 53.

MCCLESKEY: Page 53, rule 200, alright.

SPARKS: I've had to wear these trifocals for a while, but the way I read this rule 200 it appears that without leave of court a plaintiff can take a deposition for appearance date by filing a motion and an affidavit.

KRONZER: That's what it reads to me too. I can't see why that follows.

SPARKS: My question was, why this change in the rule, I don't understand that. What was the reason for it?

DORSANEO: The first thing I'd ask you to do is repeal it, and I can tell you the deposition rules, how they developed and where this language came from, but I'm not understanding your exact question.

MCMAINS: He wants to know why you can take a deposition before the appearance date of the party, without leave of court. Why that change? Now you can do it by just filing an affidavit.

SOULES: The reason for the change is, why have the court involved at all. There may be no objection to it, period. So, you get the, the

other party must be served with the notice and there must be good cause shown by affidavit, and it may just come off.

SPARKS: But isn't that by agreement? I mean....

SOULES: No, because you've got to file a motion objecting to it and then get the court involved. It's reversing the court's burden. It's making the court come into play only when there is an objection involved, as opposed to putting the court in play without an objection.

SPARKS: I just see a lot of potential abuse there. I just don't understand.

DORSANEO: It follows roughly the language of the comparable federal rule, and it is now to my recollection it was present just as a matter that was thought to preferable to the way it's ordered now.

KRONZER: Well Bill, I really don't follow it either. You mean that if I file a motion, and I just allege good cause, nobody passes on it. I've got a motion there that with an affidavit, I get to take the deposition.

MCMAINS: That's right.

DORSANEO: That's right.

KRONZER: That seems like an exercise in futility or not futility

cause I want the deposition, but that doesn't seem, there ought to be somebody, if you are going to accelerate it to pass on it or grant leave to do it.

MCMAINS: Frankly, I think what Sam's talking about is, is a concern for a defendant probably since he is not the one initiating the action, that is the little party defendant or driver is liable to wind up being deposed formally in a judicial proceeding on an affidavit before he ever gets representation by a lawyer. I'm sure that that's his concern. Am I not correct?

SPARKS: That's one of them. It could be anybody.

MCMAINS: It could be without notice.

SOULES: It could be without notice?

KRONZER: Sure, it could be without notice. It says that a defendant has served .....

MCMAINS: Yes, but service does not necessarily mean received. You understand.

SOULES: Service in this case obviously means by citation.

MCCLESKEY: We are obviously talking here about a concept of policy rather than the wording of a rule. I think probably we just might take a vote on the concept itself as to whether or not you are in

favor of changing the present policy of not allowing depositions prior to appearance date. How many are in favor of retaining the rule as it is now and not allowing an early deposition?

SOULES: Would you believe this?

MCCLESKEY: One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen. I have thirteen in favor of retaining the present rule of not allowing early deposition. How many are in favor of changing the rule and allowing early depositions?

MCCLESKEY: How many are in favor of the change? One, two, three. Thirteen to three. Now as I understand it, that knocks out all of paragraph one, the two paragraphs in paragraph numbered one under rule 200, page 53, is that correct?

SPARKS: No only the b part as I recall.

MCCLESKEY: Oh yes, only the b part. Well the second unnumbered paragraph beginning with "Leave of court..."

DORSANEO: The first phrase, then, probably need to be adjusted.

KRONZER: Mr. Chairman, as long as you are talking about policy, I won't even make a big argument about it, I sure am opposed to that italicized language on the middle of page 65 dealing with rule 207a on the use of depositions. That leads you right up to the eve of trial.

JONES: Go to page 63 Jim.

MCCLESKEY: Lets go to that page.

KRONZER: Franklin's got one earlier.

JONES: Luke.

MCCLESKEY: Lets stay with page 53 for the time being.

KRONZER: Oh, OK.

JONES: That's where I am.

MCCLESKEY: Ok, Franklin.

JONES: Luke, what discussion was had within your committee with respect to the ten-day notice rule as opposed to the federal rule of reasonable notice?

SOULES: None.

JONES: Well, I for one have got caught with my britches down on that ten-day notice rule so many times that my insurance company ought to be nervous. And, I'm very much favor going to the federal rule of reasonable notice. My natural opposition is....

SOULES: I think that's a good suggestion

LOW: Ten days is reasonable.

SOULES: I think that's a good suggestion.

KRONZER: Of course that cuts a lot of ways.

MCMAINS: Might be shorter might be longer.

KRONZER: That kind of stuff you get, the courts over there only one or two days is adequate.

LOW: Depends on the fact situation.

KRONZER: Whether the ships are coming in or out, they really load you down.

MCCLESKEY: Are we through with one? I'm not satisfied that we're through with number one yet, there on page 53. 200(1) how is that changed under our vote? Do we retain the old rule?

SOULES: I believe, how's this for a suggestion? We say "Leave of court granted with or without notice, must be obtained only if a party seeks to take a deposition prior to appearance day...." Period, anyway after that to strike the exception, cause that's what we're taking out. Leave is not required if you have notice and an affidavit. Based on the information believed, it is actually

everything from except in the sixth line to the conclusion in the writing of that rule.

MCCLESKEY: Would you repeat that?

GUITTARD: That's the practicing policy they can work out.

SOULES: But it's the exception that you want them to think about when they vote.

MCCLESKEY: So that the second paragraph would read, "Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant." Period.

SOULES: Period.

MCCLESKEY: To the end of the paragraph? Let's see.

MCCLESKEY: Would you leave "b" in?

MCMAINS: "b" in.

MCCLESKEY: Now it sure is, you're sure right.

DORSANEO: Right now that principle is addressed in different language in the first sentence of rule 186b, and just at first blush, what Luke suggests looks to me to be basically what the first sentence

of 186b currently says, but we could either take that sentence and put it in. The first sentence would read, places a leave of court limitation for depositions prior to hearing date, requires a sworn motion showing good cause.

MCCLESKEY: I think that's a good suggestion, and Judge Pope is making notes on that and the Court will take that into consideration.

SPARKS: Cause that enlarges it from a defendant to any person and that's the way it should be.

MCMAINS: Right.

MCCLESKEY: Yea, in the second line Sam. All right Franklin, let's go to your paragraph two there, 2a.

JONES: My suggestion or motion is to substitute the word "reasonable" for the words "ten days."

LOW: I'd do the same thing.

MCCLESKEY: Any objections? By consent that will be done.

GUITTARD: I have a question about that, are the judges going to have to decide .....

.....

******there is more here but I can't get it

******

KRONZER: I'll say this Judge Guittard, it ends up where there are just never any complaints about it, except when you just got a bad thing going with the other side, between the lawyers, because it is a practical matter, it works both ways. The federal, the type of cases make a lot of difference in what notice you have to give.

SOULES: One question on that could we set an outside limit so that you wouldn't just get up to deposition day and have a party object, the deposition didn't have reasonable notice and we're not going to testify. Say, reasonable notice not more than 30 days must be given.

MCMAINS: Not more than 30 days.

JENNINGS: That's 20 days more than now.

SOULES: Ok, I withdraw.

MCMAINS: You would need a not less than.

KRONZER: Well you set your time, Luke, you set it. If they don't like that, if they think it's not reasonable, they got to quash it.

SPARKS: I agree with Jim.

SOULES: We get objections to depositions the day before the deposition needs to take place, and set three days after that for

hearing.

MCMAINS: That's right.

SOULES: So if you had an arbitrary standard that said this is enough no matter what, you would know that wouldn't be the objection the day before.

KRONZER: But can't you provide that any motion to quash must be heard before the date it's set?

MCCLESKEY: Let me interrupt and talk about a more pleasant matter. Franklin has just pointed out to me that if you desire to do so, we can take orders and get the Oyster Bar to send over sandwiches of some kind, and either eat here in a few minutes rather than go out or work through lunch. I think we had better break for a few minutes. Would you rather do that or would you rather take a forty-five minute break and go somewhere for lunch.

--BREAK--

MCCLESKEY: Lets get back to order, and get back to our discussion. Judge Campbell advises me that a check has been made over at the Oyster Bar and at 1:00 they can take care of our group going through the buffet line or they will take specific orders, if you wish to do that. So we will work here until one o'clock and go back to that.

We had not completed rule 200 on page 53, paragraph 2 in that

"reasonable" had been suggested but some question had been raised about whether or not that was a good term. During the recess I talked with at least one of the individuals who raised that issue and he said "reasonable" was alright with him. What's the pleasure of the group? Do you want to leave it "ten days?" Do you want to change it to "reasonable?" Everybody in favor of "reasonable." Well, I believe that is nearly everybody, let's just leave that reasonable and...

KRONZER: Before we go on on that, something that Luke said, our notice rule that we have, and it's not tampered with here, does raise the question about what Luke says, about the filing of a motion to quash the day before your notice is set for hearing, because you have to give three days notice for a period after the setting. So that would in effect knock out your deposition time. I believe we ought say regardless of rule 14 or anything else, that any motion to quash a notice under this should be heard before the deposition time.

CUNNINGHAM: How are you going to get the enforcement of that rule?

KRONZER: Well, that's a good point, I don't know.

SOULES: OK, lets give it a try like it is and see we get.

MCCLESKEY: Let's finish here. Were you on this subject, Rusty?

MCMAINS: Indirectly, because right now this says ten days notice must be given, doesn't say served. Elsewhere we have talked about "served." If you put "served," then if they mail it, they get three

days after receipt anyway.

MCCLESKEY: Change given to served.

MCMAINS: So, yeah. You have a little more leeway, I think

MCCLESKEY: Any objection to that?

KRONZER: Reasonable after service.

MCCLESKEY: Anything else under the rule 200? If not I'm going to ask that we move to 215a.

KRONZER: Wait a minute, no, 207.

MCCLESKEY: Jim, what I would like to do is go to 215a, on sanctions discuss that and then come back to answer the .....

KRONZER: Well, David's got priority, he's back at 169.

MCCLESKEY: What comments do you have on 215a, are you in favor of putting abusive discovery and sanctions in this all in one place?

JENNINGS: What page?

MCCLESKEY: It starts on page 74. Looking a paragraph numbered one, which extends over onto the top of page 76, do you have any suggestions on that? Motion For Order Compelling Discovery. Sam?

SPARKS: I don't think it makes a lot of difference in meaning, but maybe it's because you seem to spend more and more time on sanctions in both federal and state court. But I sure do like the word the court "may" rather than the court "shall", even though you give court in the next sentence the authority not to impose sanctions.

MCCLESKEY: Where are you?

SPARKS: I'm looking right now at page 75. "d" paragraph "d"

MCMAINS: Where are you talking about, Sam?

SPARKS: Just on "d." A lot of trial judges read the rules, read just the first part and don't read the second, and they think they're under an obligation.

MCMAINS: They are.

SOULES: This does put a loaded obligation on them.

MCMAINS: This is mandatory.

SOULES: The court has now ordered that the expenses and so forth be paid unless, and that's the last part of the sentence, "unless the court finds that the opposition of motion was substantially justified or that other circumstances make an award of expenses unjust." The court has to make those findings in order to not give cost of

expenses. That was the burden that the Administration of Justice Committee wanted in the rule. That doesn't mean that we'll want it in the rule, but that is the way they wanted it to be worded.

MCCLESKEY: Sam, are you satisfied with that explanation?

SPARKS: It is just a personal idiosyncrasy I've had a long time.

MOORE: Could someone tell me what this means?

POPE: Where are you?

MOORE: On 215, the first paragraph, "A party, upon reasonable notice to other parties and other persons affected thereby...."

SOULES: There is now a provision....

MCMAINS: It's non-party discovery.

SOULES: For document discovery for example, from a non-party, or a deposition of non-parties.

MOORE: Alright, just tell me, I wanted to know what it means. Did you consider it to be a party affected thereby....

SOULES: That's what it means.

MCCLESKEY: Rusty, you indicated you had a comment.

MCMAINS: I just had had a question on section "b" paren 3, on page 74 when you get down to "c" and "d" are you intending to include all of the request for production? All it says is the request for inspection. I mean, is it any request on the under rule 167? The rule is labeled,

SOULES: Well just say a request submitted under rule 167.

CUNNINGHAM: You're saying that might ought to be a request for production or inspection.

MCMAINS: That's what I say. This is production of documents and things for inspection, copying work.

SOULES: That's what I was saying, why don't we just say, "to serve a written response to a request submitted under rule 167." Not for anything.

MCMAINS: Oh I have no problem with that. I'm just saying wasn't that intended, that's the only place I could find rule 167 mentioned so I, anything you wanted under 167 ought to be in there.

MCCLESKEY: Any problem with that?

MCMAINS: That the same thing appears in "d". "in a response to a request for inspection submitted under..."

SOULES: Take out "for inspection" there too?

.ESKEY: The change that I assume is being made by consent is in rule, is on page 74, near the bottom of the page in "c" and "d" sub-subparagraphs "c" and "d". "To serve written response to a request submitted under Rule 167," and in "d" "in response to a request under rule 167." In both cases leave out the two words, "for inspection", any objection? Done by consent, it will be so recommended. David?

EDGAR: Are you going to leave that in "d" George?

MCCLESKEY: Do it in "d" also.

EDGAR: You've got to do more than just eliminate the words. How will "d" read?

MCCLESKEY: "in response to a request submitted fails to respond.

DORSANEO: Change the other "inspection" to discovery.

MCCLESKEY: Discovery?

DORSANEO: Yes.

POPE: Two places.

MCCLESKEY: You are very correct Hadley, and the word "inspection" will be changed to the word "discovery" in two places in "d." So that

"d" will read, "in response to a request submitted under rule 167 fails to respond that discovery will be permitted as requested or fails to permit discovery as requested." Any other suggestions on that page?

MCMAINS: Why do you need those two paragraphs?

MCCLESKEY: You mean "c" and "d?"

ELLIOTT: If you leave out inspection, don't you have everything that's in paragraph "d" that's in paragraph "c?"

MCMAINS: No, but one's a failure to file a response, the others file a response saying I ain't going to do it. And you get a sanction in both cases. At the present time there ain't no sanction for failing to respond.

ELLIOTT: Well, you've got failure to respond in paragraph "d" and you've got failure to respond in paragraph "c."

MCMAINS: No.

SOULES: No, paragraph "c" is that he failed to respond at all.

MCMAINS: Paragraph "c" is ignoring it.

SOULES: It keeps on saying nothing, and the other one is, he says, the wrong thing.

DORSANEO: It may not be needed, but it doesn't hurt anything does it?

GUITTARD: I think you need it, I think it clarifies.

MCMAINS: I think that you do too, under the existing rule...in light of the existing rule.

EDGAR: Alright then, George, what you have done in "d" then is eliminate in the first line the words for "inspection", just eliminate that entirely. And then changed "inspection" to "discovery" in the other two places.

MCCLESKEY: Right, but, do we have clear language if you go back and read two up there?

MCMAINS: It's three, the first half of it, it's a little bit...

MCCLESKEY: But we have the word "fails" appearing twice if you say if a party fails, and then go to "d", in response to a request submitted under 167, "fails" to respond. Something needs to be done.

JENNINGS: Strike that last "fails."

DORSANEO: Yea, the second "fails."

MCMAINS: What about if you'd change it to the affirmative, responds that discovery will not be permitted as requested.

DORSANEO: No, the second fails needs to go.

SOULES: You can start out this way, "d" to respond that discovery will be permitted as requested or to put discovery as requested and then move the first part down. That's consistent with the rest.

MCCLESKEY: Do this again.

SOULES: Slowly, In response to a request, then strike "for inspection", submitted under rule 167, then strike the word "fails", take all that language that I have just described and move it to the end.

POPE: Tell us how you would, what it would say.

SOULES: And then it will say this "d," to respond that discovery...

MCCLESKEY: Go back and read it, "if a party fails."

SOULES: If a party fails, "d" to respond that discovery will be permitted as requested or to permit discovery as requested in response to a request submitted under rule 167. That the rest of the subparagraphs.

MCCLESKEY: Everybody happy with that? If not, do you have any other, if so, no objections, do you have any other proposals on rule 215a, page 74?

EDGAR: I've got a question generally and it goes back to rule 166b, which continues to allow a non-party who has given a statement to obtain a copy of the statement from the person that took it. Now that rule came into being a number of drafts ago, back seven or eight years ago, and then the very next time that rule was amended, well, the original rule provided for some vehicle by which that witness could obtain, go to court and obtain a copy of the statement, and after the rule was amended, that provision dropped out. And I just don't know of any provision in the rule now by which that party can obtain a copy of his statement if the party to whom he gave it refuses to give it to him.

EDGAR: And I would like to know how we can address that, and if it is our desire to include in here some provision for enforcement of a right to receive that statement. Because you see rule 215A is initially the record only allows a pardon to a full sanction, and so it's not going to help this witness who gave the statement, at least as I read it, and I just have a problem with that provision.

MCCLESKEY: Do we have in rule 166b a provision whereby the. . .

EDGAR: Yes, I think it's on page 25, we've continued to recognize

MCCLESKEY: 26.

SOULES: g.

EDGAR: We have continued to recognize that, but where is the sanction for refusal to ....

KRONZER: Very good point.

EDGAR: It dropped out of the rule when it was amended two or three times ago, and it's never been picked back up and I've always been concerned about that.

CUNNINGHAM: On just a simple motion?

EDGAR: By whom?

KRONZER: By the party. The party doesn't have a right to get it, Joe.

EDGAR: The witness wants it.

DORSANEO: What do you want to do to somebody who doesn't turn it over?

EDGAR: We are talking about a sanction rule, and if we're going to provide for a statement being made available then we ought to provide a sanction to make it available.

MCMAINS: Hadley I think actually the rule does, 215 A is broad enough and it's a general language to include a party affected, not only just the party.

BECK: That's just the notice provision.

EDGAR: The statement is not the statement of a party, but a person, at least that's the way I would construe it.

SOULES: What about adding a paragraph E on 74, if the party fails E to provide a statement as required by whatever G is, look down through the outline, to provide a statement. . .

EDGAR: I'm not suggesting that we take the time here to draft this but it seems to me that this is something that should be considered, and perhaps we should get an impression of the Committee about whether appropriate language in this sanction should be drafted to include that situation, that's all I'm suggesting.

MCCLESKEY: Alright, what's the pleasure of the Committee, do you think sanction should be provided in such event?

KRONZER: I do.

Edgar to provide, did he ? yes.

MCMAINS: Yes.

MCCLESKEY: Anybody opposed to providing some kind of sanction? Hadley, this is not intended as any penalty, would you propose some language to be submitted to the court. . .

EDGAR: Yes, I will.

DORSANEO: Hadley, I suggest you put it on page 77 where it would go logically on page 77 before 3 under the C that's on page 77, maybe D, sanction against non-party for violation of rule 167, or whatever it is, 166B whatever it is, that would be the place for it.

MCCLESKEY: Alright, Hadley Edgar will propose some language in that respect, but the thinking of the Committee is a change is needed or a sanction is needed. Any other proposals on page 74 or 75? Rusty?

MCMAINS: I have a problem with the imposition in under both D and on the next page, on page 76, the imposition of sanctions directly against the attorney for a party, for the reason that, first of all there's a statute in Texas, 320C, Article 320C which says that you can't tax costs against an attorney at all in a civil proceeding unless he's a party to the proceeding, and I'm not sure that any of these would not result in a violation of that statute.

POPE: You know, Article 1731A has a repealer provision and if the Legislature doesn't change our rules it's an automatic repeal of any conflicting statute.

MCMAINS: Well, except it's not a direct, it's not directly in point on that, I mean I'm not sure whether it would just be creating conflict, also it's not, if the Court were to do a rule which says that the parties, I mean a party and his attorney, shall be liable for costs, then I can see how that would be a direct repeal, but when you merely do one that partially conflicts I'm not sure that we get quite

to the same position, because the rule otherwise would still be alive and in fact the actual language of the statute is any rule or statute regardless of any rule or statute, no attorney in a civil proceeding may be taxed or charged with cost unless he's a party. I'll be glad to get the statute if you want.

KRONZER: Here it is.

MCMAINS: You got it, that's it.

MCCLESKEY: David?

BECK: I'd like to speak against what Rusty just said, I think that most of the discovery abuses arise not because of the parties who are litigants, but by the attorneys who are involved in the discovery proceedings, and I think if you look at what the federal courts have done, they are moving in the opposite direction that I think Rusty speaks of. They've even amended the rule now to allow the taxing of costs to government lawyers, which was never the case, to correct the discovery abuses brought about by counsel. Requests for admissions can be signed by lawyers. They don't have to be signed by a party in Texas. The objections are made by lawyers. Evasive answers or answers to interrogatories are generally prepared by lawyers. I think it's important to include the lawyers in there.

MCMAINS: Don't get me wrong, I'm not making a policy decision at this point, I'm merely saying I think that it conflicts with the statute.

MCCLESKEY: Steve.

MCCONNICO: We have had a federal experience with this in the Northern District of Texas. They've been doing this for four years under a local rule, and it's been pretty successful, but when all this discovery abuse was coming up, one of the arguments against having sanctions were that all of a sudden, sins of lawyers are going to be visited upon their clients, and what the American Bar, their committee, one of the suggestions they made is make it where the lawyers pay for their abuses and not the clients.

MCCLESKEY: I think what Rusty is saying is that he's not deciding that policy issue but. . .

MCMAINS: I just think that the statute is fairly clear as I read Article 320C. . .

MCCLESKEY: How would you cure that, Rusty?

MCMAINS: Well, I don't think you can unless somehow this is not the taxing as costs. As I understand the procedure, the procedure generally for these types of sanctions, they are taxed as costs at some point, and you know maybe that's a way out, maybe that's not really, maybe there's a construction around it, but I'm not. . . over the lunch hour I'll go get the statute and show it to you.

GUITTARD: Raised in terms of penalty rather than costs.

MCMAINS: Right.

WELLS: I have a question about just the wording. Are you going to fault the attorney for his conduct or for his advice? I worry whether, the way it's set up here, he can conduct himself any way he wants to as long as he doesn't advise somebody to do something wrong. It seems to me only conduct ought to be . . .

DORSANEO: My recollection is that the language employed was that this Rule 215A in very large measures based on federal rule 37, and that language is precisely the same language, and although I agree with you there might be a more artful way to word it, it seemed to me that the same way was a good way, given the difficulties of wording it.

MCMAINS: I think what he's, one of the things though he's commenting about, is that as long as he ignores the discovery request, then it doesn't appear that the sanction applies.

KRONZER: How do you get around the problems of attorney-type privilege, when you talk about the advice the attorney's given or in the case of a defense that has written to his client somewhere up in Saskatchewan that we don't have to answer this or we've got an Upjohn working for us here, and the judge has got him there by the scruff of the neck, and they say judge we don't disclose that stuff that's Upjohn, that's privileged and how do you get to grips with it? You're talking about punishing for the attorney's advice. Where do you, -how do you pierce that veil?

SOULES: Well, isn't advice a part of conduct?

KRONZER: For sure, but I mean are you saying that breaks down and you're entitled to have a disclosure of all that material that passed between the clients, and well, I mean how do you punish for advice then, if you don't have a disclosure of those things passing between them?

SOULES: The word that's here now is conduct.

MCMAIN: Against the attorney, it's advising such conduct.

KRONZER: . . .and your talking on the next page this obedient party or the attorney advising him, on 76.

MCMAINS: You don't punish an attorney for ignoring discovery requests or throwing them in the wastebasket, or anything else. I mean, under this rule directly as it's written, it says the attorney advising such conduct. Unless you consider his throwing it in the wastebasket advice.

MCCLESKEY: I wonder if we can have a suggestion as to how to cure the problem.

SPARKS: How about the disobedient party or his attorney, or his or its attorney, whichever is preferable. . .

KRONZER: Well at least, Sam, that would probably indicate a

protection of the privileges, but I don't know how you . . .

BECK: What you want to do is make it an objective test where you don't get into communication between an attorney and client, and one way you may do it is strike out the advising and put language such as "involved in such conduct" or "participating in such conduct" or something like that so that you're just looking at objective facts.

MCMAINS: Let me ask you this, as a policy thing, doesn't that put you though in a conflict between the attorney and his client as to who did what and from a financial standpoint, I mean as to whether the party or the attorney is going to get stuck with the cost? You start getting into conflict with your own client.

DAWSON: It sure does.

MCMAINS: I'm just not sure that I would want to be able to precipitate that by saying by just filing a motion. . .

KRONZER: . . well as a practical matter, if a court holds in just an ordinary sore back case, holds a plaintiff in contempt and assesses fees because of something you were caused to go to extra and to do, the plaintiff's lawyer has got to come with the cash, to pay it anyway, the guy doesn't have it. I'm talking about under the present practice, and so you aren't inquiring into what happened or beyond what the man himself did or didn't do, but it seems to me he could be opening up Pandora's Box.

CUMMINGHAM: After all the lawyer's doing what he's doing for his client subject to any other malpractice claim that may be, but he's doing it even if it's bad, because he thinks he's doing for interest of his client. I'm not really sure that I'm in favor of the philosophical part of it.

KRONZER: Well, I'm not either, and I can't see how you could measure it, Joe Bruce, without getting into everything they've done.

CUNNINGHAM: I agree.

SPARKS: What is wrong, Jim, with saying "against the disobedient party his attorney or both?" It seems to me that they're in the disjunctive anyway, and then we'll let the attorney worry about advising the client to waive the privilege so he'll get stuck with the cost rather than. . .

KRONZER: Well, I think that helps as far as trying to create some objectivity that doesn't invade their privileges. As far as me thinking it's a good idea to get into that, I don't. I think punishing the client. . .

MCCLESKEY: In an effort to try to bring this thing to a head, I believe it was Sam here who suggested this kind of language and I'd like your reaction to it. In the third line, well let me start at the beginning of d, page 75, paragraph d. "If the motion is granted, the court shall, after opportunity for hearing, require a disobedient party or deponent or his attorney who participated in the conduct to

pay the moving party the reasonable expenses incurred in obtaining the order," and so on. What we're doing is in the third line after the word "a," require "a," insert the word "disobedient," just before party, and then right after. . . B?

MCCLESKEY: Require a disobedient party, require a disobedient party or deponent or and then insert the words or his attorney who participated in the conduct, and then strike the words whose conduct necessitated the motion or the party or attorney advising such conduct or both of them.

SPARKS: No, I was talking about page 76, "Failure to Comply With Order."

SOULES: That's where you have to go, because you don't really have a disobedient party under, on page 75. That's just a party refusing discovery, he hadn't been ordered to do anything yet. But you have somewhat the same language, except for the disobedient, "required a party or deponent whose conduct necessitated the motion, or the party's attorney."

SPARKS: I'm looking at 2b(2) is what I'm looking at.

MCCLESKEY: Where are you? Well, you don't have any trouble on 75 with this?

SPARKS: I didn't. I thought they were talking about page 76. It may be the same problem, but I wasn't looking.

POPE: Let's go to page 76.

MCCLESKEY: Alright, page 76, 2b(2), is that where you are, Sam?

SPARKS: Yes, sir.

SOULES: "Or the party's attorney" and strike "advising him."

SPARKS: I think you ought to put "or both." There may be an occasion where the judge might want. . .

GUITTARD: "Or his attorney."

MCCLESKEY: "or his attorney or both?" Anybody object to that? Jim, do you object?

KRONZER: I'm of the policy and the principle that you are making it totally objective. He is a participator, if he participated in the preparation of the materials, then he's almost automatically going to be assessed, in any such instance, and I just think that we're into an awful sticky area.

MCCLESKEY: Alright.

WELLS: Well, don't you have the same problem back on 75 where you're talking about the depositions before there's any court, before the court's involved. If the deponent won't answer a question and you got

to go to court to make him answer it. . .as I understand it as the committee has drafted it, the deponent and his attorney are both subject to pay, and perhaps the way it's drafted, his attorney is subject merely for advising him for example that he has something right.

SOULES: See if we could get it this way, if the motion is granted, on d on 75, "If the motion is granted, the court shall, after opportunity for hearing, require a party or depondent or attorney whose conduct necessitated the motion," and then strike all the rest of that over to the end; strike "or the party or attorney advising such conduct." Pick up again, "or any of them," and then finish, and I'll read it again like it would read. "If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent or attorney whose conduct necessitated the motion or any of them to pay," and so forth.

MCCLESKEY: That gets to your point doesn't it, Nat?

WELLS: Well, if it talks in terms of conduct, it certainly makes it difficult. Well, it doesn't make a clear line between conduct and advice as far as I'm concerned.

SOULES: Well, how about this, "If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent or attorney who necessitated the motion." Slight conduct.

WELLS: I think it's really just a policy question whether this

committee believes that an attorney ought to be at jeopardy for advice he gives.

MCMAINS: His conduct could well be the way he's practicing law. He could determine that it's objectionable, and he could be wrong.

SOULES: But the court has the right to tax the attorney or deponent or the party as the court judges . . .

MCMAINS: I understand, I'm just saying all they're asking is. . .

KRONZER: Since he can't test it by habeas corpus, as you know, since it's not incarceration. . . Well, hello Judge.

MEYERS: I'm sorry I had another meeting.

KRONZER: Since he can't test it by incarceration, suppose that you loaded the boat on him, the lawyer, and then the judge has ordered it, fined him and charged him a bunch of current fees, and the lawyers had to come up with it, and then it's determined later on appeal that he shouldn't have ordered that, that was an improper ruling, independent of his success on appeal, do you give him his right of appeal, or return of appellate cost and right to recoup that money in any way? Or, do you give an absolute, arbitrary, autonomous sanction to the trial court where your dealing with a lawyer's advice to his client; no relief by habeaus corpus, no extraordinary power there, as you know, because you're not incarcerated. . . pretty tough.

LOW: I've got a question and maybe I'm in the minority and apparently I am, but it looks to me that we're getting the rules involved in a dispute between the attorney and the client. I mean if the lawyer fails to file a lawsuit or something, the client's bound by it. The client's bound by what the attorney does. Now whether it's the attorney's fault or the client's fault, the court shouldn't have to determine which one it is, and you have the parties before the court. Fine the parties. If the client thinks it's his lawyer's fault, let him go back, but don't have the lawyer go in there and trying to say, no, it's not my fault, it's the court's fault or that. But fine the parties, and then let the parties and their lawyer argue it out whether the court's arguing it out between the lawyers and the parties first hand. I just have a, but that is complete policy, and it creates a conflict that the Canons of of Ethics are going to have. I've been on the Committee 12 years and I can just see many, many problems, and it also goes to the basic concept of what a lawyer does, his client's bound by. Don't make the court make that determination, make the court only say what I did is not being done and I'm going to fine these parties. Now, you parties can argue it out whether the lawyer is to pay it or not. It would penalize the plaintiff's lawyer, because ordinarily he'd be the one that would have to come up with it. I just think it's unfair to include lawyers in it.

MCCLESKEY: Just as soon as we come back from lunch we're going to vote on the policy issue. Let's all go over to the Oyster Bar and let's try to be back here at 1:45, I hope to be knocking on the table at that time.

MCCLESKEY: I believe we'll reconvene the meeting and yes. . .

POPE: There's Pat Beard coming in.

MCCLESKEY: Yes, I see Pat. I welcomed him a while ago. He's going to be here until he starts to Lubbock. He has a son playing football in Lubbock tomorrow.

MCCLESKEY: When we recessed we indicated that as soon as we came back we would take a vote on this policy matter concerning assessment of sanctions against attorneys, and we're talking about the overall general policy now and not the wording of any particular rule. How many of you would recommend that the rules be changed so that the court upon proper finding could assess sanctions against attorneys concerning discovery matters. 1,2,3,4,5,6, let me count, hold them up again 1,2,3,4,5,6,7. How many of you would be in favor of not changing the rules so as to assess sanctions against attorneys in discovery matters, 1,2,3,4,5,6,7,8,9,10,11,12. So, as a policy matter the Committee recommends by a vote of 12 to 7 that there be no changes allowing sanctions against attorneys with respect to discovery procedures.

Before leaving this, I believe there were one or two attorneys who came in after we took the vote, those of you who did not vote on the policy issue of whether or not the rules should be changed or recommendations concerning rule changes, should allow sanctions against attorneys in discovery proceedings would you vote for imposing the sanctions against the attorneys, or against it. Those in favor

that did not vote a while ago, well, let's just start over. Those in favor of recommending the imposition of sanctions against attorneys with respect to discovery procedures, indicate by holding up your hand, 1,2,3,4,5,6,7,8; and those who would not recommend imposition of sanctions against attorneys, 1,2,3,4,5,6,7,8,9,10,11,12. So there are 12 against it, and 8 for it. With that, are there other matters on page 75 concerning Rule 215a that ought to be discussed? What about page 76? 77?

BEARD: Mr. Chairman?

MCCLESKEY: Yes, Pat.

BEARD: On page 76 at the top, award expenses which are reasonable in relation to the amount of work expended, I think the amount of work should be "reasonably" expended.

MCCLESKEY: Alright, any opposition to that? It's on page 76 the next to the top line insert the word "reasonably" between the words "work" and "expended" with "the amount of work reasonably expended in obtaining an order compelling," any objection?

GUITTARD: Chairman, I suggest that instead of that, just use the word reasonable and say reasonable expenses, and strike "which are reasonable in relation to the work expended."

MCCLESKEY: How would that read then?

GUITTARD: The trial court shall award reasonable expenses in obtaining an order.

MCCLESKEY: The trial court shall award reasonable. . .

SOULES: That was debated in the Administration Justice Committee, and it was the feeling of that Committee that a standard of some kind should be there, something that the court should be told would be the standard for evaluating the award, and it was work expended that they decided would be the matter to be considered and not whatever else, a trial court might want to consider of whatever nature, and that's the reason the words are there.

GUITTARD: I withdraw the suggestion.

MCCLESKEY: So, as I understand it by consent the recommendation is that the two lines at the top of page 76 read, "trial court shall award expenses which are reasonable in relation to the amount work reasonably expended in obtaining an order compelling," any objections? If not, what else do you have on page 76?
MCCLESKEY: David.

BECK: Mr. Chairman, I raise this question, under subparagraph 7 on page 77, it speaks of the court awarding reasonable expenses and pleading attorneys fees, but no where in the rule have I been able to find anything that speaks as to how or when that is to be done. A question which oftentimes arises in Harris county, is are those expenses to be taxed as costs or should they be promptly paid, or be

paid forthwith, and this can become important because if this is designed as some type of a deterrent to discovery abuses by taxing it as costs, you carry it along with the case with the result that whenever settlement discussions take place, it has a way of getting lost in the shuffle, so it really doesn't become a deterrent. So I really raise the question, I'm not making any motion. Should we specifically say how the court should award, in other words, should the court enter an order awarding expenses forthwith promptly, or should the court tax them as court costs?

MEYERS: Mr. Chairman, David, doesn't that raise then the additional question of, if they are to be paid forthwith, what happens if they aren't? How are they collectable?

KRONZER: Isn't that under the ruling for costs?

BECK: I don't think it speaks to that Jim. Well, it is if you tax it as cost, yes.

KRONZER: I know, but the right to get the party to come up ruling for cost. Yea, if you tax it as cost.

BECK: Yea, that's what I'm saying, are these court costs or not. I think the district clerks don't consider them court costs.

CUNNINGHAM: I don't see how they could be court costs. The person that asked for it to be done might end up paying for it.

MCCLESKEY: David, how do you think we can cure this?

BECK: Well, one suggestion I would have, if it's the sense of the Committee that they clearly not be part of court costs, I think we could add on the third line there, where it says order or the attorney advising him or both to pay, add the word "promptly" or "forthwith" the reasonable expenses. I think that telegraphs the idea that the party who receives such an order shall pay the money promptly.

MCCLESKEY: Ok, in the third line.

SOULES: The attorney advising him comes out of there too, doesn't it?

MCCLESKEY: Yes. That will come out in a number of places. Does that take care of your problem, David?

BECK: Yes, sir.

MCCLESKEY: Does anybody have any objection to inserting the word "promptly"in the third line between the words pay and the? Anything else on page 77?

KRONZER: Before you leave that, I'd like to add that other circumstances make an award of expenses unjust, in that sense, I would like to suggest to add, or other circumstances make an award of expenses unjust, or that they be paid instanter.

MCCLESKEY: Where is that Jim?

KRONZER: At the end of the sentence. Because he could take a Pauper's Oath.

MCCLESKEY: What change would you make?

KRONZER: I would just say "or that they be paid instanter" because you have a Pauper's Oath and he shouldn't be required to give up his litigation, should he? I mean the judge should be permitted to continue it in his discretion equitably, if he should decide to do so the same as...

MCCLESKEY: Where is that?

KRONZER: At the end of the sentence, the same paragraph. Unless the court finds that the failure was substantially justified, or that other circumstances make the award of an expense unjust, or that they not be paid promptly. I'm just saying invest him with discretion about not causing dismissal of the lawsuit.

SOULES: Bill just came up with this one. Justified or that other circumstances make the award of expenses or the prompt payment.

KRONZER: That's fine, it gives a test to it.

WELLS: Is it better instead of promptly on the third line to put the judge's discretion in there, and to pay at such time as the court may order.

KRONZER: I don't mind leaving promptly and forthwith in here, the plaintiff would .....

MCCLESKEY: Who made that suggestion? Nat, what you are suggesting is in the third line, "or both to pay at the time prescribed by the court the reasonable expenses" or ordered by the court? What's your pleasure, is this last suggestion satisfactory?

KRONZER: It is with me.

MCCLESKEY: This would eliminate the addition there at the end of the paragraph. So that the first three lines will read, "In lieu of any the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay at such time as is ordered by the court the reasonable expenses," and the same language on the end of the bottom line.

BECK: Mr. Chairman.

MCCLESKEY: Is that recommended by consent? David, you got something else?

BECK: No, I was just going to say, that somebody's going to need to look at other provisions of rule 215a, to make sure that we don't need to make similar changes, of a similar nature. For example, on page 75 we have another provision dealing with expenses, and we may need to make the same changes there.

MCCLESKEY: Yes, we will need to make the same thing all the way through, but ..... Is there anything else we need to consider on page 77? 78? I believe that completes 215a.

BEARD: Can I ask a question, what happens if the party doesn't pay?

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muffled

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SOULES: Well it's a court order, failure to comply, with an order can just get worse and worse, under ....

BECK: Under b

SOULES: number 2 on 76, right on down through dismissing your case. It's just another order connected with discovery; you can just order it.

KRONZER: That's when the lawyer evaluates his case.

BEARD: What happens later on if the appellate court decides he shouldn't have paid, how do you get it back?

KRONZER: They didn't answer that question, Pat.

BEARD: I don't know, a man ought to have the right to post a bond or do something to keep from having to pay. You have that procedure everywhere else, and I don't think the courts can just order him to pay, and he will have to pay. But a lot times he's not going to get it back. It would be wrong.

MCCLESKEY: Jim, raised that question before lunch, Pat.

BEARD: I'm sorry.

KRONZER: They didn't vote me down, Pat, I was glad you have apologized.

MCCLESKEY: Did others have concern about that question?

DAWSON: You are going to have to write a whole lot of rules in order to cover it.

MCCLESKEY: If they are not assessed as costs, that's the case apparently, there is no way to appeal from it, the trial court's autonomous.

JENNINGS: If there is an appeal in the case, couldn't that be (appointed as a cost opponent?) -?

KRONZER: Frank, the question there would be whether you would have to be successful in your primary appeal to get those back. Can you appeal on that ruling alone? See, that's not a final judgment, appealable judgment in and of itself.

MCMAINS: Plus you're not a party.

SPARKS: No, we already eliminated the attorney. Rusty, the attorneys can be paid but they don't have to pay.

MCMAINS: I want it where the attorneys have to get paid.

MCCLESKEY: Jim, do you or Pat either one have a suggestion as to how that question can be dealt with?

BEARD: Well, I think it's going to produce ----

KRONZER: I would say that the losing litigant if having been assessed such a fine or penalty or charge, should be able to carry that along with the case as a part, as if it was a part of a final judgment. So it is in a part of the appealability of it. And that imposes a countersanction on the party that got it, because you can get a free ride on appeal or at least an adjustment of cost on appeal, if you were right about it.

BECK: But you can't appeal it now.

KRONZER: No, but I'm saying if you were otherwise appealing the

judgment. Then you can take it.

MCCLESKEY: Jim, you in effect would change the language, from at such time as ordered by the court, to upon final judgment pay the reasonable expenses.

KRONZER: Not necessarily, I would just say, in the event there was an appeal, by the party required to pay on a final judgment itself, he can carry that along as a part of his complaint, relevant to the judgment, even though he may not be successful with respect to the judgment, he can complain about that fine, and can obtain relief on that result.

BECK: Are you concerned that somehow he may be waiving his right to appeal the point by not taking some type of interlocutory appeal?

KRONZER: Well it depends on what the fine is and stuff.

BECK: There is no appeal.

MOORE: ..... it may be that the action of the court may be reviewed and revised on appeal.

KRONZER: In connection with any final judgment, appeal from that.

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too many people talking at once to understand

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KRONZER: No, not if the judge doesn't sustain, the judge on appeal, they don't go with you on that judgment then you can't review that collateral automonous ruling.

CUNNINGHAM: If the case is appealed then that could be raised.....

KRONZER: But you can't get any relief from it if your primary appeal is fatal.

MCCLESKEY: Can you appeal from it if it is not included in the formal judgment?

KRONZER: It is not part of that judgment, it doesn't necessarily perform a part of it or is not a part of it.

SPARKS: These sanctions have been in effect for a couple of years anyway, has anyone had a problem like this?

KRONZER: Oh yes, our judges are not as unkind as you guys, I'm saying that you have to provide for a remedy.

MCCLESKEY: How many of you feel that there should be some provision in here that upon appeal, that the imposition of this sanction should be subject to review by the appellate court?

KRONZER: I'm not advocating, George, except in connection with an

appeal from a final judgment. I'm not saying it itself can be appealed from.

MCCLESKEY: Alright, I understand.

KRONZER: Only in connection with a final judgment adversely.

SOULES: If we put in this language, to pay in the time specified by the court, the reasonable expenses including attorney's fees or to execute or file with the clerk a surety bond as conditioned by the court therefor, would that solve the problem that you are seeing and cause it to be carried with the case or not?

KRONZER: That ruling is not necessarily intrinsic to that judgment, Luke, and it would be final and it doesn't necassarily rise or fall with what the court on appeal does with that judgment. So unless it is given independent vitality on the appeal, it can't be reviewed.

LOW: Jim, can't the court, I realize this is not court cost, we've decided that, but in a judgment can't a court, they can affirm the judgment, but do what they want to with regard to court costs. They can say court costs should have been this way, and still affirm or reverse the judgment. This is a little bit different situation. It came in the category of court cost. You can put some provision in there that although this is not court costs, upon final review, the court will have the power to make rulings with regard to any such fine justice they would, on appeal of court costs, or something, you know, treat it similarly although it is not court costs, because they can do

it in court costs. They can say, the appellate court can say I think it should have been fifty-fifty, you know, and still affirm the judgment.

KRONZER: Well, there is no question if its court costs, they can do that.

LOW: Say, just for these purposes, although it is not court costs, on appeal the trial courts, appellate courts, shall have the same power as they would if it were a matter of court costs.

MCCLESKEY: Jim, would it solve your problem in the event if we added a sentence at the end saying this, at the end of the rule. "In the event of appeal the order of the court upon this matter shall be subject to review by the appellate court." Would that solve it for you Pat?

KRONZER: Yea.

BEARD: I like the language that Luke had about posting a bond so you don't have to pay it.

KRONZER: Pat, come up here at the table where you can eat dinner with us.

SOULES: What if we did this, if we back up and try to get it as part of the judgment. This would be the trial court's discretion with the order saying or enter an interlocutory judgment to say in lieu of the

foregoing orders or addition thereto, the court may render interlocutory judgment for, or require the party failing to obey the order, something like that, I haven't quite got it written. Where the court would either render an interlocutory judgment for those expenses against the other party or they would pay it promptly, or order to pay as specified.

LOW: Would the trial courts be able to rule on that without it affecting the final judgment entered by the appellate court, in other words?

SOULES: The interlocutory judgment would be rolled in, would it not, to the final judgment, be appealable at that point.

LOW: The other point is that you are afraid you can't do anything other than rule on the judgment.

SOULES: Jim, if it's made an interlocutory judgment while the case is pending, it would be appealable at the conclusion would it not?

SPARKS: I think we are making this thing awfully cumbersome when all, I think Jim's concern simply is that you have the right of review. I think that by adding the sentence suggested we preserve that right, and I think if you permit an interlocutory appeal you really are kind of encouraging somebody who is really upset to appeal it, and I think you are just creating a lot more work.

SOULES: I didn't mean an interlocutory appeal.

KRONZER: What I think is if you provide and carry it pendent to the appeal on the merits, then you don't have to provide here for the method by which relief is granted, you just say, it may be reviewed on appeal and carried up with the final judgment in the case.

SPARKS: That language takes care of it.

KRONZER: I thought your language was pretty close, but.....

MCCLESKEY: Let me give it to you again, add this sentence at the end of the paragraph, "In event of an appeal, the order of the court upon this matter shall be subject to review by the appellate courts."

GUITTARD: Talk about appellate courts, who else is going to review .....

CUNNINGHAM: I'd like to ask a question, if it can't be appealed without that in there how can that sentence in there change that? I don't follow that Jim.

KRONZER: Because in 1731a, if the Legislature doesn't mess with it then the ....

DAWSON: George, we are not implying by that that it is subject to an appeal on other grounds are we?

LOW: What if that's the only point you want to appeal? You are

satisfied with everything else. You are going to have to file a frivolous appeal on other points just to reach the..... Are you saying that you can't review that then? What if the fine is a lot of money, that would have to be a big sum for Jim to consider that, but if it were a lot and that was the only thing you wanted to appeal.

EDGAR: Why couldn't you simply say then, "An order by the court on this matter shall be subject to appellate review."

LOW: You can do it that way, but I'm saying they .....

DORSANEO: That would mean that you couldn't on the original procedure.

LOW: That's right.

MCCLESKEY: Let's work in language to that, Hadley, that indicated, that it was reviewable -----

EDGAR: Just say a matter, an order by the court on this matter shall be subject to appellate review.

MCCLESKEY: Well, the question was raised up here as to whether or not that means you could take an interlocutory appeal.

MEYERS: Statute clearly doesn't allow that.

EDGAR: Doesn't the Legislature have to set forth those matters which

are subject to interlocutory appeal?

KRONZER: They would be doing that by 1731a.

MCCLESKEY: Give us that language again, Hadley.

EDGAR: Just say, "Upon final judgment, and order by the court on this matter shall be subject to appellate review."

DAWSON: Are we vesting the court of appeals with jurisdiction by so doing?

WALKER: If it is interlocutory we can't do it.

DAWSON: That's right.

KRONZER: That's why I think it has to go with an appeal.

WALKER: It has be on final judgment

CUNNINGHAM: He used those words on final judgment

KRONZER: I move that what the Chairman dictated to be satisfactory.

SPARKS: Second

POPE: What he said was "In the event of an appeal, the order of the court upon this matter shall be subject to review."

MCCLESKEY: Buddy, do you think that the court can grant the right of appeal upon this matter only?

LOW: I don't know.

WALKER: I don't think so.

KRONZER: I don't think the court can do it but rather what judge, you mean, independent of the cause in the main. I think this, under 1731a the rule making power after the Legislature passes it by when you create that. Right, I think this court can under rule 385 add to the temporary or take away from the temporary injunctive powers.

POPE: Are you talking about an interlocutory appeal, Jim?

KRONZER: Yes,

GUITTARD: .... for many more interlocutory appeals.

KRONZER: I think they can relieve him from the fine or reimbursement.

POPE: We took the position on interlocutory appeals on class actions that that was not a rule making matter, and the Legislature had to get Article 2250 added that as an appealable interlocutory order making it number _____ of the kinds that were _____. we kind of take the position that you could not do that by -----

KRONZER: But to make it clear, Judge, I do believe pendent to a case on the merits final judgment, I believe it can be done and reviewed as a part of the case on the merits.

POPE: Well, of course, and you could also, you know we provided last time for partial appeals and wrote the rules to implement it.

KRONZER: So long as you could get your relief independently of the case on the merits from an adverse ruling in this regard, I think you've got enough protection from getting harpooned by the trial judge.

GUITTARD: Mr. Chairman, what about this language, "Such an order shall be subject to review on appeal from the final judgment."

KRONZER: That's fine.

MCCLESKEY: I think that's fine, everybody satisfied with that? Give it to us again.

GUITTARD: "Such an order shall be subject to review on appeal from the final judgment."

KRONZER: You know, you've got a lot of intermediary reliefs now, Judge Guittard, because before you get to that point in the sanctions you might have mandamus relief when he is threatening to do a lot of things on you in the way of discovery anyway. You might not have gotten down that far on the road to get into mandamus relief before

you got there. To test out some things he's done anyway.

MCCLESKEY: We have to try to move along. We have this language before us, and I would like for us to vote on it. Adding a sentence at the end of the paragraph which reads, "Such an order shall be subject to review on appeal from the final judgment." All in favor of making that change indicate by raising your hand. It's overwhelming; any other suggestions on 77, 78?

KRONZER: Mr. Chairman, I'm concerned about this business of the Deemed Admissions under rule 169 on the bottom of 77 and top of 78. I see we are in that same old thing of when are they deemed, can you take them as deemed and just start out without even asking the court to admit them, but it appears that here you're providing something, or Luke and them are, that even if the court has previously ruled them to be admitted or they have not been answered and they are admitted under the rule, the court can instead of these orders determine that the final disposition be made at a pretrial conference. Which itself may be harmful to the party that thought he had those admissions and cause a delay and postponement. Why do you grant that belated power once the admissions have been established? I'm talking now on page 78 and in the fourth sentence.

EDGAR: Jim, doesn't current case law now provide for .....

KRONZER: For relief against an admission. It does, by showing a change of circumstances.

MCCLESKEY: Where is the specific language, Jim?

MCMAINS: Page 78

KRONZER: After you've talked about admissions, and what it is deemed to be admitted, then it says "The court may, in lieu of these orders," that is, having ordered matters to be admitted, "determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. "One of the primary purposes of request for admissions is to get that underbrush out of the way. And have it decided before you get down that late in the game. If the judge is just going to carry that along, what have you solved, well, I'm going to carry that along until we get ready for the trial.

CUNNINGHAM: He wouldn't do it unless they were aggravated circumstances.

KRONZER: It doesn't say that.

SPARKS: I read that just the opposite, after that final disposition of the request, he is not going to change his mind.

KRONZER: Well what I read it is ...

MCMAINS: It says that they may determine in lieu of these orders, determine that I will finally decide it later on.

SOULES: That's right, that's what it says.

MCMAINS: I understand that, and I think the point is well taken, you ought to know whether you are going to have to prove something earlier in the game than at a pretrial conference or just before trial when you better start getting your ducks in a row to get it proved.

KRONZER: That's the primary purpose of request for admissions is to get that underbrush out of the way.

DORSANEO: The reason behind giving the court discretion to postpone that is partially because of the extension of 169's coverage to matters that involve more than what everyone would agree without question unanimously is a fact.

MCMAINS: I think that the court has the inherent power to not rule, I mean if the court doesn't rule on something, if you reject it and then say I'm not going to decide that right now, you don't have to tell 'em, I don't think you need to invite them to wait until just before trial. I don't see this doing anything but perhaps injecting some delay tactic on whether or not to admit something.

CUNNINGHAM: This doesn't say "have to," it just gives him the right to. Why would he do it unless he thought there were unusual circumstances.

MCMAINS: Because there are a lot of judges who don't like to make up their minds unless they have to.

KRONZER: Without really talking about the good or the bad judge, let's talk about the reason for request for admissions practice.

MCCLESKEY: We've got the answer coming up, Buddy has it down here.

LOW: We have to give the trial judge credit for having some sense, why would he do something like that, I mean, you've got to give him some credit. These trial judges have got to have sense enough to not just jump into something so obvious as that, if they don't, well then something is bad wrong. There are not going to just postpone something like that, I mean most of them listen to reason. If there is a reason to wait until that time or something, then maybe so, but I don't think any trial judge is going to do that so that nobody knows what the situation is going to be until then. I don't think it's that big of a problem, if we give the trial judge credit for having a couple ounces of common sense.

DAWSON: . . . I just wondered why we need this rule anyway, because the rule provides that they'll be deemed admitted and then it goes on and says any matter admitted under this rule is conclusively established to the party making the admission unless the court on motion permits withdrawal. . . . the admission.

KRONZER: The thing that always gets in a switch there, and that's what I guess Bill Dorsaneo is talking about, Matt, is that it's a big agrument whether, even if when you really have an admission when you've got to go get the judge to find they admitted it or they are deemed or whether they are automatically admitted, there's a big argument about that one. You've got these evasive answers, we don't know, we can't find out, the plaintiff knows more than we do, and we just haven't had time, and they put it off for a million different reasons why they don't answer, and you know, you say we ought to take that as admitted, and the judge says well let's carry that along. I can name one if you want me to that will do that in every case. He would never get to it.

DORSANEO: Let's look at this paragraph in context though, it says, it deals with a situation where the party gets an answer that's insufficient, not with the situation where there's no answer at all, and under the circumstances the answer might be, "I can't admit or deny that. I don't know enough yet to admit or deny that matter which is not purely whether the light is red or green but whether someone was in the course of employment or they had authority to engage in particular activity," and all this says is the court may lieu of saying the above two things postpone that until later in the game but

before trial. What's so wrong with that? Seems perfectly sensible.

GUITTARD: Well, he can do that anyway.

KRONZER: The problem's in the real world of providing a judge with a tool of delay. The real, and it isn't just the studies that the court itself has seen over these years, this court, but it's every single agency, school or anybody that's made a study of discovery. It's the unwillingness of the judges to impose sanctions; the unwillingness to act directly when the problem raises its head; the unwillingness to have these hearings and hit them in the head. That's what's the problem with discovery, and that's all there is. There's the lawyers who are friends, they don't want to kick them around and say OK you fellas work it out. Anytime you invest judges with a broad base of getting out from the hole and moving and waffling around, they whop them. They're going to get out from it, and they will, and the majority of them will. You've got to have some measureable conduct, in my opinion, that says come on down, descend on it, and that's what's wrong with discovery, and that's what's messed it up by every study ever made.

CUNNINGHAM: You're practicing in the wrong part of the State. You ought to come up in our part of the State.

KRONZER: I've been there to, and I'm not going to say I can name them there. . .I just think that's a horrendous - that is not found in any rule. . .

McCLESKEY: Jim, would your objection be met by deleting that sentence from paragraph B of the rule?

KRONZER: Sure, I have no objection to a guy that's caught short and finds out later in the game that he made a bad admission and it was wrong. A move in the court to withdraw that, because ... the court hearing that out, but I do have one of him not having to make a determination till sometime in an eve of trial when you're dealing with a rule that is primarily designed to get the underbrush out of the way early along.

MCCLESKEY: Let's take a vote on whether we delete the next to the last sentence of paragraph B on page 78. All in favor of recommending that sentence be deleted, indicate by raising your hand.

DAWSON: Is that the one beginning with each matter?

MCCLESKEY: No, that's the one beginning with, "The court may, in lieu of these orders," page 78, top paragraph b, Motion. Alright, we're voting those in favor of deleting that sentence, OK, 1,2,3,4,5,6,7,8, 9,10,11,12,13,14,15, and those opposed indicated by the same way, 1,2,3,4. By a vote of 15-4, we recommend to delete that sentence.

MCCLESKEY: Alright, any other suggested changes on 78? If not are you ready to recommend 215 as amended? All in favor of recommending 215A as amended, and all opposed? Without a dissenting vote, it's recommended, 215a, recommended as amended. Alright, before we go forward let me make this statement to you. We're going to try to quit

here this afternoon about 5:00, and some way or another we've got to spend at least two hours on these appellate rules today, so I ask your indulgence don't raise any questions about other rules under group one unless you just think it's vital, and let's limit the discussion as much as we can where we can move on to the appellate rules by 2:00 or 3:00. OK, what other rules within group one do you want to talk about, David?

BECK: Mr. Chairman, Rule 169 on page 42, the concern I have is on the fourth line of the new section which talks about how a matter shall be deemed admitted unless within 30 days you respond or within such shorter time as the court may allow. Now I'm concerned about the word "shorter" in there, because we're broadening the base of Rule 169 to include opinions and conclusions, and I'm concerned about a situation where you're going to need more than 30 days, and I just want to make sure that by putting that "shorter" period in there, we're not telling the court that he cannot extend it beyond the 30-day period, but I think the present rule does allow him that latitude and by changing this language, I think we're suggesting that he does not have the latitude. So, I would change the word "shorter" to "other".

SOULES: That's fine.

MCCLESKEY: That's in the fourth line of the second of the. . .

BECK: Just eliminate shorter and I think that would take care of it.

MOORE: I want to mention something about this same rule, on the last

line page 42, the sentence says, "An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny." I don't like the word "readily," and I suggest instead "that the information known or with only little difficulty obtainable by him is insufficient to enable him to admit or deny."

MCCLESKEY: You would strike the word "readily" and insert the words, "with only little difficulty?"

MOORE: I don't think that we ought to allow him to excuse that, because in his opinion it is not readily available.

MCCLESKEY: Any problem with that, by consent that will be recommended.

JENNINGS: How about "reasonably available?"

SOULES: I like "reasonably obtainable" better.

MCCLESKEY: Hardy, does that get to your problem?

MOORE: I don't know, I think that still, you've got . . . I think you've gone a little bit too far on the other side that way. .

JENNINGS: I'll withdraw the suggestion.

MCCLESKEY: By consent we're changing the word readily to "with only little difficulty."

GUITTARD: . . .why can't we just say "or readily available by him with little difficulty?"

MCCLESKEY: At the top of the next page?

JENNINGS: The word is "obtainable," that's in the rule now.

MCCLESKEY: Yes, or "obtainable by him with little difficulty," that does the same thing doesn't it, Hardy?

MOORE: Well, I think so . . .

MCCLESKEY: Does your consent go to that? We assume that it does. What other rule do you want to discuss under the group one, Sam?

SPARKS: I have more of a question, I guess on page 69 with regard to depositions on written question. I seem to be getting more and more of these, and there, really a lot of them in different parts of the State or different parts of the United States and a lot of times, you know, I find myself going to the court for an order to give me 20 days after the direct questions and the documents have been produced so I can formulate crosses, examine questions, and now all of a sudden I'm seeing the play to expert witnesses where a person is opposing their own expert witness and so I started, a lot of us have started, just

notifying the court reporter to tell us where the deposition will take place and we'll orally cross-examine on the written questions, because a lot of times you won't have any of the information that normally produces an oral deposition rather than a written deposition. My question is on 3. would there be anything improper by adding something like "nothing herein prohibits any party from attending the deposition and orally cross-examining the witness." I think we have that right, but I don't know that it's specified in the rules.

DORSANEO: It's here somewhere let me look. . .

LOW: You wouldn't have any written depositions. I'd do away with that pretty quick.

McMAINS: Yea, nobody would take the chance.

SPARKS: I notice we're doing just the opposite. We're allowing, of course, we've always had written cross-examination of oral deposition. It's being done I know, frequently.

KRONZER: . . . I never did know you could just show up. . . . . but I may start doing that.

SPARKS: It's sometimes possible. . .

CUNNINGHAM: You have done it?

SPARKS: Oh yea.

CUNNINGHAM: I didn't know you could.

KRONZER: Have they tried to ....

SPARKS: Well I do it by writing a letter to the court reporter with a copy to the opposing counsel indicating that I want to know the designated time and place, because I intend to review the records and cross-examine . . .

CUNNINGHAM: A court reporter ... it doesn't have to be a court reporter to do it. . . you can do it by writing it down, we run into that problem also.

SPARKS: But they have to designate who. . .

MCCLESKEY: Apparently there's a difference of opinion on whether or not you have that right at the present time, David?

KRONZER: I didn't know that was so.

BECK: Well there's a corollary problem here in that I think the fundamental question is whether or not a party ought to be required to cross-examine a witness when you don't even know what the answers to the direct questions are, and I know that in Harris County we normally file motions for protective order and ask the trial court to allow you time to at least get the answers to the direct before you're required to file your cross questions. But, the rule doesn't speak to any of

this, I mean you just kind of take it on a case-by-case basis, but the fundamental problem is you're being required cross-examine a witness when you don't even know what the answers to the direct questions are, and I personally think the rule needs to speak to that in some way.

LOW: Dave, on protective orders right now, if you meet that situation, you ask for it and go to the court, and you'll properly ending up taking an oral deposition.

BECK: Buddy, I agree with that, but if one of the purposes of these rules is to quit burdening the courts with some of these trivial motions we have and to try to let the rules be self-executing so the lawyers can work it out. . .

LOW: You're going to involve the court if the other lawyer wanted to take it by oral deposition, he wouldn't have tried to take by written anyway, so you're going to end up in court. Well, he's going to come back. It's a question of whether you have to go before the court or whether he does.

CUNNINGHAM: Well he might change it to an oral deposition, but the rules say you have a right to be there and cross-examine orally why. . . . .

MCMAINS: Then you've eliminated written questions.

JONES: Well, all you've got to do right now is notice the depositions.

LOW: Give notice and then you take them.

MCCLESKEY: Let's vote on the policy issue. How many of you think that the rules should provide that one party may take, may be present to orally cross-examine in the event of an oral, written interrogatories. How many of you think that's the plan that Sam Sparks tells us that they practice out in El Paso. How many of you feel that way? 1,2,3,4,5,6, and how many of you think that the rules should not provide and allow the oral cross-examination on written interrogatories?

McMAINS: ...nobody's voting against allowing the trial court to do whatever anybody asked it to. . .

McCLESKEY: The rules should not specifically allow. . .

McMAINS: Right. Oh, OK.

MCCLESKEY: 1,2,3,4,5,6,7,8,9,10,11,12,13,14, what was that vote 6, alright by a vote of 14-6 the Committee recommends that there not be inserted into the rule a provision for oral cross-examination in the event of written interrogatories, did I say it right that time, Rusty?

SOULES: Leave it as is.

MCCLESKEY: Leave it as is.

KRONZER: I have another policy matter, let's see. . .

MCCLESKEY: Have we decided it once, Jim.

KRONZER: No, this is a change of substance to me, on the use of depositions, Rule 207 on page 65. As I read this, Luke and Bill, you are authorizing the trial court to refuse to let a party use depositions if the court finds either in the interest of justice or presentation of the testimony, the witness orally is necessary and the witness is able to attend and available without complusion or compelled by subpoena. This is sort of a modified federal practice, and I'm deadly opposed to that, if you've got a deposition you ought be able to know you can use it or not use it. That federal practice is for the birds. That's a policy. I'm not talking about the language. I'm saying if you've got the deposition and taken it -- if you want to put it on and not show your guy, they can call him or whatever.

LOW: I'd have to agree with Jim. He's right for once.

MEYERS: I find myself, strangely, agreeing with him also.

CUNNINGHAM: Me too.

DORSANEO: Even if he's in the courtroom, you agree?

CUNNINGHAM: Sure, why not?

McMAINS: Well, it's always been discretionary with the judge as to whether to allow ....

KRONZER: No it isn't.

MCCLESKEY: How would you change the rule, Jim?

KRONZER: I'd just leave it like it is, I'd strike it out and and just deposition use like it is under the present law.

MCCLESKEY: You mean we'd strike the underlined paragraph and use the old A, there the old part that's listed.

MOORE: Mr. Chairman?

MCCLESKEY: Yes Hardy?

MOORE: I think there should be occasions when the trial court could require someone to appear and testify personally, and I suggest that. . .

DAWSON: Well, they can do that by subpoena.

MEYERS: Not on his own.

MOORE: No because he'd make him his witness if he does that. I suggest instead you say, "Unless the court finds. . ."

KRONZER: I can tell you that's probably going to change by the time the printer gets done.

MCCLESKEY: How does that read then?

MOORE: I suggest that you eliminate the second paragraph and say that "Unless the court finds that in the interest of justice the presentation of the testimony of the witness orally in court should be required."

MCCLESKEY: And where do you put that?

DAWSON: Well, why would that preclude your using the deposition?

MOORE: Well, because that's what the language of the rule is, that any deposition may be used by any person for any purpose without a showing that the witness is unable to attend or testify unless the court finds that in the interest of justice the presentation of the testimony of the witness orally in court should be required.

LOW: What if the court finds you just tried a little bit too late, and you depended on that deposition, that you've been reading about, you haven't talked about it and you know you can rely on the deposition. It seems to me a lot of circumstances.....

JONES: This is the one area that I've seen federal judges abuse the process more than anywhere else, and I think it would be a bad mistake to vest any discretion in the trial judge in trying my lawsuit.

DAWSON: I do too.

JONES: And if I can't rely on being able to present a deposition ... bad news.

DORSANEO: Mr. Chairman, if you want to change it, I would suggest striking the words, including "unless" beginning in the third line rather than going back to the older language which talks about legal exceptions etc. Say, if you want it to make it be the principle that any deposition may be used without a showing that the witness is unable to testify, to attend or testify, period.

DAWSON: Mr. Chairman, I so move that we make the rule read that way.

JONES: Second.

MCCLESKEY: That's putting a period after "testify" and striking the rest of the paragraph?

DAWSON: Yes.

MCCLESKEY: Alright, we have a motion.

SOULES: May I offer a slight amendment to that. What about stopping and say "any deposition may be used by any party for any purpose" and stop there except to add to it the last phrase of the old rule "subject to all legal exceptions which might have been made to the

questions and answers were the witness personally present before the court giving evidence."

MCCLESKEY: " Party" instead of "person?"

SOULES: Right.

ELLIOTT: Well, you've already got that in your rewritten first paragraph when you say so far as admissible under the rules of evidence.

SOULES: Okay, that's fine. Any deposition may be used by any party for any purpose, period.

MCCLESKEY: Alright, the proposal is that we're about to vote on is that in rule 207.

EDGAR: Do you really need that subdivision 1a in .... paragraph 1?

McMAINS: No, you don't need it at all.

MEYERS: No, you don't.

EDGAR: What are you adding?

ELLIOTT: Just take paragraph one and strike the last clause and then strike all of paragraph a.

MCCLESKEY: What last clause are you talking about?

ELLIOTT: In accordance with the following provisions.

McMAINS: Stop at thereof. Stop at thereof in section 1.

MCCLESKEY: Stop at thereof and strike the rest of it.

McMAINS: Strike A. You don't need A.

EDGAR: Strike out "in accordance with the following provisions," well, you're going to need that because of b though and c.

McMAINS: Strike out a and renumber?

MCCLESKEY: Strike out a, and make c number 3?

McMAINS: Yeah.

MCCLESKEY: It is proposed, and we're about to vote upon the proposal that rule 207 be recommended so that we use all of the first paragraph, that's the underlined new paragraph, except that we delete from it the last words reading "in accordance with the following provisions" and put a period right after the word "thereof." Secondly, we renumbered b as number 2 and c as number 3. Franklin?

JONES: Before we leave this rule generally, I have another observation if this is the appropriate time to make it.

MCCLESKEY: Will it affect our vote on this issue?

JONES: Well, it will affect the adoption of paragraph c in its entirety.

MCCLESKEY: Alright, let's vote on this issue subject to deleting c altogether. All in favor of this proposed amendment to the proposed rule 207 indicate by raising your hand. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four. So, I won't ask for the no's. Alright Franklin we'll go to your comments on paragraph 3 on page 66.

JONES: I'm entirely in agreement with what paragraph c attempts to do. I would like to see paragraph c adopt a federal rule that requires objections to the forms of the questions and answers that be made at the time that the depositions are taken. Rather than let it lie on file.

BECK: Unless agreed otherwise?

MCCLESKEY: How would you accomplish that change Franklin, by striking...

JONES: I was afraid you were going to ask that.

DORSANEO: You would change the last two lines, wouldn't you?

MEYERS: I have one comment on that Mr. Chairman. There are some answers, that whether objected to or not, are not evidence in Texas, and you should not be precluded from objecting to answers before a jury that cannot, under the law, be evidence. And you should be able to exclude it if it's not evidence, even though you didn't object prior to the filing or prior to trial. An obvious example is hearsay.

CUNNINGHAM: But he's just talking about the form of the question.

MEYERS: No, he's talking about answers. Oh, form of question. Form of answer.

DORSANEO: Form of question.

MEYERS: Form of answer is hearsay.

DORSANEO: He's talking about unresponsiveness of the answers.

MOORE: Form of answers would be unresponsive answers -- not hearsay.

DORSANEO: Not substantive -- talking about unresponsive...

MEYERS: Well, is he?

MOORE: ... form of answer is a nonresponsive answer.

SPARKS: I think that's what's intended.

LOW: What happens is you go to New York to take a deposition. You've spent a whole bunch of money and while you're there, you cure it, there's no objection make. You come back and then it's in writing, and you've spent a whole bunch of money and done very little.

MEYERS: Well, if that's what it means, that's fine.

MCCLESKEY: Buddy, I believe we have more than one conversation going. Will you start over and we'll all listen.

LOW: What I'm saying that what Franklin is getting to is that we go to the expense of going a long way to take the deposition and then it's not made at that time. The parties can always waive it. Then you come back, and you find that it's objectionable and this was leading and this wasn't quite responsive and so forth. Then you're in trouble. You might have to go back and do it again.

CUNNINGHAM: Well, is responsive a form of question?

McMAINS: No, it's a form of the answer.

EDGAR: Couldn't you simply just change c to read "an objection to the form of the question and the nonresponsiveness of the answer shall be made at the time the question is asked and the answer given?

CUNNINGHAM: I think that's going too far. I think that's putting too much a burden the other way.

DORSANEO: Unless agreed otherwise.

GUITTARD: Mr. Chairman, I don't know why an objection to the unresponsiveness on an answer on a deposition should be a good objection anyway. The only real purpose of objecting to an unresponsive answer is that it sort of disturbs the course of the trial. You want to keep the witness on the subject, and if it's already down in the deposition, it's just a question of who wants to offer that particular answer. Whether or not it's responsive would seem to be immaterial.

JONES: When you've got an answer that you want in evidence and it may not be exactly responsive to that question asked but is admissible evidence and then you look at the prospect of having to go back up there and ask the question on another form.

GUITTARD: I'm agreeing with you. I'm agreeing to you that the objection to responsiveness ought not to be a good objection.

JONES: Well, unfortunately it is.

LOW: Maybe it's going to be unless it was verified.

KRONZER: Well, you'd have no objections as to Guittard, though, to requiring it be made at the time you're taking depositions.

GUITTARD: Right, and then you'd decide later ...

JONES: Let me make this suggestion and let's see if it will float. Let's bracket out between the word "deposition" on line 4 of the first paragraph through the word "answers." Include everything else and then include a new sentence at the end of that rule which reads as follows: "Objections as to the form of the questions or the answers shall be made at the time of the taking of the deposition." And we could add there "unless otherwise agreed by the parties."

GUITTARD: The question there is this. If you object to the unresponsiveness of the answer, you're not objecting to the form of the answer, you're objecting to the substance of it as not being responsive to the question.

SOULES: But it gives the deposing attorney indication from his adversary that he better stop the witness there and ask him a question. Because if he doesn't, then that unresponsive part is not going to be admissible at trial. I think that's what we find there.

MCCLESKEY: Franklin, give us that language again, that you add. Let's get this. Slowly. Franklin we didn't hear that up there. Give it to us a little slower.

POPE: Would you start from the beginning and tell us what you said?

JONES: "Objections as to the form of the question or the answer or the nonresponsiveness of the answer shall be made at the time of the taking of the deposition."

MCCLESKEY: Now do it again.

JONES: "Objection as to the form of the question or the answer or the nonresponsiveness of the answer shall be made at the time of the taking of the deposition."

POPE: Now back up in the rule itself where you bracketed some stuff off, where did you begin? What line are we on?

JONES: Line 4.

POPE: Okay.

JONES: Bracket out the words "to the form of the questions or answers."

POPE: Now that comes out?

JONES: That comes out and goes back in in this form.

SPARKS: I'm a little worried, Franklin, when you say the form of the questions or answers or the nonresponsiveness of the answers. With some of the lawyers I know, like myself, we may not be able to realize that we shouldn't be objecting each time to the answers.

SPARKS: No, no, I understand what you are saying. I'm just saying that if .....

LOW: Any objection is going to be to the answer.

DAWSON: Just leave out the words, or the form of the answer. Just leave the words, or the nonresponsiveness.....

DORSANEO: That's what you are talking about.

MCMAINS: Yeah.

JONES: The federal rule has a form of that.

MCMAINS: What about the situation where you ask question X, as to a fact and he gives you an answer in the form of an opinion? That may not be an unresponsive answer, but it may be a form of answer that ought to be corrected.

JONES: Well I think you ought to straighten it out while you're there.

MCMAINS: I understand that. I'm just saying, is there something about the form of answers, apart from nonresponsiveness that we are trying to require treatment of?

EDGAR: Your concern really is the form of the question and the nonresponsive nature of the answer. And that's really what you are trying to cure. You don't want to have to go back and retake the deposition again.

MCMAINS: Those are not necessarily the same concerns. I think the desire not to go back and take it again goes a little further than just leading questions and nonresponsiveness of the answer.

BEARD: I think you ought to be able to object to opinion answers if you have the right witnesses can .....

DAWSON: What I'm worried about is, we're going to open up a deposition to all the objections you would ordinarily be making at trial.

JONES: ..... the lawyer is not going to sit there and obstruct the deposition. Or if he does, you can change it a little bit. But if you get up there and take one and you run into one of these lawyers like Ray was talking about, up in New York, you could spend three days taking that thing. This has worked very well under the federal rule.

MCCLESKEY: I believe we will take a vote, proposedly as section c, or 3. as the case may be on page 66, be changed so that in the fourth line you would delete the language, "to the form of the questions or answers," and add a sentence at the end of the paragraph reading, "Objections as to the form of the questions or answers or the nonresponsiveness of the answers shall be made at the time of the taking of the deposition."

GUITTARD: Mr. Chairman, I have this suggestion, in line with a decision of our court and of the Corpus Christi Court, and the Court

of Criminal Appeals, for what that's worth, I would add this, "unresponsiveness of an answer shall not be a valid objection," period.

LOW: There is also going to be a question of where you put a comma there, you know if you put it, you can have three things you are talking about, you can include answers or form. I think some understood it that way. If you refer to unresponsiveness to the question or answer, are you saying unresponsiveness to the question, or the answer, or the format, are you saying three things or two? You've got to put a comma in your rule, under ..... I don't know.

MCCLESKEY: Are you talking about making a choice between just the questions and nonresponsiveness?

LOW: I'm saying that you, what you've told us can be interpreted two different ways, depending on whether you put a comma or don't.

POPE: So, what you are saying if I understand you is, it would be objections as to the form of the question, or the answer, or the nonresponsiveness ....

LOW: Or you could have the, the nonresponsiveness mean into the question or answer. You know one thing.

MCCLESKEY: Franklin, what did you propose there? Would the commas be .....or the form of the answers?

JONES: Commas are consistent with what I proposed.

MCCLESKEY: So it would be, ...

JONES: Should I read it one more time? "Objections as to the form of the question, or the answer, so far as to the nonresponsiveness of the answer...."

DAWSON: You are now opening it up, every objection must be made at the time of deposition.

SPARKS: That's right.

MCCLESKEY: Every objection to any answer.

DAWSON: If you put comma after form of the question, and then say or the answer, that is exactly what you are doing.

MCCLESKEY: Luke has a proposal, ...

SOULES: Could we get by with this: "Objections to the form of the question or the nonresponsiveness of the answer," and leave it there. Form of the question or the nonresponsiveness of the answer.

MCCLESKEY: Matt, that helps you doesn't it?

DAWSON: That's the way, I would move..

SPARKS: Second.

MCCLESKEY: All right. I have a substitute motion.

JONES: I accept that George.

GUITTARD: An inquiry ... does that mean to hold that an unresponsive answer objecting to an unresponsive answer is in fact a good objection. Isn't that to overrule the law that would say it is not?

MCCLESKEY: I don't think so.

GUITTARD: They repealed Federal Rule 214, which speaks of matters not responsive. That has been held not to go to the question of whether or not the objection is a good objection or not, but the problem is that there is no rational reason for holding such an objection to be good if it is in relation to a deposition rather than the testimony of the trial.

DAWSON: You are saying Clarence, that by the Supreme Court passing such a rule, would imply that that is a good objection.

GUITTARD: Right.

JONES: George, back up one more time, back to the proposal I had at the beginning, and that is the federal rule. The federal rule says, unequivocally that objections as to the form of a question or the answer, shall be made at the time of the taking of the deposition.

That answers Judge Guittard's criticism and it gives us the body of the federal law that interprets those rules, which has worked well.

MCCLESKEY: Does that mean, any objection to the answer or just to the form of answer.

JONES: The form of the question or the answer.

MCCLESKEY: So you leave out the comma.

JONES: Yes.

CUNNINGHAM: What is the form of the answer?

KRONZER: They hold nonresponsiveness is the form of the federal ....

MCCLESKEY: Could you clarify it Franklin to say, objections as to the form of the question, or the form of the answers? That's what you're saying, isn't it? For your information we are about to leave the discovery and deposition rule, but we've got one more vote coming here. We are losing out on your comments by not keeping your conversations going one at a time. Bill tells me that this provision ought to be over in rule 204 instead of rule 207 anyway.

DORSANEO: What we are talking about, this provision is in our current rules as rule 212; the one about objection one day before the trial. In my notes on page 21, I raised the question as to whether old rule 212 as revised should be in rule 204 which talks about objections at

the disposition. Or in 207 which talks about use of the depositions at trial. The form of what was voted on, it seems to me, ought to go in 204 subpart 4, at page 60 and 61 the second sentence not the first sentence. The form of the question objection being necessitated at the time of taking of the deposition looks to me like it ought to go in 204 subpart 4, whereas the part about objecting to the form of the deposition or to errors occurring at the oral deposition in the manner of taking, if that is going to be retained as a separate thing, could stay over in 207. Because basically 204 is about what happens at the deposition, and 207 is about what happens at trial. By changing the language it could be left in 207. It looks to me if it's going to be requiring action at the deposition it ought to be in 204.

DAWSON: By adding to section 4 of 204 the one little phrase, the court shall not be confined to objections made at the taking of the testimony, except such objections as to the form of the question.

MCCLESKEY: Would that delete all of c then Matt?

DAWSON: No.

EDGAR: No, there are other things in c about the method of taking and that sort of thing that would still be liable.

MCCLESKEY: What is your language that you, how you incorporated Franklin's material here?

DAWSON: Except now, let me say this, that after Judge Guittard's

explanation about nonresponsiveness, I would not be in favor of inclusion of that language. I will also say that because of the misunderstanding that a lot of people will have in reading the rule and thinking that the form of the answer may include any objection that may be required, I would not be in favor of that either. But Franklin's idea would incorporate the addition of the language except, objections as to the form of the question or the form of the answer. Am I right Franklin? I would not be in favor of the latter part of it the reason, I think it is going to create a lot of misunderstanding among the the bench and bar, about what you've got to object to and what you don't have to object to.

CUNNINGHAM: .....says that all they have held under that federal rule is nonresponsiveness to the question. If that's so, what does form answer mean?

MCCONNICO: That's not the way the federal rule reads, it's wide open.

CUNNINGHAM: But what does it mean? What's form of the answer, what else can there be?

MCCONNICO: Form of the answer could be a layman giving an expert opinion, that's form, could be.

SPARKS: If you depose people in Arizona or New Mexico, where they have got the federal rules, it does take four times the amount because, just like Matt is saying, the lawyers who, good lawyers, they object to almost every question, on the basis of the answer. It's

almost, I can't even get 'em to agree just to put an insert and say that I objected to every question on that page. They do it everytime.

LOW: What is your protection when you take a depostion? You ask the man where he lives and he said, "Well, your client was going 95 miles an hour." That's not responsive. What's your objection? How do you protect yourself there if there is no objection to responsiveness? What are you going to say on the deposition? You just say, well fine what's the next answer?

CUNNINGHAM: If we are getting just to responsiveness, then let's say responsiveness.

DAWSON: I would certainly be in favor of that except for what Judge Guittard says. That by saying that the Supreme Court has impliedly stated that that's a good objection, when according to Judge Guittard it is not.

MCCLESKEY: Nat, what do you have?

WELLS: Just a question, is the revised version deleting rule 214?

DORSANEO: Yes.

WELLS: Why?

DORSANEO: You just heard it.

WELLS: It seems to me 214 takes care of it.

SOULES: 214 seems to make nonresponsive answers inadmissible.

GUITTARD: Now we had to write around that.

SOULES: They don't want to have to do it again.

GUITTARD: The point is this, the question is, did you talk to so and so? and the answer is, yes he said, so and so and so. Well, why make the, as far as depositions go, why make the lawyer go back and say, now what did he say after he has already said what he said? There is no sense in that and if there is anything in the answer that is objectionable for some other reason, such as it is prejudicial, or it's irrelevant, or whatever else, that can be stricken for that reason and it makes no sense to strike it because, just because it's unresponsive.

SOULES: As I hear what they are saying is, you would not have to strike it as being not responsive. If the objection that it was not responsive was made at the time the deposition was taken which gives the lawyer who is asking the question a signal you better stop your witness right there and ask him a question to get that answer on the record so that it is responsive, then you won't have to go back and do your argument again.

GUITTARD: Well, I see that point, but why should he have to do that? In other words if the witness has already said all of this, why should

he have to go back and ask him the question and ask him to say it again?

DAWSON: Judge, is your reasoning the same whether it is on direct or cross-examination?

GUITTARD: Oh, I think so.

DAWSON: For example, I would seldom urge a nonresponsive objection during the trial of the case to a question asked on direct, whereas on cross, it is a different matter.

GUITTARD: For this purpose, it is all the same. It seems to me that there may be other reasons to object to unresponsive answers in the deposition, but the simple fact that it is not responsive is no good reason.

LOW: Judge, if that's no good reason, what would be the objection the question, he doesn't even answer it? You ask him his name and he tells you the client is going 90 miles an hour. Sure that's prejudicial, lot of answers I hear are prejudicial, but that's the problem I have. I can't object to it or keep it out for that reason, so how would I protect myself in a witness like that?

GUITTARD: If it's prejudicial for some other reason, you can object to it for that reason.

LOW: I don't know what objection, I still don't see.

MCCLESKEY: Rusty?

MCMAINS: To me, I think unresponsiveness, and I'm just talking in a vacuum, I suppose, but is a legitimate objection because the individual is sworn, giving sworn testimony. How can you hold a guy for giving sworn testimony which is a function of the deposition, if he hasn't responded to a question. His oath is that he is answering truthfully. Well, if he ain't answering nothing if he is just spouting off, how could you prosecute him for perjury or how could you secure any of the sanctity that you would ordinarily expect in the oath?

GUITTARD: Whatever he says is under oath.

MCMAINS: But if it's not in response to a question, it doesn't have anything to do with whether or not he is telling the truth. He couldn't be prosecuted for it. What I'm saying is that I think that is the function of a responsiveness objection is to make it something that could be prosecuted for perjury if he gives you a false answer. If you don't ask him any questions, and he gives you all these other things, I don't see how that is sufficiently secured.

MCCLESKEY: We've got a new voice here, Professor Newell Blakely

BLAKELY: It strikes me that the objection that something is nonresponsive may be invoking the form of questioning; shall we proceed question and answer or shall we proceed narrative? If we have

been proceeding question and answer and suddenly he is permitted to go off on his own, we have switched to narrative. It is objectionable in the sense that the court controls the form of the taking of the testimony, and it would have to have permission to switch to narrative. It strikes me that it ought to be in there; the objection ought to be made at the time of the taking of the deposition.

GUITTARD: If it's good at all it should be made then, I agree.

MCCLESKEY: Bill, what do you have?

DORSANEO: As I understand the Professor, he is saying that it depends on how you look at it, whether it is the form of the question or the form of the answer. Assuming that it is otherwise admissible, Judge, and why not avoid all that trouble by saying, either the form of the question or the form of the answer? Instead of having somebody try to decide whether it's the answer that's the problem or the question that was the problem, because it wasn't the right question for the answer you got.

MOORE: Mr. Chairman, let me read something I've got here. Objections to leading and suggestive questions on direct examination and to answers as unresponsive shall be made at the time of the deposition if taken orally. If you say there the form of the answer, then you are going to have a lot of lawyers who think they are going to have to object to every answer that you give them. That is the way it has been interpreted by the courts under the present law. That's what form is meant, a leading or suggestive question on direct examination

or an unresponsive answer.

LOW: Really the thing maybe we need to vote on is whether everybody agrees with Judge Guittard that we ought to just shove unresponsiveness of the answer under the carpet, or whether we ought to leave it on top. Then, I think if we kick that out of the way, then we won't have much trouble drafting the rule that we want to do.

MCCLESKEY: I've been wanting to take a vote on something, this will do it. All of those in favor using language in the rules which refers to nonresponsiveness of the answer, as distinguished from form of the answer, indicate by raising your hand. I'm saying put them in a reference to nonresponsiveness of the answer. Put it in the rule. 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22, and those opposed? 22 votes in favor of recommending that there be a reference in the rule to nonresponsiveness of the answer.

JENNINGS: Can we have the same vote on form of the answer.

MCCLESKEY: How many of you would be in favor of not including in the rules, deleting from the rules, any reference to the form of the answer, except for nonresponsiveness? 1,2,3,4,5,6,7,8,9,10,11,12, 13,14,15,16,17,18, and those opposed to that: 1. OK, eighteen individuals against one would eliminate the language "form of the question." I believe this gets us down to where we can vote.

MCMAINS: Mr. Chairman, which rule did we change?

MCCLESKEY: What we are talking about is including language that refers to form of the question and nonresponsiveness of the answer. Do you want that in rule 204 or 207? All in favor of 204 raise your hand. (All agree.) And we don't need to take the opposite vote, so that will be included under paragraph 4 of 204 on page 61. Let me make some notes here before we go on.

EDGAR: It ought to be cleaned up a little bit though rather than making it a proviso on a proviso on a proviso though, because see you have already got a, that 204 paragraph 4 starts out saying one thing and then says, "but the court shall not be confined," and then if you go on to say however so and so, then it is really going to lose its impact unless you kind of restructure that whole sentence.

MCCLESKEY: Could you restructure it, and I'm shooting fast from the hip here, Hadley, with this thought but the court except in cases of objections to form of the question and as to nonresposiveness of the answers which shall be made at the time of taking the deposition shall not be confined to objections.

POPE: Why don't you make it a separate sentence.

MCMAINS: Put a period after pending.

MCCLESKEY: OK, we will put a period after pending and say, Except..." Well, why don't we put the whole preliminary phrase before we get to the court, and that way we won't be dividing the subject and the verb. "Except in the case of objections to form of the question and

nonresponsiveness of the answers which are required at the taking of the deposition."

MOORE: You don't intend to .... the party of the right to ask leading question on cross-examinations on deposition ....?

MCCLESKEY: I don't believe that would be an objective form of the question on cross, would it Hardy?

MOORE: It wouldn't be a good one.

POPE: Now read to us what you have got, except.

MCCLESKEY: Put a period after pending and strike the word but. And then we start with the language, "except in the case of objections to form of the questions and the nonresponsiveness of the answers which are required at the taking of the deposition, the court shall not be confined to objections made at the taking of the testimony."

SOULES: I'm not sure but what the word, "which" in following, it modifies and may limit some objections. How about this: "the court shall not be confined to objections made at the taking of the deposition, except as to objections to the form of the question and the nonresponsiveness of the answers." I don't know whether ... , the which must be made in trial," bothers me.

EDGAR: Aren't you going to have to say: "Which objection shall be made at the time of the deposition?"

SOULES: That's OK, maybe that's what you've got here, which objections shall be made.

MCCLESKEY: No, I didn't have, the word "objections." Taking that into account, Hadley, it would read, "except in the case of objections as to form of the questions and nonresponsiveness of the answers which objections are required at the taking of the deposition, the court shall not be confined....." Does that meet your objection?

SOULES: I don't have a problem with that, sounds OK.

MCCLESKEY: Sam, do you have a problem?

SPARKS: Yeah, well not a problem, maybe more of thinking conversation. We are putting in the rules what has always been, and that is either party at the time of the trial can put on any part of the deposition taken. What if a party attempts to put on a leading question that another party used in cross-examination? Have you waived the objection at that point? So you object to your own leading questions to protect yourself at the time of the deposition?

MCMAINS: Well, that's the problem we have now.

CUNNINGHAM: That's there now and most courts rule that. I don't know ...

KRONZER: That's clearly wrong.

GUITTARD: If you ask the leading question you can't object to it being used.

EDGAR: The point you are raising is that you just assume you want to take a discovery deposition and so all your questions are phrased in a leading manner simply for purposes of discovery. And then the question is, can the other side then on using that witness on direct, use your leading questions over any objection which you might have. I think your point is a very cogent one.

MOORE: I think it's been held that can't be done.

MCMAINS: That's right.

JONES: Mr. Chairman, I think we're beating a dead horse to death, but and you can rule me out of order when you want to. It occurs to me that this paragraph c on page 66, is directly in line with the federal rule 32db, I don't suppose everybody has a copy of 32bd, before them but I simply inquire of Luke Soules, if the question came before your committee with respect as to whether or not to substitute the federal rules in substance on this issue.

DORSANEO: The matter was raised by one member and it was not discussed with the same degree of detail or appreciation for an alternative approach as at this meeting.

JONES: Am I at liberty to assume that the Administration of Justice Committee did not openly oppose adoption of the federal approach to

this particular issue?

SOULES: I think so.

DORSANEO: There was no vote, do it this way or do it that way. The only reason for the modification in the current language was to try to clarify that you need to make an objection in the form of a question. Just as the last comment on page 66 indicates, that really is the reason why the language was changed at all. Partially in anticipation in further action.

JONES: It would seem to me we would at least be wise to consider the substitution of the federal rule in its entirety in this area, because there's not that much difference. As I read the state rule, we require this objection to be made or filed in court or be made after the deposition has been filed in court and notice given to the other side at least one day before the case is called for trial. Now that's the state rule, and in the federal rule we're gonna simply move that back and make the parties raise those questions when the deposition was taken. Now I would like a policy vote out of us, or at least a policy consideration, as to whether there are any real serious valid reasons for not backing up and looking at the federal rule in its entirety on these objections. I'm concerned. I'm afraid we may have...what I'm hearing Judge Guittard say, I'm afraid we may have already put something in the rule that we shouldn't have by this nonresponsive answer, and to me we could clear this whole matter up by adopting the federal rule in its entirety on objections to the formalities of taking, filing, and that sort of thing of depositions.

MCCLESKEY: Franklin, I think we voted eighteen to one in favor of eliminating from these rules reference to the form of the question. But I believe in view of your new comments that we ought to take a vote on it again.

MOORE: What is the federal rule, Franklin?

JONES: Can I read the federal rule? "Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated or removed or cured if promptly presented, or waived unless seasonable objection thereto is made at the taking of the deposition." Now I really don't think we could improve on that if we're really wanting to get to the heart of the problem and that is to when we take a deposition to know we've got a deposition unless somebody raises an objection.

SOULES: The limitation on the use of the deposition at trial, I think, they warrant that. Whenever you're taking a deposition in federal court, purely, it may be purely for discovery, if witness is available to trial and party and you're only going to be able to use it for limited purposes at trial anyway, but as broad as we can use depositions in state practice, we voted that we want to keep it broad. I'm not sure that we ought to be forced to making that many objections at the time of taking the depositions. There are a lot of categories of objections there that bother me.

MCCLESKEY: I think Franklin is right in asking for a vote. As a matter of policy, how many of you would be in favor of adopting the federal rule here in lieu of the matters we have talked about? One, two, three, four, five, six, seven, eight, nine. Those who would be opposed to adopting the federal rule, in lieu of what we have talked about, indicate it by raising your hand. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen. So by a vote of fourteen to nine, we choose to make our own rules instead of the federal rules.

SOULES: I move that we use George's language in lieu of 204, proposed language at the end of 204.

SPARKS: I second that.

EDGAR: When we do that, haven't we automatically excluded the language in subsection 3 over here on page 66, which reads: "to the form of questions or answers?"

SOULES: Do that also at the same time. I do think if we choose George's language as proposed in rule 204 and we delete from the fourth line in what will be paragraph 3 of rule 207, the words "to the form of the questions or answers."

MCCLESKEY: No it will be "or answers." Just delete "or answers."

SOULES: No, because this rule now goes strictly to the oath and the

other formalities of the deposition.

MCCLESKEY: Alright, Rusty?

MCMAINS: Am I incorrect that the 204 deals with an oral deposition only? Doesn't it deal with just an oral deposition?

DORSANEO: Yes it does, but it picks up in 209 by reference.

MCCLESKEY: We do have Luke's motion.

MEYERS: I second it.

MCCLESKEY: Do you understand the question? All those in favor of the motion indicate by raising your hand. One, two, three, four, five, six, seven, eight, nine, ten, eleven. All opposed indicate by raising your hand. By vote of eleven to zero.

I declare that 3:00 has arrived, and it's time to go to the appellate rules. If we have time left tomorrow and you have any questions about the other discovery or deposition rules, we'll come back to them. For the lead off and introductory statement, a short introductory statement, we're ready to go to group 2, the appellate rules and for that purpose we've called upon Judge Clarence Guittard to introduce this matter. He has carefully gone over the appellate rules which were amended the last time we met and the last time the Supreme Court made some changes, and he's been asked to go over all the appellate rules since that date and make recommendations. Judge Guittard we

appreciate the work you've done on this.

GUITTARD: Thank you. Unfortunately, I didn't have the benefit of a committee to work with me on this as Luke and Bill did. By the time I got through with my work, Judge Pope was expecting to get this into his office so that he could distribute it, so I hope he's looked real carefully on these rules and picked up some things that perhaps haven't been previously considered. Judge Pope has requested that I undertake this study, and I found that it extends on further than I thought it would when I accepted. Referring to my general summary on page 81, you'll notice that there are sixteen rules there that have just been repealed or the proposal is to repeal them as being either obsolete or more properly included in other rules. I will not discuss any of those in particular unless someone raises some questions about them. On section 2 with respect to clarifying and forming these amendments, these are of minor import, and I will not make any particular reference to them unless questions are raised. There are a number of minor practice changes that I have listed here under subdivision 3 on page 82. I'll try to cover most of them. There are a number of new rules proposed which I will try to cover and then finally there is the problem with respect to late filed records beyond the 21c, fifteen-day rule that we had some difficulty with as a result of our last amendment that I've offered some alternative solutions for. I think we might, I'll just have to hit the high spots here because obviously we can't cover them all. I would like to direct your attention first to page 90, rule 324. Some of the changes to this rule are my suggestions. Some of them are suggested by others, I think Professor Hadley had one suggestion with respect to this rule.

In line with the Supreme Court's recent decisions that say that fundamental error is not a legitimate concept in most instances in the civil courts and would it were true in the criminal courts as well, the design of the suggestion here is to require objections to be raised in the trial court or complaints to be made in the trial court before they can be made on appeal. One has to do with the factual insufficiency of evidence as supported jury findings or complaints that the jury finding was against the overwhelming weight of the evidence, or that the damages are excessive or inadequate. Now, if the case is tried by the judge, without a jury, he's already passed on that question, so there's no point in having that raised in a motion for new trial. But if he has not, if a jury verdict is against the great weight and preponderance of the evidence, the judge has heard the evidence and he ought to have an opportunity to say whether or not the evidence is factually sufficient to support the findings or whether damages are inadequate or excessive as a matter of fact, and therefore that would be required to be made in a motion for new trial before it can be raised on appeal. With respect to inadequacy of damages in subdivision (b)(4) that could also be done by a motion to correct the judgment to increase or reduce it. Rusty?

MCMAINS: Judge, I have a problem with that. I don't think there's power to reform or correct the judgment in a jury case. You can't alter the judgment amount. You can threaten them to grant new trial if they will not accept an amount, but I don't really think a motion to reform or correct a judgment is an appropriate remedy.

MEYERS: That's called additur. Are you suggesting that the judge

will have a power of additur in Texas?

GUITTARD: Well, I don't know. That's another question. In other words, if there some mistake in the figures or something, they ought to be able, that ought to be brought to the judge's attention so that he can .....

KRONZER: Well, that's nunc pro tunc there isn't it, Judge?

MCMAINS: But that's a 315 or 316 motion, isn't it? I don't really think that's the same thing as a motion to reform or correct a judgment. It says a complaint of excessiveness of damages may be presented by a motion to reform or correct the judgment, and what I'm saying is I don't understand how that ....

GUITTARD: Well, if that's a problem, I would suggest that we just eliminate that proviso in subdivision 4. Okay, if there no objection we'll just eliminate that.

KRONZER: Why are we going back to this one? I thought in 1960 Rule 324 was amended so as to knock all that our and it gave you the opportunity to do those things if you wanted to, do except on newly discovered evidence but you can do it still.

GUITTARD: But ought not the judge to have an opportunity to pass on that?

KRONZER: Oh yea, you can right now assert insufficienty against...

GUITTARD: That's right, but you don't have to and that's the problem.

KRONZER: But why do you have to?

EDGAR: Well the problem, Jim, isn't it, where you have a factual insufficiency point if the complaining party is not required to present that in a motion for new trial then in effect if that can be brought up on the first time on appeal, then you are giving the appellant an opportunity to reverse the trial judge on something upon which the trial judge never did have an opportunity to rule.

KRONZER: That was the way it was prior to 1960. That's was the way you had to come at it before 1960 in the trial court on insufficiency. They took it away in 1960. In fact Bardwell v. Anderson held they could do it after the final judgment and while the case was on appeal. They gave the right to prove insufficiency, and now we're putting that back. I don't see why we're doing that.

GUITTARD: It went too far before, and the proposal is in line with the fundamental error concept or the abolition of the fundamental error concept, is to require that objection to be made in the trial court. To require that complaint be made in the trial by a motion for new trial.

KRONZER: But I mean you can do that now.

GUITTARD: Yes, I know you can do it, but you don't have to and that's the point.

MCMAINS: It's a policy reversal, Jim.

KRONZER: We're just going back to where we were.

GUITTARD: There's has been some confusion. There's has been some problems as between the courts of appeals as to whether this can be considered or not and this straightens that out.

ELLIOTT: I think what we did in '78 was when that change was made. Every other error except this one requires some action by the trial court for it to be ruled upon. That's what the Supreme Court has recently been saying about fundamental error. If it's an objection to evidence, it's overruled, he's had a chance to rule on it. We just don't have to now put it in a motion for new trial and give him two chances to rule on it. But this is the only thing that's left that the trial judges never have to rule upon that the appellate court can consider, and I think that's what your theory is now, is to get back so that every action that can be considered on appeal must have been ruled upon by the trial judge once. Not twice, but once.

GUITTARD: That's right.

DAWSON: Clarence, this does not relate to this particular rule but isn't there also a divergence of opinion among the courts of appeals as to whether there need be a prerequisite in the trial court

for raising a no evidence point?

POPE: Look at the bottom of page 91. The cases are in confusion.

GUITTARD: I understood the rule to be that a no evidence point has to be raised in the trial court by a motion for instructed verdict or a motion for judgment non obstante or a motion to disregard the findings or objection to the issues, but that's not true with respect to a facto basis.

DAWSON: I know, but some courts of civil appeals have held otherwise in what you just stated.

GUITTARD: That may be so. This amendment does not attempt to deal with that question, perhaps it should.

MCMAINS: There is a rule later on that does. I think we can talk about it then.

GUITTARD: Ok.

CUNNINGHAM: Why is 5, "incurable jury argument" in there, based on what you just said, he's had a chance to rule, well no objections.

MCMAINS: No, he hasn't. There are no objections. That's what the whole difference is.

GUITTARD: Well, let me speak to that. This is not my proposal with

respect to incurable jury argument and I would say that if that matter has otherwise been presented, say by motion for mistrial, it not be required to be presented again in a motion for new trial so I would suggest that 5 be amended to read "incurable jury argument if not otherwise presented to the trial court for a ruling."

MCCLESKEY: What is that language, Judge?

GUITTARD: and if not otherwise presented to the trial court for a ruling.

MEYERS: Why if such jury argument is so bad, should it be objected to?

GUITTARD: It needn't necessarily, but the trial judge should have the opportunity to declare a mistrial or to grant a new trial, his attention should be called to it, so that he can do that.

POPE: It's a pretty settled law that there's one or two categories of jury argument that are incurable and you don't have to make a jury argument. I mean don't have to make objection.

DAWSON: Your whole premise in this rule is that whatever could be raised on appeal ought to be presented to the trial judge for his opportunity to correct.

GUITTARD: Right, if it hasn't otherwise been presented.

KRONZER: Well, there was a concept we've dealt with for years.

GUITTARD: Now, the other amendments to the rule are suggested with respect to subdivision c are not my suggestions and I suggest that Professor Hadley explain that.

BEARD: Are you really accomplishing anything if in every issue you just start off no evidence, no sufficient evidence. I mean that doesn't bring the court's attention to anything. That ought not to be ....

GUITTARD: The no sufficient evidence objection to the issue is never a good objection, because the court can't sustain it. You have to let it go to the jury. You can't really rule on this question. When you get to the sufficiency, factual sufficiency, he can sustain to that point. He can't sustain it until after judgment when the motion, he can't even sustain it before rendering judgment. He has to wait until after judgment and that's the reason that it should be presented to him at that time whereas no evidence may be presented before.

BEARD: Shouldn't he really make the both of them afterwards, unless you're really arguing strongly with respect to an issue.

GUITTARD: There isn't any reason why he should raise a no evidence point if he's already raised it. But there's no way he can (properly?) raise an insufficiency point and get a proper ruling before judgment.

WALKER: Doesn't it all boil down to this. You're talking about the error of the trial court. The trial court has never erred until it's ruled. He's never made an error. So you need a ruling or to call it before the trial court so he can rule so you can complain it.

GUITTARD: That's correct. He hasn't really made an error until he's overruled the motion for new trial.

MCCLESKEY: I wonder if it might be well for us to take or discuss here briefly and then take a vote on the policy issue on whether or not there are going to be any changes with respect to the necessity for a motion for new trial. Luke?

SOULES: Well these points that are being raised, I think they do look after the trial judge, give him a chance to call the shots before judgment is entered or maybe following judgment by some practice before it becomes final, but they seem to me to be some pretty fine lines when a brand new trial or appellate practitioner is trying to decide whether he needs a new trial or not. Simple enough it seems to me for him to determine if he doesn't have enough record to show the error that he's going to complain on when he writes his brief and he's got to have some evidence on that point, newly discovered evidence or whatever, and he's got to file a motion for new trial because he's got to make a record. He doesn't have a record. But on these matters it seems to me like we're singling out a few not really easily identified problems and saying you've got to have a motion for new trial there, it's jurisdictional, and we're going to wind up with parties' rights being poured out just like we tried to eliminate when we eliminated

the motion for new trial practice before. We kept the motion for new trial practice last time solely as a vehicle to allow a lawyer to make a record if he didn't have one for appeal, and I think it ought to be kept right there, extended no further. Say a trial court has entered a judgment, and he's entered a judgment contrary to these problems, if a lawyer wants to file a motion for new trial, bring it to the trial court's attention, he can. If he misses it, he ought to be able to have it reviewed on appeal anyway and not have skipped a jurisdictional problem.

KRONZER: Mr. Chairman, there's not many lawyers that have either the capacity to persuade a judge or an appellate court that he's going to get a new trial or satisfactory review of insufficiency questions that don't have a good enough feel following their loss to the jury to make a decision of whether to assign that now in a motion for new trial and give the judge the bite of the cherry and the kiss at the pig. They have that opportunity there right now. We're not giving anything, we're just preventing a pitfall that we had before. We're just putting another obstacle that we took away and left one jurisdictional appeal process was the appeal bond and now we're going back. I don't, to me, considering that my practice, which is largely appellate, it's a boon to me. It's a pitfall, but I just don't see why we want to go back. You can do it if you want to. You can do it to delay if you want to, to make a record, but if you think you've got a judge that might entertain those grounds, then come at it. But if you don't you're just wasting court time, appeal time, and jacking around with the court system.

BEARD: I don't know of any trial judge that's granted a new trial for insufficiency.

WELLS: Well, how many courts of appeals are having to worry about insufficiency on matters that were not presented to a trial judge? Are there very many of them?

KRONZER: Yea.

MCMAINS: The question is whether or not a party who's going to appeal a case, obviously the loser or perceives himself to be the loser in the trial court, ought to be able to sandbag as to what his points of appeal are in regard to things that have never been secured a ruling -- both the trial judge and the appellee. I, of course, was not in favor of the change before, because I hadn't figured the rule was all that bad at least the way it went in 1978, and I am in favor of this change because I think that the trial judge ought to have a chance to keep his record clean if he thinks there is a problem and he can't, will ordinarily certainly not grant one on his own motion because he's not going to go ferret back through the record. By the same token, the appellee ought to be able to look at some things after the judgment reasonably soon and be able to tell his client what the appeal's about. Which at the present time you can't do until you get the brief.

MCCLESKEY: Frank, what do you have on this?

ELLIOTT: Well, I'm just saying as of right now it looks to me like

the granting of a judgment on factually insufficiency of the evidence is the only fundamental error that's around. Because that's the only thing that you can complain on on an appeal that the trial judge has not ruled upon. And complaining that he rendered judgment on insufficienty of the evidence and he's never been asked to do otherwise.

MCMAINS: Incurable jury argument if there is any sustained.

SPARKS: I have a question. As I recall the reason for the elimination of the motion for new trial was an effort to try to speed up the appellate process and obtain decisions quicker. That was the stated reason for it. I'm just wondering if it has had that effect at all.

KRONZER: To some extent.

GUITTARD: I think it helped.

KRONZER: It's hard to say, Sam, because we got increased sizes of our courts of appeals.....

SPARKS: I just don't have that much practice to know.

MCCLESKEY: As a policy vote, how many of you are in favor of leaving the rules with respect to requirement of motion for new trial like they are without any change? Like the one that is under the existing rule with no change. The existing rule. In effect you're voting

against the proposal. Those in favor of leaving the rule as it already exists: one, two, three, four, five, six, seven, eight, nine, ten. And those in favor of a new approach requiring an opportunity for the trial judge to pass upon error at least one time, indicate by raising your hand: One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen. So we're adopting some kind of new recommendation. Now what are you proposing, Judge Guittard, with respect to 4?

GUITTARD: I would propose down, we're talking about subdivision b now, I'm proposing adoption of the subdivision b as now written with the following changes. In subdivision 4 delete "provided" and all language thereafter. In subdivision 5 add "if not otherwise ruled on by the trial court."

GUITTARD: No, if the jury goes out and the defendant or the party makes a motion for a mistrial and the court overrules it, he's preserved it there and he doesn't have to make a motion for a new trial on that point.

MCCLESKEY: Now that will get us up to a vote on proposal with respect to Rule 324 down to but not including c, as I understand it, all in favor of that proposal.

WALKER: I'd like to substitute the word "improper" with incurable.

SOULES: No.

POPE: Incurable is a word of art.

DAWSON: You're talking about an argument that is so terribly prejudicial in nature ...

WALKER: I know that but, it's all, the appellate's always going to say that. . .

KRONZER: What they mean is the argument to which you made no objection,. . .

MCMAINS: Don't need it if it's not ...

POPE: The court can instruct to disregard that kind of thing.

MCCLESKEY: Steve?

MCCONNICO: Mr. Chairman I think we have some real good caselaw now on what is incurable. Judge Pope's Standard Fire Insurance case sets it out. If we start tampering with that, I think we're just going to confuse the Bar as to what's incurable and what's the proper argument, and I think for the the first time we now have some definition in the Southwestern Reporter.

MCCLESKEY: Maurice, did you have a comment?

BULLOCK: Yes, I have a question. I didn't understand exactly what was and what was not being deleted from 4.

MCCLESKEY: In 4 he goes to the second line and continues with the words, "the damages found by the jury" and there he puts a semicolon, and strikes the rest of that paragraph; all of the words "provided that a complaint of excessiveness of damages may also be presented by a motion to reform or correct the judgment."

DORSANEO: Then add the word "or."

MCCLESKEY: Yes, semicolon "or." (5) Incurable jury argument if not otherwise ruled on by the trial court." Are you ready for the vote?

BULLOCK: I would be opposed to a plaintiff, inadequacy, the excessiveness it would seem to me, be within the province of the trial court if it were a jury trial, but I don't think it would be, that he could. .

MCMAINS: That's what they're talking about.

DAWSON: Well, Maurice, they can do that now. That's the only way they can require or omit it.

MCMAINS: That's right.

BULLOCK: I'm talking about the inadequacies situations.

MCMAINS & DAWSON: That's the way the present rule is now.

BULLOCK: Is that right?

MCCLESKEY: Alright, all in favor of recommending the rule as printed and as amended by Judge Guittard, indicate by raising your hand. I believe that's overwhelming, any opposed? We have one opposed. That gets us down to c of Rule 324. Hadley, do you want to discuss that?

EDGAR: Well, I really didn't propose the exact language as it appears here, but I think it's obvious that in view of what the Committee has just determined that you need to consider those types of cross points which might relate to factual insufficiency which might otherwise be presented, so you've got to provide a vehicle, it seems to me, to take into consideration what the appellee is going to be able to do with those potential problems, and my proposal which appears on page 92 would simply be to defer having to present that to the trial court until after a remand, but that's not exactly the way it appears over here on page 91, and I really can't speak to that because I don't really think that was the language, the language on 91 was really not that which I suggested.

GUITTARD: Now the language on page 91 is current language except there are some misprintings in it. It says "a matter of law" and it should be "a matter of fact" and down the third line from the bottom it says "should" where it should say, "shall." Otherwise, that's the existing language of the rule.

EDGAR: All right. Well then my suggestion on page 92 is that this addition be made to simply delay a hearing on matters such as factual insufficiency or against the great weight and preponderance until

after the cause is remanded to consider that crosspoint; otherwise the appellee is going to have to request a hearing prior to the appeal to determine whether or not there is any validity to a factual sufficiency or against the great weight and preponderance argument, and it seems to me that's getting things out phased (?)

GUITTARD: Well, wouldn't that be taken care of by the existing language of the rule, "When judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more special issues, the appellee may bring forward by crosspoint ... any ground which would have vitiated and verdict ...." Now that doesn't require in any case that that has been presented in the trial court, does it?

MCMAINS: But what if you got the judgment, I think is what Hadley is saying, what if you got the judgment. . .

GUITTARD: That's what I'm saying. . .

MCMAINS: No, not a judgment and N.O.V., a judgment on the verdict.

GUITTARD: Yes.

MCMAINS: The appellant files his motion for new trial. What Hadley is concerned about now is, there is nothing to protect an appellee's ability to crosspoint if it turns out that it's going to be reversed and rendered and the appellee wants it remanded instead.

DAWSON: Well it's not remanded. It's not rendered on an insufficiency point, it's only. . .

MCMAINS: No, no I understand that. The point is that you're not the appellant, you're the appellee, you won, and say the other side is going up and he wants something done and you want, what used to be in the rule when you had all of these prerequisites was a provision that said that if you've got no complaint of the judgments you don't have to file a motion for new trial, which is what used to protect you. That's not in the rule now, and I think that's what Hadley's concerned about.

KRONZER: Well, this is no problem. The existing rule even with the change that we voted today, would still permit you, if you prevailed on judgment non obstante, to cross-assign insufficiency for a remand, even though you did not assign it under your newly required rule. That was the way it was, until 1978 in the case, well several of them, on that where they held that you could cross-assign insufficiency for the first time.... but you had to do it on cross-assignment if you were successful on your judgment non obstante.

MCCLESKEY: Bill, do you have a comment?

DORSANEO: I may be confused but this provided language is to replace the save and accept language here on page 92. This is to provide really the next thought that would follow the save and accept thought. . . "The failure to bring forward by cross-points such grounds shall be deemed a waiver but. . . then "provided however. . ."

KRONZER: Let me say, Bill, do you remember DeWinne v. Allen, those cases involving jury misconduct, Judge, where you did require them sent back on that ground alone where they got judgment non obstante, and they had been assigned motion for new trial with proper affidavits. They take it on up and they couldn't hear it in the Supreme Court, so they just sent it DeWinne v. Allen you sent back down without hearing, and you can't handle that under these rules here and still preserve your right to judgment non obstante so you have to send that back down for another hearing and on that part only, if you have determined that the non obstante was improperly granted.

BEARD: Would you be able to raise jury misconduct?

KRONZER: Yes, that's what DeWinne v. Allen in the Supreme court held.

POPE: Well now the last sentence of the present rule was written in there and the direct result of DeWinne.

KRONZER: That's correct.

DORSANEO: Doesn't this then clarify the procedure to be followed?

EDGAR: Here's a letter that I wrote Judge Pope back about a year ago. Let me just read one paragraph to you, and this is what was on my mind. Assume that the defendant believes that the jury verdict is tainted with jury misconduct but also believes he's entitled to a

judgment N.O.V. which the trial court grants. He then has no real basis for filing a motion for new trial and develop a jury misconduct because he has a judgment in his favor. The above quoted sentence which is that underlined part right there, seems to state, no pardon me, the proviso language over here on page 91, it says if that sentence seems to state that he has not waived this ground for a new trial by failing to file a cross-point in the brief; however, if he does not do so, then by what method does he call the matter of jury misconduct to the attention of the appellate court should it determine that the judgment N.O.V. was erroneously granted.

KRONZER: Well, the way he did it in DeWinne v. Allen , Hadley, was that in the motion for judgment non obstante, he said all _____ in that motion, we would want a motion for new trial, based on misconduct, and the text affidavit said jurors. But he said we first want our judgment non obstante. They heard it, granted it, the Supreme Court determined that was improperly granted and sent it back without hearing arguments.

POPE: This thing doesn't seem to be quite as complex as it's coming across. A fella wins a lawsuit, therefore he doesn't want to be complaining about the judgment. After DeWinne as I read the present rule and as I read the first sentence of Professor Edgar's rule, that fella who won in the trial court has to do something. He has to protect the judgment that he has, but he also has to cross-point and call attention to the fact that there was jury misconduct and in case this case is reversed, then I want another trial. So, I don't think

there was any objection to that procedure. Now, the only new thing really that is being added is a provision that the fella who won the trial down below doesn't have to call for a jury misconduct hearing until it's from the appellate thing, and it comes back down, and that's all there is to this.

KRONZER: And your order in DeWinne sent back, was solely on, for a hearing, on misconduct.

POPE: That's correct. This really says what we did there, I think. Is that right?

KRONZER: That's correct.

GUITTARD: That sounds all right to me.

KRONZER: That's what this was intended to cover.

POPE: The fella who won the lawsuit is in an awkward position. He's calling in the jurors to have a jury misconduct trial that he doesn't want.

KRONZER: He still has to manifest in your record though that you're not just on a fishing exhibition, because you have to have it in your motion alternatively --- judgment non obstante that you got something besides just wanting it.

POPE: That's right.

BEARD: Do you have to have it there, or could you put it in the appeal?

KRONZER: Well, you have to have at least affidavit so the jurors...

BEARD: Doesn't this rule allow you to do that for the first time on appeal?

KRONZER: I would think it would. But DeWinne did it, Pat, at the level of his motion. . .

BEARD: But the new rule would let you base it on the first trial (?) and then file your affidavits ....

EDGAR: No, the new rule would require in (b)(1) that he could complain of jury misconduct at the time --- motion for new trial.

MCCLESKEY: Hadley?

EDGAR: Yes.

MCCLESKEY: Bill Dorsaneo here has read the issue of whether or not you need to leave in the stricken language on page 92, deleted language -- "save and except ..." Would you look at that and give us your opinion?

MCMAINS: But it's in there.

MCCLESKEY: Well, but the proposal leaves it out.

MCMAINS: No, that's what's in the next, that's on the third line in the underlined language.

ELLIOTT: The thing is here, by Hadley's amendment, you're requiring a cross-point when before Hadley's amendment you did not require a cross-point.

KRONZER: Yes, he did.

ELLIOTT: Well, it said in the old rules, "save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the cause." That was the exception, you had to ask for it somewhere, but you didn't have to ask for it in cross-point. That's what the amendment to the rule following DeWinne did.

DORSANEO: That's right.

ELLIOTT: You don't have to have a cross-point on that, I guess you've got to ask for it somewhere in trial court, but you didn't have to mention it in the appellate court, for if it was remanded, that was still pending.

POPE: My recollection of the DeWinne is, that the request for the hearing on the jury misconduct came in the court of last resort after the fella who had won below lost his case. He says, "But wait a

minute," he says, "I've got this thing coming to me, and they remanded it." That's my recollection of it, but this just says that if, that beginning at the court civil appeals level, the one who won below has got to say I'm going to hold on to my judgment, but if I don't get that judgment then I have a point that says there was misconduct down below, and if you don't do that you waive it, at that point.

ELLIOTT: But that's the change that's being put into it. . .

POPE: That's correct, that's the change.

KRONZER: But that was in there last time, that's been there. . .

DAWSON: Mr. Chairman. . .

POPE: This just clearly states what the law is, I think.

DAWSON: I move that we accept the proposed change made by Mr. Edgar.

MCCLESKEY: Alright, one other comment here. . .

MEYERS: May I ask a question just to show my ignorance? Is the effect of this rule, that the fella who thinks there is jury misconduct affecting the adverse jury verdict, but who gets a judgment notwithstanding, still have to file a motion for new trial?

SEVERAL: No.

DAWSON: Just has to file a cross-point.

MEYERS: Just the cross-point is sufficient, he does not have to do it, well then. . .

DORSANEO: What does the cross-point say?

MEYERS: He surely doesn't want to file a motion for new trial, obviously.

MCCLESKEY: Alright we have a motion before us. All those in favor of accepting the recommendation of Professor Hadley Edgar indicate by raising your hands, 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19, 20,21,22; and opposed? It carries by 22. Judge, Guittard, what rule do we go to next?

GUITTARD: 329b now with respect to the proposed amendment to subdivision, (c) since we amended the rule before, to provide in subdivision (g) for a modification of the judgment or correction of the judgment, certain matters can be raised in that fashion, that weren't raised otherwise in the trial court, Russell McMains called this to my attention, and might be used as a predicate for appeal, also to the extent that a motion for new trial is a prerequisite for appeal, a motion for new trial has to be raised in trial court, but it doesn't make sense to have those motions overruled by operation of law without having been presented to the trial judge, therefore proposed subdivision (c) would provide that in the event of motion for new trial is not presented to the trial judge is waived rather than

overruled by operation of law, but that wouldn't affect the extension of the time for appeal which he gets by filing his motion.

MCMAINS: Judge, the only question I have is what, I'm not sure I know exactly what the "present" means? I mean if we have a hearing, I can understand you have a docket sheet entry on that, I'm not sure what type of record evidence in a transcript we're going to have at presentment.

DAWSON: The courts have heretofore held that any request for a ruling is a presentation.

CUNNINGHAM: How's that going to . . . for an appellate court?

MCMAINS: But there's a distinction that has been made, I think the Judge is aware in Rule 296 and 297, when you request additional findings of a trial judge, you've got to call it to the court's attention or present that. It means more than just file it, and by definition this, of course, means just more than just file it. Well, if you take it up there and give it to him and shove it in his face. .

DAWSON: ....request for a ruling on it.

MCMAINS: Well, I mean the filing of it is a request for a ruling on it, I think.

GUITTARD: Would you say ruled on by the trial court within sixty days? Or, how would you state that?

MCMAINS: No, don't get me wrong, I'm not really proposing an alternative. I'm just trying to figure out what it does mean.

GUITTARD: It says "presented to the trial court for a ruling." That means that the trial judge actually has an opportunity to rule on it.

CUNNINGHAM: He does that the day you file it, Judge.

GUITTARD: Well, the question is if the trial judge doesn't get some opportunity to rule on it, if you don't present it to him and get his ruling on, it ought to be waived.

MCMAINS: Well, it seems to me if what you're trying to do is to get a ruling by the trial judge as a predicate for appeal, again going back with the fundamental error concept, then the rule should be explicit, that unless it's overruled by written order, then it's waived.

GUITTARD: Well, that permits the judge just not to act, and that's what we're trying to avoid.

SOULES: I would say instead of presenting, if the motion's not presented, if no request for setting on a motion is made, because sometimes a request for a setting is all you get in the country. The judge just keeps traveling, going over there to that county where he's got that murder trial and been on it for six weeks, and he just never pays any attention, and we do have trouble with that in country courts. We'll get to that on our request for reinstatement, but if

you request a setting, I don't think you ought to waive anything, if you've asked the judge to hear you.

KRONZER: Judge Guittard, I'm interested, what do you waive, what's swallowed up in your waiver.

GUITTARD: You waive anything that you have to present by that motion. That's all.

KRONZER: That would mean that rule we just messed around with, and re-did, and came back to after four years of satisfactory operation, but even if you had grounds in your motion for new trial that were not compulsory or necessary to assert under that rule, you wouldn't be cut off from those or this part of the rule that says and the omission of a point in such motion shall not preclude the right to make a complaint on appeal on other grounds.

GUITTARD: If you have a ruling in the record otherwise, well, and you have in your motion for new trial, but you don't have to have it that way, then you don't waive that, you just, that would not be affected.

KRONZER: Well, it doesn't say that, and it doesn't say what you waive.

BEARD: Why should you waive anything? You've filed your motion for new trial. If it isn't acted on, it's just overruled by operation of law. Why should you have to. . .

GUITTARD: Russell, you had a problem there that prompted this language. Could you illustrate that?

MCMAINS: The problem with the existing rule really was not directed per se to the motion for new trial, of course, but the motion to reform a judgment, which was a new procedure, came in last time, and there is no specific provision in the existing Rule 329b that a motion to reform, correct or modify a judgment is overruled by operation of law, within the same period, so I'm not suggesting that it necessarily should have been, but once again that's the situation where the trial judge ought to be entitled to do something. If he's made a little mistake in the judgment or there's some other reason why the judgment needs to be reformed or modified, which is a relatively easy error to correct, the judge ought to have an opportunity to rule on that. It might not ought to be overruled by operation of law. There's a different policy consideration to me there than as to the . . .

KRONZER: But it seems to me that in all this argument we're making here for the last hour, the self interest of the losing litigant is such as that in the vast majority of the cases, he's going to be pushing to see that that correction occurs, and hunting that judge out there in the murder trial, if he's got any grounds, he's going to get a ruling. But for us to waive things, instead of just having it overruled by operation of law, it seems to me to impose a lot of risk.

GUITTARD: For instance, if a judgment omits a provision for attorney's fee that should be in there, and you don't want to file a motion for a new trial, but you want a motion to correct the judgment, but you

never had to actually ask the judge to include a provision for attorney's fees. You ought to be able to go to the judge say correct the judgment by putting attorney's fees in, but if you hadn't called it to his attention, why should you be able to go up and sit back and say, "Well, I don't need to call it to the trial judge's attention, I'll just go up on appeal and get it there.

MCCLESKEY: Judge Guittard, I wonder if it would meet Russell's suggestion, if we include in the proposal the added language in line two, but delete the rest of that added language and otherwise leave the rule as is, so it would read, "In the event an original or amended motion for new trial or motion to modify, corrected or reform a judgment is not determined by written order ..." and so on, and leave out the waiver.

GUITTARD: The problem about that is about the judge that you can't find or the judge that won't hear you on your motion, you waive it. .

MCMAINS: Well no, but what he's saying though is there isn't a waiver. He's done away with all waivers.

BEARD: Eliminate waiver.

MCMAINS: All he's saying is he's bringing the motion to reform and correct the judgment under the aegis of the overruling by operation by law.

MCCLESKEY: That's right. Does that satisfy your concern, Rusty?

MCCMAINS: Well, yes. My concern is, I have had people that have filed a motion to reform. Actually, it looks very much like an N.O.V., but they filed a motion to reform, case lost pretty clear, with an N.O.V. that isn't ruled on isn't worth anything, as an appellate predicate, on the other hand if they do the same thing and call it a motion to reform, or to correct the judgment or to disregard any of it, then the question is whether or not you ought to have that just automatically overruled, by operation of law. Put you with a different situation and I'm not sure they should be treated differently. I mean there have always been reasons why the motion for new trial, it's always started something running, and that's why it's been overruled by operation of law, but that's the only thing in our practice ever has been, and I have some problem, because people don't know yet, I haven't seen too many appellate decisions, what a motion to reform, modify or correct really embraces. We know it's not quite the same thing in 315 or 16 but it might be, and it might be just a mistake or it might be something new. Obviously, there are various and sundry problems that a plaintiff might have in drawing a judgment that affected some of the defendant's rights on contribution, for instance or indemnity, or something like that. But if a motion to disregard or a judgment N.O.V. requires a ruling as a predicate for appeal, it seems to me that any tampering with the judgment or request to have the judge modify it, ought to require the same thing.

GUITTARD: Right.

MCCLESKEY: What my proposal would do, would be just make it the same rule for a motion to modify, correct or reform a judgment, it would have a motion to be ...

MCMAINS: I understand, that's what I am saying. The objection I have to that is that I have had parties that have filed a motion to modify cause they didn't want a new trial, which is actually a judgment N.O.V., but they didn't want to present it to the judge either, and they just wanted to sit back and wait. They wanted the extension of time and they wanted a predicate to appeal, but they didn't want to have to go back and talk to the judge, because they were afraid if gave us a new trial we'd get more money.

MCCLESKEY: Judge Allen Wood had his hand up. Judge Wood, do you have a suggestion?

WOOD: I don't know whether this rule can be changed or amended. The deal with the problem that I've always had in sending in a motion for new trial on newly discovered evidence ... Under presented that here, I assume, it's obligatory for you to get a setting before the judge, if presented means heard within 60 days, to have him hear it, you have 15 more days for him to rule on it. Last year, I think that all you had to do is request a hearing, and they'd give 15 more days, that's 45 days, to me the way these dockets are right now and how busy some of these courts are, that where you've got a motion of the kinds I mentioned, requiring the evidence and maybe a good deal of evidence, and pretty strenuous argument on your rights after that evidence is presented that a busy court acting in all good faith might not get to

it in that motion the judge has overruled by operation of law without a hearing, and I don't suppose in that instance you'd have a predicate on appeal, because you'd have never made it around.

MCCLESKEY: Well in the courts where you can't get the hearing though, like Luke was talking about, would you be in favor in having waived the grounds?

WOOD: That's what the rule is now.

MCCLESKEY: That's what the proposal is now.

WOOD: It's a pretty hard rule. I'd like to hear Judge Guittard on that. That's a problem we have in the trial of cases. I would say on the other parts that are involved in a motion for new trial, you have ... If they're overruled by operation of law, you've got your record.

GUITTARD: Well my thought is that a motion which has been overruled by operation of law ought not to be able to help you any on appeal except just for what extension of time it gets. If it's going to help you on appeal, you ought to at least invite the judge to rule on the motion.

DAWSON: Clarence, isn't the whole purpose of this - to be in conformity with your other rule requiring these matters to be presented to the trial judge.

GUITTARD: That's right. And in accordance with the recent opinions of the Supreme Court with respect to fundamental error.

DAWSON: Yeah, that had about four of them this last summer.

GUITTARD: Right.

WOOD: Would it help any to say to give the trial judge structure upon a motion being filed --- required evidence on --- these two items are the items I think ought --- that he shall hear evidence upon those motions within sixty days.

GUITTARD: Well, it might not be a matter that requires evidence, but he ought to have it presented to him for ruling, and I don't know how to say it any better than that.

DAWSON: I think your word is well chosen, because we used to have that word "presented" in the old rule, you know. Had to be filed within ten days; presented to the court within thirty, etc. etc., and there's definitive authority on the meaning of the word "presented."

GUITTARD: That's right.

WOOD: What do you do then if you can't get the motion for new trial heard on jury misconduct within seventy-five ---.

BEARD: Could just assign it as error?

WOOD: Well, if you could do that, of course, why ---.

GUITTARD: Well, that's the situation as it is under the present rule. If you have to have the evidence to support your motion, then if the judge doesn't hear your evidence, you can object to his not hearing your evidence if you've got a good affidavit which entitles you to it.

DAWSON: Just like on a bill of exceptions.

WOOD: If that's the case then, it's all right.

KRONZER: I don't why you want to impose those kinds of sanctions on him, if you're talking about the judge, you can't get him tied down. He ought to be the one that waives something.

SOULES: Absolutely.

DORSANEO: I'm sitting here listening. Don't really like the idea that it shall be considered waived. I mean you can have circumstances where you can't or after the fact unless presenting it to the judge means he requested a hearing and you didn't get one. Sometimes it's very difficult to get the trial judge to even stay in the room. In one case I had lately, you say you can make a bill of exceptions and all that, well that may not be so easy either after all attempts at getting your record in shape for appeal have failed maybe because the trial judge doesn't appreciate these niceties that you have to do in order to preserve your rights to complain later.

MEYERS: Mr. Chairman, why don't you vote on the policy issue of waiver?

MCCLESKEY: I was just getting ready to request that. All of those in favor of a rule which invokes a waiver in the case this is not presented, indicate by raising your hand.

DAWSON: We're talking about the rule proposed by Judge Guittard?

MCCLESKEY: We're talking about those who favor the rule as presented by Judge Guittard.

TUNKS: Paragraph c on page 93?

MCCLESKEY: That's right, that's right. In other words, those in favor of invoking a waiver if it's not presented. One, two, three. And those opposed to that, indicate. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen. It's determined that we shall not recommend the waiver feature of paragraph c on page 93.

GUITTARD: In view of that then I think we ought to at least include this language about motion to modify, correct, or reform a judgment, and make it read "for new trial or motion to modify, correct, or reform a judgment is not determined by written order."

MCCLESKEY: Alright, it is now proposed that we approve as a recommendation subparagraph 329b(c) so as to delete all of the added language except "or a motion to modify, correct or reform a judgment." All those in favor of that proposal indicate by holding up your hand.

One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one.

EDGAR: What we've done then, George, is eliminate commencing on the third line with the word "presented" and go all the way down to four lines down and picks up again where it says "determined by written order?" Is that correct?

MCCLESKEY: Right. That is correct.

GUITTARD: Subdivision (h) is sort of a minor correction. We now have a case before the Dallas Court. Well, in background, in our last amendment to the rule we provided in subdivision (h) that if a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected or reformed judgment is signed. Now, we now have a case before the Dallas court where the judgment was rendered about ten years ago and an order was entered correcting the judgment with respect to the spelling of a name or something of that sort and the appeal is now sought to be taken from the whole judgment, and the court reporter is dead, and the court reporter's notes are lost and that creates a problem. There is a decision from the Austin Court of Appeals, I think, that says you can appeal from the whole judgment when a judgment is rendered nunc pro tunc. And this would change that to provide, if that's done, if the correction was made beyond the time within which the court has plenary power in its judgments under rule 329b, if the correction was made beyond that time, there's no ground of appeals that would be good that

would have been properly raised in an appeal from the original judgment. Rusty?

MCMAINS: If you do that, Judge, don't you have to also take out rule 306b which says "the appeal from a nunc pro tunc judgment shall date from the date of the judgment?"

DORSANEO: No.

GUITTARD: No, this just has to do with the grounds of the appeal. You can take an appeal from a judgment nunc pro tunc and complain that the judgment nunc pro tunc was not --- improperly --- . There's no problem about that. It just the grounds that go back to the thing that could have been raised in the original judgment.

MCMAINS: But there are cases under that rule which say that you can make the complaint and in what effect have to reperfect the appeal under 306b.

MOORE: -----

DORSANEO: Maybe you're right. Same idea.

MCMAINS: -----

GUITTARD: Well, the plenary power provision is provided in another provision of rule 329b. The plenary power provision is in the previous part of the rule that had to do with finality. Subdivision d

and e, I think. So if you want to refer back to those same subdivisions, that would be fine, but it is in the same rules.

MCCLESKEY: Are you satisfied with the proposal? Any objections to it? If not by a consent we'll consider the proposal for h on page 93 is approved as printed.

GUITTARD: Now, let's go now to rule 329c which is a proposed new rule. Now I got into this at Judge Pope's suggestion that I look at rule 245 which has to do with failure to give a notice of a setting to trial and what the moving party can do if he doesn't care for the setting and he finds a judgment against him and in rule 165a which has to do with dismissal for want of prosecution, and so this rule was designed to coordinate those rules with rule 329b in that if the complaining party hasn't had a notice of setting for trial or hasn't had a notice that the case was going to be dismissed for want of prosecution, he shouldn't be held in quite the same strict standards of time standards. As I got further into it, it appeared that, and considering the suggestions which the Administration of Justice Committee had with respect to rule 165a, it appeared that the problem is not that he didn't have a notice before the judgment complained of was rendered. The problem is that when he doesn't have a prompt notice of that judgment itself. In other words, if the judgment has been rendered and he hasn't gotten the notice provided by rule 306d, and it's really a broader concern than those two instances because of cases for instance which Judge Keith wrote on where he had to hold that when the judge signed the judgment and put it in his desk and didn't give it to the clerk and the party didn't get his notice until

more than thirty days later, there wasn't anything anybody could do. So, the proposal here is to say that in that kind of situation, the periods provided by rule 329b do not begin to run until he gets notice of the judgment if he doesn't get that notice within twenty days after the judgment is signed. The thought is that if he does get the notice within twenty days of the time the judgment is signed, then he has ten more days in which to obtain relief or file something in the trial court which would extend the time further. And so the proposal would be not the entire thing that we have here. Rather, in line with the suggestion over here on page 95 under Query, which I'll summarize as follows, in the next to the last line of the opening paragraph, delete "in the following situations." Just put "signing." And delete subdivisions 1 and 2 and then proceed with subdivision b and c. In other words, in that situation, if a party has a judgment rendered and hasn't got a notice of the judgment under 306b within twenty days, then his time runs from the time he receives it, whether it's a dismiss for want of prosecution situation or a situation where he fails to receive a notice that the case was set for trial. But under subdivision c down there he has the burden to come in and prove the facts and get the court's ruling on it so that he show that he is entitled that additional time.

MCCLESKEY: Judge, which is your preference?

GUITTARD: I would prefer to delete that and proceed as suggested with

MCCLESKEY: Page 95?

GUITTARD: Yes.

MCCLESKEY: What comments do we have? Are you generally in accord with the purpose that is sought to be accomplished here? Any objection to the overall concept that is attempted? Yes, Rusty?

MCMAINS: The only problem is that the purpose of 329b is to give us some definitive time table as to what we're supposed to be doing and when you expand this to a contested case where people have submitted their judgment, and they ought to be checking to find out whether it's been signed or not, but when you, this basically, as long as the clerk doesn't send the notice and they close their eyes or go out of town for three weeks or whatever, then they're protected by the rule until they get actual notice and they get another three months or so, and I just have a problem with putting the finality of judgments off until such time as well as extending the plenary power of the trial court, which is also the effect of the rule, because it extends the plenary power of the court accordingly in (d) beyond that period in order to do something, merely based on an omission of the clerk to send out a notice.

WELLS: Well can't his adversary send him a letter and tell him here's the judgment?

MCMAINS: Yes, I think that he can, but by the same token, he can deny by affidavit that he got the letter. Whether he did or didn't, I'm not saying one way or the other about that sort out there, but to get the additional time if for instance he's just messed up for one reason

or another. I am just saying it injects a great deal of uncertainty to me, and how are you also going to enforce the rule on the clerks in the court of appeals to determine the time you have to make-you impose upon the trial court a determination of when the actual notice was attained. Because your time's tolled only until then and from there on in you've got a new time. It's not the date of the signing of the judgment, it's the date that he had actual notice, and I just have a problem with that, trying to figure out how we get that done.

MCCLESKEY: Luke, do you have the answer?

SOULES: There's a later proposal in the rules that requires a clerk to serve notice of judgment by certified mail and then there would be proof, presumably, in the clerk's records by virtue of return receipt that notice had been given, number one. Number two ----.

MCMAINS: I understand that the clerks are notorious for not always having done that.

SOULES: Well, they're just supposed to mail a post card now. I don't know how you prove they didn't mail, it but there is this case Petrochemical Transport, Inc., v. Carroll, opinion by Judge Walker, that is a bill of review case. It's cited at the end of Judge Guittard's notes on page 95. That was long after judgment was entered. It was into the bill of review period. And we had to test that you had a right to a bill of review, that you hadn't .... fraud, accident or mistake on the part of the adverse party, if you remember that rule. The only thing that was wrong in Petrochemical was that

the clerk had not mailed the postcard notice of the judgment. There wasn't any fraud , accident or mistake on the part of the adverse party. That really opens up the bill of review practice since it's a Supreme Court case, 1974. So we're only doing now, we're expanding some appellate time periods, not very long, on basically on the same grounds that the court's already recognized for bill of review that gives four years after discovery to raise the issue.

MEYERS: But isn't Rusty basically right in his proposition that in a contested case, the losing party has a duty to chase around and find out when that judgment is signed. He can't sit back and wait for notice. He has a duty to find out.

SOULES: Why should he have to do that, Judge? The situation where the trial judge says ----

MEYERS: Nothing there, so I'm suggesting "had" or "should have had" actual notice or something like that. That isn't quite the word I mean, but I think you're right. He has a duty to do something to find out if a judgment has been signed.

GUITTARD: Doesn't that go down to the question of how long he's going to have, if he has three months or maybe two months or how long within which he could act. Does he have to act within the thirty days? That's the question.

MOORE: This is what bothers me. It's what you're talking about now, about when is a man who has a judgment going to be able to feel secure

that he has a final judgment?

GUITTARD: Well under Petrochemical he might not be secure for four years.

MOORE: That's right. You send a notice out by certified mail and it comes back as not delivered. I know of some people smart enough they won't accept a certified mail. Not delivered and then you're sitting there and he comes in and he swears he didn't get any notice.

KRONZER: You've got to realize that some of these lawyers that would come in and expose themselves to notice and hearings might even be telling the truth sometimes. They just might, and if that's the case, and they got short in that way, it seems to me we ought not to make more malpractice. That's sort of what we've been fighting. And it happens, it happens to all lawyers.

SOULES: The times runs from the time the judgment is signed. Now suppose the judge signs it and puts it in his coat pocket in a contested case and doesn't take it to the clerk? There are contested cases where something happened after the judge signed the judgment and you can chase around and you don't find it, then why should the lawyer have to call the court every day or every week to determine whether or not the judgment was signed.

MCCLESKEY: Buddy, it's your time to talk without anybody else talking.

LOW: It's the argument between equity and certainty. And no matter what you put in this rule, you can't tell your clients certainly that judgment is final and can never be upset. We can't write certainty in these rules. Well, we can write some equity, like Jim was talking about, and I think there's room for some, because there is no certainty right now anyway and we do have situations or used to have them in Beaumont, now our present judges are all real fine, but used to where you couldn't find out, he might sign it and you couldn't find out. His clerk would say well you'll have to find out that from the judge and you just shouldn't have to chase that down and if you have that problem and something happened, then I don't think you ought to be penalized just because --- death's certain, but it's not good.

MCCLESKEY: On a policy vote, how many of you think that we should have some provisions such as those in rule 329c as proposed? One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen. And those opposed with the same sign. One, eighteen to one. Judge Guittard has now proposed that we recommend a rule such as 329c with the query version of it on page 95 rather than the original version on page 94.

GUITTARD: And you might want to consider that connection whether the 90-day provision in subdivision (b) is the appropriate time. Now that was taken from the present rule 245 whereas the present rule 165a has six months.

MCCLESKEY: Let's vote on that separately on the 90 days. Is the 90 days appropriate? All those who thinks that it is, raise your hand.

Are you favor of the 90 day provision?

MCMAINS: You mean 90 day max? Is that what you saying?

MCCLESKEY: Yes. 90 days. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen. Nineteen in favor of the 90 days.

SOULES: Any chance to discuss that?

MCCLESKEY: Sure.

SOULES: I'm sorry, but we've got rule 165a where you've been dismissed for want of prosecution, you never got notice that there was going to be a dismissal and you never got notice that you were dismissed which we're trying to put within the ambit of this rule. And it's always been six months. Now if we're going to make an exception to that one, it's okay with me if we go 90 days, but if we're not going to make an exception for that one, it seems to me that we ought to go.....

MCCLESKEY: That will be the first order of business in the morning and we'll start the vote over after Luke finishes his argument. Before we leave let me point out one or two things to you. Remember that in the morning we come back to this same room. Contrary to what was in the notices, we'll be in here rather than in 101. Secondly, it is suggested that you not park in the parking building in the

morning because it will be locked at 12:00 and there should be enough room on the streets. Thirdly, let me express to you my appreciation for your participation in the meeting today, and I especially express our appreciation for those who have worked so effectively in getting the agenda put together, Judge Pope, and getting the substance of the discovery and deposition rules, you've done a good job, Luke, Bill, and we appreciate what you've done, and we'll continue in the morning but before we recess, in the morning, don't faint, at 8:30. Is that satisfactory? 8:30 in the morning in this room but before we leave I'd like to recognize Judge Pope.

POPE: The Supreme Court as some small indication of our deep appreciation want you to have a skin that you can frame and hang on the wall and I'm going to leave these right down here and if you will, please pick up your own. I want to say this. It's alright to leave your materials here, because I don't anticipate that you're going to do a whole lot of studying tonight and I'm going to be greatly disappointed if you do, and if you want to park in the Supreme Court parking lot right over here behind you I think tomorrow morning you'll find just plenty of space. Now I've got to go and do a little cooking.

END of November 12, 1983, session.

BEGIN November 13, 1983:

MCCLESKEY: As we recessed yesterday afternoon Judge Pope very graciously handed to each of us a plaque or certificate that had been

prepared and signed by all of the court members and then in the evening he gave a great party that we thoroughly enjoyed. I think it would be appropriate for us to just say "thank you, Judge" this morning. (Applause) When we recessed yesterday afternoon we had talked about the time element on rule 329c as to whether it would be 90 days or some other period of time and after 90 days had carried it overwhelmingly Luke decided we ought to discuss it further. I'd like for you to repeat that Luke so we can kind of get back in our chain of thought.

SOULES: Just a small voice from the outlands. We're trying to make these time periods under the circumstances before us and dismissal for want of prosecution uniform. We've given six months under rule 165a in the past and that seems to me to be preferable. That's my own feeling about it, and we did vote yesterday for 90 days without any discussion ahead of time, and I just would, in view of the fact that we given 165a six months in the past, we are making an effort to protect parties from losing their appeals by negligence or otherwise of the lawyers and it seems to me that the uniform six months rule is not that harmful. That is to extend the present three month rule to six months to make that the uniform standard instead of three. That's all I really have, George.

MCCLESKEY: Alright, thank you Luke. Are there other suggestions on this?

KRONZER: I move for a rehearing. Six months.

MCCLESKEY: Hardy, did you have a ----.

MOORE: I was just going to say I noticed the same thing this morning. I thought we ought to make it six months.

MCCLESKEY: Everyone in favor of six months indicate by holding up your hand. Are there any opposed? That will be changed to six months instead of the 90 days. And then that gets us back to what we had started to discuss and vote on as to whether or not you want to go, yeah, Rusty?

MCMAINS: Mr. Chairman, I had one other question Judge Guittard can answer it about 329c and the fact that the times don't start to run until the actual notice of the judgment. What happens if you've got multiple parties? You've got the judgment entered, like for instance you've got two defendants and one of the defendants files a motion for new trial. Maybe doesn't send it to the other side so that you got one guy that doesn't know that the judgment has been entered at all and the other guy's already busy perfecting his appeal. Now what are the times you imply?

SOULES: Let the law review decide that!

MCMAINS: No, that's going to happen. I mean I've got lawyers that will never send me copies of things they've filed post-judgment.

GUITTARD: Our rule that was adopted in 1981 says that if one party files a motion for new trial that extends the time for all.

MCMAINS: I understand that.

GUITTARD: Now the question is does that apply in this instance. It may well.

MCMAINS: All I'm getting at, once again, once you had made this thing run from it, all of a sudden we thought we knew that it ran from the date of the judgment and that's what we tried to do to make it obvious and now if somebody doesn't have actual notice of the entry of the judgment within the twenty day period then all of a sudden the times are different. At least for him, and we don't speak to the issue of whether it's different for everybody or just him in 329c.

SOULES: Consistent with what we've done with respect to ordinary motions for new trial for timely motions for new trial, if anybody files one, everybody gets the benefit of the time. I would suppose that that same principle ought to apply here but perhaps something ought to be said specifically to adopt it, I don't know.

MCMAINS: Well I'm not proposing that we take up a lot of time to write the rule. It just something I wanted to call to Judge Pope's attention and if he wants us to try and work it out, Judge, I would be happy to, you know we could communicate and try to offer a suggestion to the court.

GUITTARD: Ok.

SOULES: All you have to do is add "as to all parties" after the word "run" in the fifth line, isn't it?

MCMAINS: Yes, I understand. My concern is here we are benefiting all these other folks just because you've got one guy who doesn't pay attention to what's coming into his office.

ELLIOTT: Judge, isn't there a proposed amendment to the rules in this batch somewhere that requires notice to all parties instead of just adverse parties because of what just was stated that one defendant might not give notice to another defendant. Isn't one of those rules in here?

MCMAINS: But notice of the entry of the judgment rule has been changed, yes.

ELLIOTT: Well besides that. I mean we're talking about filing of a motion for new trial. Any filing notice has to be given to other parties, not just adverse parties.

MCMAINS: Don't get me wrong. It's not something I say is going to happen everyday. But then it's not going to happen everyday to that somebody that doesn't know the judgment's entered.

ELLIOTT: No, I know it. Yesterday then today if that notice to other parties rather than adverse parties amendment ---.

MCCLESKEY: Rusty, what do you think of Luke's suggestion as to adding

the words "as to all parties" in the fifth line on page 94?

MCMAINS: It seems to me that the whole policy, the only reason that we deviated at all from the date of signing and the terms that had been absolute because of the finality of judgment concerned in the unfortunate situation where you've got a party that doesn't know that it's been done to him. Even if he may be negligent in some way but still, if he doesn't know, have actual knowledge that he ought to be relieved some how of these strict deadlines. I don't see how that applies to other parties.

KRONZER: You can't have different time tables.

MCMAINS: I agree with you. I mean we've got a conflict in that aspect of it now.

KRONZER: There's a number of times when that can happen. In a multiple party case the chances of him not knowing, it was the overlap of documentation going on between the parties, well one of the parties knows and he's doing his appeal process, and somewhere between slim and none, and slim left town six weeks ago.

MCMAINS: Well that depends on whether or not you're in the boondocks and you've been brother-in-lawed and you've got some local counsel who worked together on you and several that are out-of-town. That's the reason that we were concerned about this rule in the first place.

MCCLESKEY: Sam, have you got a solution?

SPARKS: No, I just want to call everybody's attention that two years ago we were sitting down trying to shorten the appeal time so that we could get a judgment that people could rely on. It seems like we're spending a lot of time now making sure that it's not going to be final under a theoretical waive to the extension of the courts of appeals for six months and a year after an appeal has ended. It just kind of concerns me. I do have one comment on 329c though. I assume that the determination by the trial judge as to whether or not a party's attorney got actual notice would be appealed.

GUITTARD: It's just like a motion for new trial. You have to make your record to show whether or not it's appealable and if you fail to make the record, well then the appellate court --- review it.

MCCLESKEY: Hadley?

EDGAR: George, just to point out that the only other time period we have that's less than in terms of days is a writ of error, six months. And I'm just rearing up because of the statute I know but I'm just wondering rather than saying six months should we say 180 days? Everything else is in terms of days except an appeal by writ of error.

MCCLESKEY: Is that acceptable to the Committee? That sounds right to me Hadley. Is there anybody in opposition to that? If not, we'll make that 180 days instead of six months.

KRONZER: Why don't we do also, while we're thinking about, also do

165a that way too.

GUITTARD: Well the proposal is to take that period out of 165a and let this apply.

POPE: On page 252 there is a proposed rule which would require service on each party to the suit a copy of the judgment.

MCCLESKEY: Alright, I think we're up to the point of deciding whether or not we're going to the printed form as it appears on page 94 or with the query form as it is suggested on page 95. And I think Judge Guittard indicated that he has a preference for the query form.

MEYERS: I thought we voted to eliminate subparagraphs 1 and 2.

MCCLESKEY: The query form would eliminate them.

MEYERS: But I thought we already voted on it.

MCCLESKEY: Oh, had we? I beg your pardon. Yes, Hardy.

MOORE: If we have eliminated that, I want to ask a question. What does paragraph c under rule 329c on page 94 mean?

GUITTARD: Well that's intended to be, that in order to get the additional time, you have to file your motion and produce evidence and have a court hear it. You can't just file a motion and have it automatically extended for six months.

MOORE: Well if you eliminate 1 and 2 would that still be applicable to c and if so isn't the language a little obscure there about whether the requirements of this rule had been met?

GUITTARD: I would welcome any clarification but the point is that ---

MOORE: I thought that's what was meant but it was a little bit ambiguous I thought and I wanted to be sure that was what you meant.

GUITTARD: From actual notice of signing, that is the crucial point that would have to be established.

MOORE: It's the use of the words "that the requirements of this rule have been met" that bothers me.

GUITTARD: And perhaps we ought to be more specific down there. "Only upon a showing by evidence, on motion and notice, as to when such actual notice was received" or something of that sort, or "when actual notice was received."

POPE: Mr. Chairman, let me ask you a question for my education. How prevalent is this problem? Of course, I know that everything impossible happens to all of us, but I just wonder how prevalent this is where somebody has been cut off of sufficient time to appeal because he didn't get a copy of the judgment. Is it a serious problem?

GUITTARD: We see a number of cases where they have that kind of complaint.

MCMAINS: Judge, I think that is, well, a prevalent or could be a problem and has been a problem in the dismissal for want of prosecution cases which of course we provide for. And then the cases where the guys don't get notice of the setting of the trial which is also the other alternative that was specifically provided for. Apart from those two cases, my experience has been while people may not know exactly when the judgment is signed, they're going to find out in time to file a motion for new trial. In very unusual circumstances it's the other way, I mean legitimately it's the negligence of the lawyers.

GUITTARD: I've seen a number of cases where it's occurred.

SOULES: There was a case on the books where two judgments were signed. He was a traveling judge in the country. He gets one in the mail. He signs it, dates it, puts it in his pocket. He gets back to his desk, there's another one in the mail in the other county. He signs and dates that one. The second one gets out to the parties, but the first one was signed and the lawyer runs past thirty days after the first one but within thirty days of the second one, and he ruled out of court. No appeal.

MCMAINS: Well, I don't think that happens now.

SOULES: The judge signs it and puts it in his pocket or he signs something and the party contends that it's a judgment.

MCMAINS: Well, I think the Judge is not asking, "has it ever happened?" But how prevalent is it that we're going to disrupt the otherwise fairly certain timetable. Especially since, to my knowledge, I think this is the only place in the rules in modern practice anyway where a trial judge has the capacity to make a fact finding to determine the extension of his own plenary jurisdiction.

KRONZER: It's limited to this very specific type of prudence, and, Judge, as far as I'm concerned, I've only seen it happen once in the last fifteen years in my practice. It was a country case where they were just not notified when the judgment was entered.

MCCLESKEY: You're raising a policy issue as to whether or not we should have this exception to the fixed time table.

MCMAINS: Well I was just trying to answer the thrust of what I think the Judge's question was.

EDGAR: Would it be helpful to meet the objection raised a moment ago in paragraph c to say something along the lines "a party desiring to obtain the benefit of this rule must upon motion and notice produce evidence that the requirements of this rule have been met?"
MCMAINS: Pending by the Judge.

GUITTARD: He's got to make the motion, it's not up to the resisting party to make a motion, it's up to the party desiring the extension to make a motion, isn't it, Professor?

EDGAR: That's what I say, a party desiring to obtain the benefit of this rule must upon motion and notice.....

GUITTARD: Upon whose motion?

EDGAR: Upon motion of the party that wants to extend the time.

GUITTARD: Well, I was concerned about whether or not that's what your wording would require.

DAWSON: Doesn't the rule already say that?

MCMAINS: That was my other point, that just from a procedural standpoint. It says now that it applies only upon a showing by evidence, well, it ought to apply upon a finding by the judge, supported by evidence, and not by just you go in and file your affidavit and you get your extension of time.

SOULES: What if the trial judge won't hear it?

KRONZER: On a policy issue, Judge, you know consistently for fifteen years I have argued against the destruction of the right of appeal. I am very dead set against the old problems we had in Matlock days, and all of these problems. The fact that it doesn't occur with any frequency doesn't seem to me to meet the problem of giving a litigant who either by lawyer neglect or whatever the cause of lack of knowledge, an opportunity to have his case heard throughout the

system, and that is what I address myself to. And even though it does cause some lengthening out of the jurisdictional problems, and that is what I have always been heard to speak to. Malpractice insurance coverage is expensive enough.

MCMAINS: Jim, I don't disagree with you except that I think just as we have already pointed out, there is a remedy by bill of review now.

KRONZER: It ain't much. It ain't much. The clerk is not required to give one of the final judgment.

MCMAINS: Well, clerk is now, and this rule is amended, and if want to treat that problem, you could somehow put in that into the rule on the clerk failing to send the notice, where it says it doesn't affect the finality of the judgment.

KRONZER: In terms of a bill of review there, Rusty, you are now talking about a post-judgment form of relief and not a meritorious cause of action or defense that has not been tried. You are talking about something that <u>has</u> happened in terms of your other party in the bill of review, and I don't see it as a part of a true bill of review remedy.

SOULES: And a jury trial, I mean a long bill of review is a pretty laborious type of thing. It is a full blown new trial.

POPE: I withdraw my question. Thank you for the answer, it's been helpful.

MCCLESKEY: Frank, does that take care of your comment?

ELLIOTT: Yes sir, once that question was withdrawn.

GUITTARD: I think perhaps Hadley has a good, and Rusty also has a good suggestion about subdivision (c). I'm not sure just how we ought to resolve it, but it ought to say something like this, "This rule shall apply only upon a finding by the court on motion and notice that actual notice was not timely received."

MOORE: That's right.

MCCLESKEY: I can tell you what Luke has got his hand up for. He is wondering what happens if you can't get a hearing.

SOULES: That's right, what if the trial judge won't hear it?

MCMAINS: Then mandamus it.

SOULES: It looks, maybe this - responsive to the problem.

MCMAINS: The judge doesn't rule on your objections all the time either, what do you do with that?

GUITTARD: Suppose he won't hear your motion for new trial based on newly discovered evidence or jury misconduct. Same problem.

SPARKS: Does the appellate court make the determination then?

MEYERS: No --

SOULES: Well you have an affidavit on file about the newly discovered evidence and that goes to the appellate court.

MCMAINS: You have mandamus jurisdiction in the court of appeals because this is determinative of their jurisdiction, and they have mandamus jurisdiction to mandamus the trial judge to have the hearing and make or not make a finding. That is essential to protect the court of appeals jurisdiction otherwise it would be lost under ordinary circumstances.

KRONZER: It is pretty clear what he will thereafter rule.

MCMAINS: That's alright, all you are entitled to is the hearing not the finding.

WALKER: What about saying, shall hear evidence that rule 306d, upon the hearing of evidence that rule 306d, was not complied with.

KRONZER: Yeah.

WALKER: If it's complied with I don't know that - he is going to have a hard row to hoe. Upon showing that rule 306d was not complied with, is the evidence isn't it?

KRONZER: Just as he was saying, he didn't receive that, though, wouldn't he --

MOORE: That's better than it is now, saying that the requirements were complied with, what in the hell is the lawyer going to make out of that when they read the book? They won't know what we're talking about.

MCCLESKEY: What are you suggesting Orville, are you suggesting that the language in (c) be changed from that, the requirements of this rule --

WALKER: Upon showing by evidence that rule 306d was not complied with. That is, the clerk failed to mail notice.

MEYERS: That eliminates the final sentence in 306d.

WALKER: If that rule was complied with, shouldn't this be automatically a motion overruled? You got....

MCMAINS: Not if the standard is actual notice.

WALKER: Well, you are trying to impeach the clerk's mailing of notice.

DAWSONS Or notice of any kind, Orville.

WALKER: Well, there is only one kind of notice we are talking about

isn't there, the clerk's notice?

DAWSON: No, we are talking about actual notice.

WALKER: Well, the clerk's not going to call him up on the phone.

MCCLESKEY: We are not getting the benefit of your comments up here, we can't hear you.

WALKER: I was just trying to narrow it down, maybe I'm narrowing it down too much. I thought we were, 329c is in relationship to 306d.

SPARKS: (San Angelo) I personally can envision a situation where the clerk mails it. But say I'm in a case, and they mail a copy of the judgment to Sam Sparks, and it goes to El Paso. You know just because you comply with 306d doesn't solve the problem.

WOOD: Mr. Chairman, what about rule "c" reading like this? "This rule shall apply only upon a showing by evidence on motion and notice that the complaining party did not receive the notice."

MCCLESKEY: That sounds like that gets to the meat of the coconut to me.

KRONZER: Don't say "the notice," just say "notice." Any kind of notice should be sufficient.

GUITTARD: Well, he'd have to have notice at some time to start the

running.

MCMAINS: Did not have notice within the time period is what, that's why you've got the requirements of the rule. You had several requirements. It's got to be outside 20 days.

SPARKS: Doesn't that allow a party to create jurisdiction by himself, without any order?

MCMAINS: Sure, it allows him to extend the time too, even though there's still plenary jurisdiction.

SPARKS: Well, I've had a lot of cases Jim where a guy goes to a court after the motion for a new trial and says, well I screwed up, you've got to help me out with the client, and the judge says sure I'll give you a new trial.

GUITTARD: We could key it back to the 20 days provided in subdivision (a), that the complaining party did not receive actual notice within 20 days.

ELLIOTT: Mr. Chairman, doesn't (c) say that already? (a) says you've got to receive notice within 20 days or else, if you don't receive notice within 20 days then this rule applies, and (c) says, you've got to show that the requirements of this rule have been met, and this rule says that that means, that you haven't received notice within 20 days. Why are we worried about (c)? Doesn't it say exactly what everybody is trying to say to begin with?

GUITTARD: I thought it did.

DORSANEO: I think it does.

MCMAINS: I agree with that but Judge, why, this backs up just one step, why do we have a rule predicated upon actual notice when they had plenty of time to do something at that point?

MEYERS: Could we say actual or constructive notice?

MCMAINS: What I was saying is, 30 days. Our time period is thirty days, They can file a new motion for trial in 20 days. They find out on the 21st day, why should they get.....

ELLIOTT: That's right. This rule doesn't apply if you got notice within 20 days.

MCMAINS: No, but if he gets it on the 21st it does.

GUITTARD: The thought is to give them 10 days to file the motion for new trial.

MCCLESKEY: I think we need full discussion but we are spending our time this morning on a rule that's not likely to be used very often, and we've got some other rules that we need to get to.

MCMAINS: Well, I'm afraid it's going to be used more often if we hit

it.

DORSANEO: That's really a good point, I mean that's really too much time if you have ..... Why not have them do a motion for new trial? Either they can do one or they can't.

MCMAINS: We only have a motion for a new trial is only a requirement for some very limited areas. I mean there is no reason why somebody can't get it out. It's timely filed under the rules if it's mailed the day before it's due. And the only concern that anybody has is that you're going to have lost jurisdiction, and it seems to me, therefore, that your period ought not to be, ought to be the jurisdictional period, and not something shorter. But anyway that's ---.

MCCLESKEY: How many feel that rule (c) adequately states the thought that's been expressed here, raise your hand. Well, that's obviously a majority of the group.

MCMAINS: Mr. Chairman, I would like to make one inquiry though, what about the requirement of a finding? Are you saying that we don't need a finding? Luke says we don't need a finding, and I'm saying I don't understand that to be it. You are going to have a lot of cases on that, if that's the issue.

GUITTARD: The law would be, if you make your showing by evidence, then if you get a finding fine, if you don't get a finding then there is, the question is whether the judge had discretion to make a

different finding. If he didn't have discretion to make a different finding, then it establishes a matter of law, then his motion, his failure to find would be reversed on appeal.

MCCLESKEY: Rusty, Luke here is going one step further away from you and suggesting that rule (c) says, "this rule shall apply only upon showing by affidavit or evidence."

SOULES: That would be like your motion for new trial on newly discovered evidence if you can't get a hearing on it, the court of civil appeals would look at the affidavits.

SPARKS: Let's say you've been lucky and you got a judgment. Are you going to take the depositon of the lawyer because you're not going to get a hearing and you don't want to be stuck with this affidavit? Or do you file your affidavit? It looks to me like it's going to be a quagmire for the court of civil appeals to make some sort of determination.

SOULES: Well, you are trying to get a hearing in the trial court.

SPARKS: I understand that.

SOULES: And you file your motion, and you file your affidavit and the trial court just won't hear you. He just won't. The court of civil appeals ought to be able to say that the trial court needs to hear you.

SPARKS: Why can't you put in the rule that there shall be a hearing?

MEYERS: Well, if you don't get a hearing then, like Clarence says, that's automatic reversal.

GUITTARD: Sure

SPARKS: That's what he wants in the first place.

SOULES: Is it?

MEYERS: Sure.

SOULES: Is it on dismissal for want of prosecution an automatic reversal?

GUITTARD: Well we'll get to that when you consider .....

MEYERS: Well, I'm analogized (?) that you are not getting a hearing on your motion for new trial on newly discovered evidence. If you don't get a hearing on that, the judge refuses to hear you, you get a reversal, don't you Clarence?

GUITTARD: Sure. If you've got your affidavit showing you have grounds.

MEYERS: Sure.

SOULES: That's what I'm putting in here right now, this rule shall apply only upon a showing by affidavit or evidence on motion for new trial.

SPARKS: I think it's going to be better to lose in the trial court.

SPARKS: (San Angelo) I've got a real simple question. I think I understand what Russell is saying. Let's say a judge hears evidence that the man didn't receive notice, and rules against him and says yes you did. As this rule is written, I think the appellate court would have to reverse, and send it back, because he showed evidence there is no requirement of a finding. Am I hearing you right, Rusty?

MCMAINS: Yea.

MEYERS: If the judge just doesn't believe it for good reason.

MCMAINS: There is no court of appeals jurisdiction to make a fact determination such as this as I view it. I mean in the first instance. It's to review the trial courts fact determination. They're the ones sitting there. Since the standard is actual notice, if one lawyer says I never got the card, and the other lawyer says, yea but I told him about it over lunch three days later....then, it's a fact question.

GUITTARD: It seems like to me that the appellate court can use their general usual power of reviewing such matters in complying with this, and I don't think we have to spell it all out.

MCMAINS: I understand, but once again there is no requirement of an order, or finding. All it says is "upon a showing." I don't find that to be a word of art.

JENNINGS: But the court would not enter an order removing the judgment or granting a new trial without a finding.

GUITTARD: Why does he have to make expressed finding? If he overrules the motion, then he has made an implied finding that, against the complaining party; he would review that on the basis of the evidence.

MCMAINS: Judge, because you have a constantly moving date of jurisdiction. It depends on the date that it is determined that there is actual notice. That's what the rule says. As a consequence, let's say that he says he got notice the 22nd day, and the judge says, no it was on the 21st day. It changes the times. There must be, if you are going to apply this rule literally, there must be a determination as to the date that he received actual notice, and then there must be a requirement that that be outside whatever the allowable time period is before you can ever figure out what the hell your appellate time table is. That's the way the rule is written.

MOORE: Mr. Chairman, I'm not going to try to say what the language should be, but I move that it require a verified, a sworn motion and a finding, by the trial court.

MCCLESKEY: A sworn motion?

MOORE: A sworn motion and a finding by the trial court. That would require evidence in support of the verified motion.

MCCLESKEY: That doesn't ..... yes, that does.

MEYERS: I agree with that.

SPARKS: I do to. I second that.

POPE: What about this? This rule shall apply only upon a finding after evidence on sworn motion and notice, that the complaining party did not get the notice.

MEYERS: No did not get "notice," not the notice.

POPE: Not the notice, ok.

GUITTARD: I think Rusty has a point, that the actual date it's received is important, and you say "a sworn motion and notice of the date actual notice was received."

MEYERS: Do that again, Judge.

GUITTARD: Ok, "This rule shall apply only upon a finding after evidence on sworn motion and notice of the date actual notice was received," or maybe that language ought to inverted around there, but

that's the idea. "Only upon the finding of the date actual notice was received on sworn motion and notice."

DAWSON: That's your motion?

GUITTARD: Yes, that's my motion.

DAWSON: I second that motion.

MCCLESKEY: Alright, we've got a matter to take a vote on here. All in favor of this motion, indicate by raising your hand. 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23. Any opposed? Alright we have (c) taken care of.

SOULES: (b) is 180 instead of ninety?

MCCLESKEY: 180 on (b) instead of 90.

SOULES: I move that we put "as to all parties" after the word "run" in "a." Either we clarify it that way or we don't.

MCCLESKEY: That's in the fifth line at the top of the page, it will read "Shall be deemed to have begun to run as to all parties upon receipt...." Are there any objections to that? It will be done by consent.

GUITTARD: I have some problem about that. It seems that if a person who prevails has not received actual notice then somebody that wants

to have his time extended and has had notice under that language, might be able to extend the time. I think we need to study that a bit.

MEYERS: Well, the party who prevailed prepared the judgment.

SOULES: That party is not adversely affected.

GUITTARD: But he might not know, he might know even though he prepared the judgment he might not know when it was and therefore he would have a standing complaint.

MEYERS: But not adversely affected.

GUITTARD: Well, shall we put adversely affected?

MCMAINS: It's in there.

SOULES: It's in there, "If neither the party adversely affected by a judgment nor his counsel have had actual notice...."

MCMAINS: In other words, the rule applies only to a party adversely affected.

GUITTARD: As all such parties then.

DAWSON: Of course you get into some situations where the judgment is entered, and you're not quite sure whether you won or lost.

MCMAINS: That's true, too.

GUITTARD: You'd have two parties adversely affected and one of them receives the notice and the other one doesn't. One party can take advantage of the other. I think there is a problem there and I think we need to study it some.

DAWSON: Am I correct that the three types of judgment we are talking about is one a dismissal, and secondly a judgment that has been taken where a defendant has filed an answer, but he did not appear at the trial, and a third is where the parties have tried the case but the judgment is entered some time later without notice. Are those the three situations we are talking about?

GUITTARD: Yea, I think so.

LOW: ..... you could have the situation where a party files an answer but simply didn't appear at trial.

DAWSON: That's what I mean. That's where the judgment is taken against the defendant and by default after he filed an answer.

GUITTARD: I think that the appellate courts can decide this. I mean you don't have to spell all these things out. Let them take 'em on a case by case basis with respect to that.

MCMAINS: You mean "as to all parties," whether it extends the time on

all parties?

MCCLESKEY: You would leave, "as to all parties" out, Judge?

GUITTARD: I would because I'm not sure what the ramifications of that might be.

MCCLESKEY: Alright it is left out. Anything else on 329c? If not, what's the next rule we have?

165a

GUITTARD: I was referring there to 165a which in my version here is on page 211. Luke has another version of it. I don't know if that's before you, and so I don't think we need to be concerned with the exact language but there are several points that I think we need to pass on and I'll point them out to you. On page 211, you'll notice in the first paragraph, and I think we ought to designate these paragraphs by subdivisions. The first paragraph has to do with the failure to mail a notice of intention to dismiss for want of prosecution. There are two situations in which dismissal for want of prosecution is recognized, one where a party fails to appear for a hearing and another where the court gives notice of intention to dismiss.

POPE: Excuse me just a minute, there are two versions of this rule, and Luke as I understand distributed to everyone the version by the Committee on Administration of Justice.

GUITTARD: Do you have Luke's version? Ok, then I'll refer to his

version, I didn't know you had that. I'll be glad to work from his version. At the end of his paragraph one, the old language of the rule is, "Failure to mail notices as required by this rule shall not affect the finality of any order of dismissal except as provided below." Now when we amended rule 329b, we tried to avoid that term "finality" and to speak in terms of plenary power and the times things run and so forth, the time the periods run. To key into that, my suggestion is, as you will see on my version on page 211 is, shall not affect the running of the period provided in rule 329b, except as provided in rule 329c.

SOULES: That sounds acceptable to me, Judge.

GUITTARD: Ok, now I got into this because Judge Pope asked me to look at the periods here and try to reconcile them with 329b, and that's what I tried to do. Now it finally dawned on me that the failure to give the notice of intention to dismiss before the dismissal order is entered is not a matter that ought to extend the time for filing a motion to reinstate. It is rather a question of the grounds of the motion to reinstate. Now that we have taken, by 329c, we've taken care of that by providing that the time run from the receiving of the actual notice of the dismissal, then that ought to be, the failure to receive the notice of the intention to dismiss ought to merely relate to the grounds, and therefore, that is taken care of by the present rule which Luke provides on page two in the language much the same as the rule now provides, "The court shall reinstate the case upon finding that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an

accident or mistake, or other justifiable cause." Now the present rule provides that the court shall reinstate it within 30 days after deciding the order. The proposal is to let that be governed by 329b, except as it may extended by 329c. In Luke's version down there, down at the bottom, where he has the amending language, "A motion for reinstatement shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within," and strike 30 days "the time allowed by rule 329b or 329c." And, "A copy shall be served," and so forth. I think that is acceptable to Luke is it not?

SOULES: Yes, I think so.

GUITTARD: Alright, now the other suggestion that the Administration of Justice Committee has made, I have some question about it.

MCCLESKEY: Judge Guittard, before, there at the bottom of the first page, of Luke's version, what did you strike out when you added, "the time allowed by 329b or 329c."

GUITTARD: Strike out, beginning "30 days" and go down to the word reinstatement, no, and insert the copy, strike out down to "A copy."

MCCLESKEY: At the top of the next page?

GUITTARD: Yea, at the top of the next page, the second line, strike out down to "A copy," keep "The copy," and I would strike out "of the motion for reinstatement," because that's not necessary here. Just

say "A copy shall be served ..."

JENNINGS: Well, at the bottom of page one it says, "but not later than 6 months." Do you need to strike that out?

GUITTARD: Yes, because that's provided already by Rule 329b.

DORSANEO: The only comment I would have is that the language that the Administration of Justice Committee put in this proposal, be a little more detailed about this notice question and I frankly think that the actual notice language in 329c, as proposed, could be improved upon. Maybe this language is an improvement maybe it could be left with this actual notice, whatever that adjective means, but in terms here it says, what you'd be talking about is whether the attorney received notice of dismissal under 306d, or had actual knowledge of the dismissal anyway.

GUITTARD: I think that's a good point, and I think that the same point applies to 329c.

DORSANEO: I would like to see that "actual knowledge," actual notice, maybe it's just a personal problem I have with actual notice. It seems to be an intermediate condition somewhere between actual knowledge and constructive notice. Maybe that's just personal with me, but to change 329c and speak in terms of whether somebody got 306d, or otherwise had acquired actual knowledge of the judgment.

GUITTARD: That would be acceptable to me. I think it ought to be

done in 329c rather than here.

POPE: I'll be working with Luke's copy, we're down to the second page, where it says a copy.

GUITTARD: Yea, a copy shall be served and so forth.

POPE: Are there any, where is your next change after you strike a copy? I didn't get the change.

GUITTARD: The next change after that, "A copy shall be served," and then the rest continues as before. Then down in about the third paragraph on that page, Luke's version says "In the event for any reason a motion for reinstatement is not decided by signed written order within 45 days after the motion is filed --." I would eliminate the 45 days, because that then would be already governed by 329c. It would be the time provided by rule 329b, beginning at the time of received notice. He goes ahead and says, "the motion shall be deemed granted by operation of law." That may be all right. I had in mind, perhaps it would be better to say, "the facts alleged in a sworn motion shall be taken as established if the court won't hear it." This takes care of the problem where the judge won't hear it. Maybe it would be just as well to say, he filed his motion and it's granted by operation of law, even though the grounds stated are not sufficient or even though he hasn't stated any grounds, but they have got the alternative if the judge wants to hear the motion either have it granted as a matter of law or provide that facts stated in sworn motion shall be taken as facts.

SPARKS: Well aren't you putting the burden now on the person who was diligent and did obtain the judgment?

GUITTARD: I'll let Luke argue that part.

SOULES: This was about a one hour or longer discussion in the Administration of Justice, in how to handle the problem whenever the judge won't hear the motion to reinstate, and that's a very real problem in South Texas. I don't know whether it is prevalent in any other area, but we have trouble with it. The arguments that finally carried the idea of having the motion granted, if the court will not hear it, were the fact that it was very difficult to get a hearing, and so often these cases were dismissed as a result of a posting of a dismissal document where there may be several hundred cases on the notice and the judge really is not that interested in dismissing the cases where the lawyers want to pursue them. He doesn't care to hear the motions to reinstate particularly. He may be willing for fifty out of five hundred cases or twenty out of two hundred cases to go back on his docket, then he has gotten rid of all the rest of them, whenever he sees what has gone back on his docket he can then set those cases again for dismissal if he wants to, without ever having had a hearing on the first motion to reinstate. It gives the trial judge another way to cull out the ones that the lawyers really are not interested from the ones where there is interest, without doing anything other than posting them for dismissal and then ordering dismissal and giving notice and waiting to see what comes back. Then deal with those. He can either deal with them by having a hearing or

he can deal with them by not having a hearing and seeing if the lawyer is going to pursue them now that they have once been posted and dropped and they are reinstated by operation of law. This does not put the trial judge in a situation of being appealed if he does nothing, so instead of having to have twenty hearings on motions to reinstate, he can simply allow those cases to come back on his docket. You don't have to go to the court of appeals to get relief if the trial judge just is too busy to act on what he considers to be forgotten matters anyway. So I doubt that with the experience of the drop docket there are going to be large numbers of motions to reinstate after the posting of such a docket and this just seems to be the, a way that a judge can readily handle his docket without spending a lot of time and then it also takes care of the situation where the judge just won't hear you, or is too busy to hear you even if he desired to do so. You are still in court.

BECK: Mr. Chairman, I understand the concerns about oftentimes it being difficult to obtain a hearing, but what are the policy reasons behind providing in a rule that the motion shall be deemed "granted," as opposed to "denied" by operation of law? Because if you look at, Luke, looking at your proposed rule, you're talking about some fairly outrageous conduct on the part of a lawyer. For example, the first part talks about him not showing up for trial of which he had notice. Why should his case by this process be automatically reinstated when he in effect was negligent? What are the policy reasons behind that? I mean, it would seem to me the more compelling policy reasons would deny it by operation of law as opposed to granted particularly in these times when courts are trying to get rid of all the trash on

their dockets.

MCCLESKEY: You would propose that that read "be deemed denied by operation of law" and then the right of appeal would be .....

BECK: Well, I guess I'm really not proposing that. I'm just wondering what the policy reasons are behind granting it. I guess I'd lean towards denying it because I don't know of any other rule where we have ever granted something by operation of law as opposed to denying it.

MCCLESKEY: Rusty.

MCMAINS: The real problem, I mean an even greater problem, I think is when you're talking now about going back to 329c, which a lot of times you are, that's the purpose of 6 months, generally it's because these notices don't get out or there is something lost or dropped in the works, if Judge Guittard may be able to answer this, a real problem is that even if you provide that it is granted, in 329c we have just required that there be a finding of the lack of notice. Now we are providing in the dismissal rule that it is going to be granted as a matter of law. Well, what's going to be granted? Suppose the guy doesn't say that he received notice on a x date. Doesn't give you a date, just says more than the period of time, well, that's not what 329c does. 329c is a rolling date. What we had in 165a was an outside 6 month period. Now we just have a rollback to the date of actual notice as if the judgment was signed on that date. That's the other thing I was going to suggest, that 329c ought to reflect that

what happens is, that the date of knowledge that is received in this outside period shall be treated as the date of the signing of the judgment, rather than this language in "b." Because, Judge, if you can tell me, look at rule 165a or 329c and you tell me what the time period means in 329c(b), I can't figure it out because what it says is the time shall not be deemed to run in 329b--(a), (b), (d), and (g). Well "a" deals both with the signing of the judgment and the motion for new trial. "b" deals with a 75 day period. "d" deals with a 90-day period. There is no way that you can say that the periods or period provided shall be deemed to run from the date of actual notice, because there are four different periods in the rule. We can't compute that. Are we talking about an outside period-which is what 165a now finally after four or five years of litigation we have determined 6 months is a outside period. Now we have 6 months from what? Six months from the periods that are extended, but what period are we talking about?

GUITTARD: Well if it has to do with filing a motion, you've got the period for filing a motion for new trial. If you've got the period of the courts...

MCMAINS: Are we saying that the period for filing a motion for new trial shall not in any event be more than 6 months after the date of the signing of the original judgment? See, I don't understand what that rule means.

GUITTARD: Yes, the period for filing a motion of new trial, no....

MCMAINS: You see what I'm saying you look at the periods provided in 329c(b), which is where you ask for relief under 165a now, notwithstanding subdivision (a) of the rule, in no case shall the period provided by subdivision (a), (b), (d), or (g), be extended to more than 6 months after the judgment was signed.

GUITTARD: Or any of those periods. That's the final date of all of them.

MCMAINS: OK, see what we have done now? We've backtracked to where we were two years ago, when you changed the time table, and now we have to figure out what the outside period is and move backwards.

GUITTARD: That's the way rule 165a is wrong.

MCMAINS: I understand that. I am saying, that I don't know that anybody on this Committee can figure out, necessarily, very easily when the time runs.

GUITTARD: It's all the same. The time runs from the date of actual notice except that, the final date for setting aside the judgment can't be more than 6 months.

MCMAINS: OK, that's what I'm getting at. See the outside date that is provided in the rule, rule 329b(d), which you are also saying has extended, is the ultimate date of plenary power. Everything else only depends on filing a motion for new trial, which of course then extends the plenary power. I mean, one rule gives you different time period

than the other rule. If what we are looking for is an outside limit let's tell us what it is.

ELLIOTT: What's the different time period?

MCMAINS: Look Frank, it says, on "b" that the period provided by subdivision (a), (b), (d), and (g), shall not be extended more than 6 months. Do you know how many periods are in a,b,d, and g? "A's" got..

ELLIOTT: Yea, but how many other periods are there besides 6 months?

MCMAINS: Every period is other than 6 months in 329b.

ELLIOTT: But none of them will be extended further than 6 months. I mean why is that five different things? Nothing goes beyond 6 months.

MCMAINS: The point is that, the real truth of the matter is, that's not what we're extending. What we're extending is the plenary power of the court, if we're allowing within this period.

ELLIOTT: Well, no, if you are extending the power to file a motion for new trial, you are extending a lot of things beyond the plenary power of the court.

MCMAINS: No, well, that's where the plenary power is determined. Once you have extended the time to file the motion for new trial, then you are back to the 30 day period. What I'm getting at is, you've got

in "b" 30 days to file the motion for new trial. Are we extending? We now have a new date, that's the date of actual knowledge, or actual notice. Do we now give them 6 months to file a motion for new trial?

GUITTARD: No.

MCMAINS: Well, I understand that, but I don't think that's what you wanted to do, but it says under no circumstances shall the periods provided, and so what..

GUITTARD: Well, they would have conceivably 6 months to file a motion for new trial, but if they file it on the 59th day, they still have only one day to get action, because the date from signing the judgment can't be more than 6 months.

ELLIOTT: You're extending each of those times. You're not extending them. You're starting them running from the date of actual notice.

GUITTARD: That's right.

ELLIOTT: And the rest of their time limits still apply just like they had applied. You're just starting a new time going.

GUITTARD: Right.

ELLIOTT: And then the 6 months says, that in no event will we even mess with this if it's after 6 months.

GUITTARD: Once you get to the 6 months, well, it's all over.

ELLIOTT: You're not extending anything. You are starting a new date for each of those time periods to be going by the date of actual notice.

GUITTARD: That's right.

ELLIOTT: I don't see what the big problem is. It just seems to me that each of those has got a different, we've got a new trigger by virtue of 329c. You've got a new trigger instead of signing a judgment, you've got actual notice. All the rest of the times apply now running from actual notice instead of signing a judgment.

MCMAINS: Except, that it does not...

ELLIOTT: Well, if it is after 6 months you can't mess with it at all.

MCMAINS: Well, but if it's before 6 months, it ends at the 6-month period regardless of whatever else happens.

GUITTARD: That's right, that's right.

ELLIOTT: It's the same way that 165 has said, 165a has said for the last 3 years.

GUITTARD: That's right.

MCMAINS: I still think that it is extremely confusing to try to figure why we were extending all of these periods.

ELLIOTT: There is simply no way in the world that you could spell this out without it being another six pages of rule to try to approach it from each possible opportunity and make it any clearer than it is now.

MCMAINS: Well, really what I was reflecting about, Frank, was the idea of granting the order as a matter of course. We've got too much....

ELLIOTT: That doesn't have anything to do with what we have just been talking about.

MCMAINS: Well, I don't.

ELLIOTT: We can put that in something else. If you want to say that after 25 days or whatever the time period is that it is deemed granted or deemed overruled, that doesn't make any difference with the time does it?

MCCLESKEY: Bill Dorsaneo, has a comment.

DORSANEO: It seems to me that all three of the subsections (a), (b), and (c), or (1), (2), or (3) if we follow numbering that we've been following elsewhere, really needs to be drafted again, not in terms so much of the substance of what's been voted on, but if there is in (a) that this business of actual notice could perhaps be improved by

virtue of what was in the Administration of Justice Committee' draft, that would be a good thing. I tried to do it and it's not really possible to do it right this minute, for me. This (b) part with Rusty saying about the new trigger notion could be expressed with more clarity, I think, in the (b) part, rather than saying (a) (b) (c) (d) to say that it begins the time that you start-- doesn't start later than 6 months after it would start.

MCMAINS: That's not what he wants to do.

GUITTARD: That's not. . .

MCMAINS: That's the problem.

DORSANEO: Well, whatever it is.

GUITTARD: The objective is that none of the times, that the six months be the absolute end of everything. That's the proposal so that you get notice 2 days before the six-month period. You've got just 2 days to get. . .

DORSANEO: Well, if you're going to do that, then you will run into problems of whether you're looking at this matter from the perspective of what happens in the trial court or what happens as part of the appellate process and those two timetables are different timetables both locked into 329b and if you look at it from the standpoint of somebody getting their case reinstated in the trial court and not having an appeal that's one thing. If you look at from the standpoint

of a case where you didn't get notice in time to perfect an appeal, that's another thing, and it seems to me that needs to be either changed, your notion changed, or it's split into two separate things for the two separate problems that exist, and it can be done and I don't think it will take six pages, it will take two sentences.

ELLIOTT: You've done it in 165a now. You said after six months you can't get it reinstated period. It doesn't make any difference when you find out. You can't get it reinstated after six months, isn't that clear?

MCCLESKEY: May I make this suggestion in the interest of time. I think we need a policy vote on whether or not the motion is going to be deemed granted or denied. I think we need that, but when we get to drafting Rules 165a and 329c, my thought would be that probably we should ask a subcommittee to take a hand at redrafting. We're pretty well in agreement as to what the rule ought to say but we're not in agreement as to whether it says it. I'd like to suggest that we appoint a subcommittee composed of three Dallas residents, Bill Dorsaneo, Judge Guittard and Frank Elliott to work on the redrafting of Rules 165a and 329c and possibly there's some language that might spill over into 329b, I don't know, and submit that to the court and to the members of the Committee for your comments if you want to make any, what would you think. . .

SPARKS: If that needs to be a motion, I move it so.

KRONZER: Have you resolved the policy matter?

MCCLESKEY: No, I need to do that.

KRONZER: And there's another policy matter in there that I would like for you do perhaps separately. I continue to see this sliding away from reasonable excuse. We are interpolating again a basis for action now, and these kinds of rules that deal only with plaintiff's side of the docket I worry a lot about, and that's what this rule is is pure plaintiff's problems, and you're trying to get back, it's almost to a good cause question again, and why are we getting away. If we want to put one in, most of the time if it really is a true excuse. This guy didn't get notice, the judges don't require much, they just give it to you. But you're requiring here now, just above that matter that David's talking about, you're almost back into old good cause and not talking about Craddock, and I wonder why we're imposing those continuing more difficult sanctions. . .

MCCLESKEY: You're talking about the portion of Luke's, which says "the court shall reinstate the case. . ."

KRONZER: "Upon finding that the failure was not intentional or a result of conscious indifference." Now that's out of Craddock, that language there, but now you're coming on with different stuff, "but was due to an accident or mistake or other justifiable cause." Now, that's not language from Craddock.

SOULES: How do you want it to read? . . .

KRONZER: Or other reasonable explanation. That would suit me fine.

MCMAINS: 21C.

POPE: Why don't you just use the language of Craddock, and Craddock says "was not intentional whether a result of conscious indifference nor fortuitous circumstance," or something. But it uses that phrase.

KRONZER: Well, of course, that's all definitive of reasonable explanation as was used. . .

MCMAINS: I think the Court has just written on 21, and I think what Jim's saying is that we can't change. . .

KRONZER: . . .Satisfy the test of Rule 21C, would suit me fine.

MCMAINS: We've already got what that means. . .

GUITTARD: . . .reasonable explanation. . .

MCCLESKEY: How many of you would be in favor of following the language of Craddock? Anybody opposed?

DORSANEO: Craddock and Meshwert.

MCCLESKEY: Alright, if you will take that into account and . . . may I ask that this subcommittee that I mentioned a while ago undertake

the job we're talking of reviewing these two rules, 165a and 329c and possibly 329b and make sure they express the thinking of the Committee and so that the subcommittee will not just be in limbo, Bill will you chair that committee and try to put this thing together and make it available to us?

DORSANEO: OK.

MCCLESKEY: Now, we still need the policy decision on the paragraph that Sam Sparks spoke to here and the Luke Soules' version." In the event for any reason a motion for reinstatement is not decided by signed written order within the time provided by rule 329b, the motion shall be deemed granted by operation by law. Maybe it was David Beck, I believe spoke to that. How many would be in favor of, and what we are going to vote between is those who would be in favor of having it deemed granted and those who would be in favor of having deemed denied. How many would be in favor of having it deemed granted? 1,2,3,4,5,6,7,8,9,10,11,12. And how many would be in favor of having it deemed denied? 1,2,3,4, 5,6,7,8,9; 12-9 in favor of having it granted.

GUITTARD: We haven't considered third possibility that it might be considered the fact and before a motion might be considered as established which would be sort of a medium ground.

MEYERS: Well, but what he's saying is that they're established but maybe they still don't support the motion. That's what he's saying.

MCMAINS: He's saying if you get a patently defective motion, that it isn't going to get granted.

POPE: Yes, I didn't do what I was supposed to do because I was in Las Vegas that week.

MCMAINS: Yes, right, Judge, once again the only problem I have with that is remember we're, we now have the requirement, this is the drafting problem in 329c in reconciliation now if it's going to be granted, which is a deviation, of course, from Rule 329b, then that's going to have to be somehow excluded from the operation of 329b, number 1, and number 2, you're liable to be in a situation where if the things taken in the affidavit would be true, you still somehow might not be in the time period. He may not set a specific date, and 329c is as I understand it, may not be able to cover that. You may have granted a motion which the judge did not have jurisdiction because he didn't make the finding necessary to get jurisdiction, and that's the problem that I had with trying to use 329c as a catch-all for this.

MCCLESKEY: May the subcommittee take that into account. Incidentally as soon as the work of this subcommittee is completed, we shall send each of you a copy, and if you have any comments, we'd like your immediate comments in writing back to the Court. . . .What is your next rule, Judge?

GUITTARD: . . .The next rule I think is Rule 245 on page 230, which in view of our recommendation to rule 329c, we've attempted to strike

out the last sentence, because . . . .it would be taken care of within, by 329c. Incidentally, the 90 day rule would be changed to six months as was taken originally from this rule 245.

MCCLESKEY: What sentence is that?

GUITTARD: The one striken out, striken through in the . . .

MCCLESKEY: Oh, it's already striken through?

GUITTARD: It's already striken as you see.

MCCLESKEY: You don't have any changes on that?

GUITTARD: No changes.

MCCLESKEY: Any objections in recommending 245 on page 230 as written? Alright. Let me make this observation, we are making every effort to try to discontinue our efforts here not later than 1:00 and hopefully, preferably, closer to twelve, and to that end we're going to be selecting specifics, carefully selecting rules, and we need to keep our discussion as short as possible but , so Judge if you will, try to abide by that suggestion.

GUITTARD: I'll try to select those that I think which might deserve comment. If there's no objection to that one, I'll move forward. In Rule 355, which has to do with pauper's affidavit on page 98. The 1981 amendment says provided that the person filing the affidavit

shall give notice to the opposing party within two days and and unless he does, he shall not be entitled to prosecute the appeal without paying the costs or giving security. That's a pretty rough thing. If you really can't pay, that means he loses his appeal, if he doesn't give notice within two days. We had that question before our court and had some problems with it, and I suggest that it be amended as shown here so that instead of losing appeal, it merely says that "the time for the opposing party to contest the affidavit shall run from his actual notice that an affidavit has been filed."

SOULES: So move.

MEYERS: I agree.

MCCLESKEY: Any opposition to that? (There was none.) That's done by consensus.

GUITTARD: The next is the Rule 363a on page 103. That is a new rule, a proposed new rule. In a great many other states, in Hawaii appellate court, there has been a very successful program, at least they say, for pre-argument conferences which have a certain number of functions not listed which induces the parties to settle their cases. The Houston courts tried that one time, and Bert Tunks was in charge of it. They operated it on a voluntary basis and found that if it was merely voluntary, it was not too successful. Another problem about it, that is, in order to be successful it probably has to been done before briefs are filed. That requires a preliminary statement from appellant's counsel, so that the other cases can be selected and the

judge who will hear it, although he will not sit on the case, can have something to go on. This rule then would merely authorize the judges of the appellate courts by local rule to require a preliminary statement and to require a counsel to appear for a conference.

SPARKS: Judge, is the last sentence practical?

GUITTARD: Well, it ought to be in there whether not it's observed 100% or not, I think so, in the places where these, and of course where this procedure has been followed, that is an iron clad rule that the judge that does that ought not to tell the judge(s) that sit on the case what he found out at that conference. That's necessary in order to get the confidence of attorneys at the conference.

MCMAINS: The only comment I have is the timing. It says "at the time of perfecting his appeal" which is when he files the bond. Well the appellate court doesn't even know it exists at that point, so don't you need at least at the time that the transcript is filed? The duty to do that is by the clerk. Once the transcript's filed, they've got a number to refer to, or just at some specified time I mean the court doesn't. . .

GUITTARD: It says, "at the time of perfecting his appeal or at some other specified time," the time specified by the appellate court, now in some cases it's thought that the earlier you can get a statement like that, if you can get it before they file their record or put out the money to file the record, it could be more effective than if you wait, and this gives some flexibility for some experimentation and

experiences along this line.

MEYERS: How does the appellate court know, until the record's filed?

GUITTARD: Well, you'd require this statement to be filed and transmitted to the appellate court.

MCMAINS: But the court doesn't really obtain jurisdiction actually until they have something.

GUITTARD: The court has jurisdiction as soon as the appeal is perfected.

MCMAINS: Well . . .

WELLS: May I ask a question, the questions that probably will be raised in the middle of _____. The Tenth Circuit has something like this at the federal level, and if you're not careful in your initial statement to set out all the questions, you find out that you don't have a point on appeal that you thought you might. You may even discover as you're briefing the case later on and my question is if it's a rather cursory statement of what it's all about, are you going to cut people off from points on appeal when they really get to briefing?

GUITTARD: It is not proposed that it have that effect. No.

WELLS: It does that in the 10th Circuit.

GUITTARD: You don't have tenure!

KRONZER: My feelings about this have been manifested in two ways. We're very privileged in our law firm to have Judge Tunks with us, and he did serve in that capacity and is more qualified to speak to the success or failure of it as a voluntary system. I am concerned as Sam, and I am concerned about the problems of getting the lawyers together with an ex-officio member of the court in some effort to weed out appeals, to limit appeals, or to interfere with, as I see it, the appellate advocacy process, and that's the way I view it. In fact, my feelings about it are so strong, as Judge Pope knows, that when the First Court sought to adopt this rule I've written lengthy letters to the court about their doing these things ex proprio vigore without the approval of this court under Rule 817 including some other changes they've made and all of which stems from this sudden influx of a criminal docket. I'm greatly concerned that the appeal process is swallowing up in these concerns of overwork, and that's part of it as I see it, and I don't think that there should be some advice whether they communicated among themselves or not. If the lawyers aren't smart enough to know what they should be doing, we just say and I don't like the big courts. A court of over 9 people is bad, but at the same time it isn't in my view a satisfactory system. Judge Tunks has had I guess it was a year of experience with it, wasn't it Judge, he can tell you how it worked at least in Houston, as a practical matter, and I don't know.

TUNKS: Well, we didn't really give it a fair trial. In the first

place at the time I was running the program, I was a retired judge, and not a member of the court, and I was the one who invited the lawyers to attend, and there was no compulsion at that end. Most of them did attend but not all of them. I think it would be much more effective under this rule than it was under our procedure that we followed during the time that I was conducting the program, because it is an official act of the court under this rule, and that was not an act of the court, in fact it was Frazier, who's not even a judge on the court. The meeting wasn't called by the judges on the court. It was called by me. That was a serious mistake; I think it should have been called by the judges of the court or the court itself to lend some official character to it. I think that would have improved its efficiency and effectiveness, oh 100%. I think the program has possibilities. You don't have to carry it on if you don't want to under this rule, but I think it's certainly worth trying.

EDGAR: Judge Tunks, during your time with the program, did it achieve the result of bringing about some settlements without. . .

TUNKS: Some, but not enough. Not nearly as many as it would have had it been an action of the court, official action of the court.

KRONZER: Judge, another thing though, the biggest pressure that's on the appellate system now to go for something like this has been the influx of the criminal appeals into the intermediate court system, and you can't move those out in this manner. Many of those have the right to have their cases heard, and they got to go on and be heard.

TUNKS: Surprisingly enough, that is causing less pressure on the court than everybody thought it would.

KRONZER: Yes, I believe that too, but I'm saying you can't move them out in this process.

TUNKS: No, you can't move them out in this process.

CUNNINGHAM: Where this rule says that "Such rule may also provide the procedure for such conferences, "that's broad language. . .that could give the court the power to limit points on appeal and some of these other things that have been discussed about it, but that is rather broad and strong language that could carry this rule, it seems to me, even further than what Judge Guittard is talking about.

MCCLESKEY: Franklin?

JONES: Mr. Chairman, I have serious policy hangups over this rule. It's bad enough to get boiler roomed into a settlement by a district judge. But presumably, when you get to the appellate process, at least when I get there as an appellant, I'm damned serious about why I'm there, and the appellee, of course, is there because the appellant is there, and the appellee ought not, I mean the appellee has won his case, and the only question before the appellate court ought to be whether he's won it legally and . . .

MCCLESKEY: How many of you would be in favor of referring this rule back to the Committee on Administration of Justice for study and

recommendation?

KRONZER: That would be better than dropping it out of the crack.

SPARK: I second Jim's motion, to deny the rule

MOORE: I'd either do that or say that we forget it this time. We're making such wholesale changes, but I think this would be drastic.

MCCLESKEY: Buddy, what do you got?

LOW: I think we can have a policy vote without referring it back. Do we want the appellate courts to get involved in negotiations? That's the policy.

POPE: Let me comment.

MCCLESKEY: Alright, I recognize Judge Pope.

POPE: I have learned that I can give up fighting faiths, as all of us do. It's how one looks upon a job as an appellate judge. I know we have the crunch, but to me the system is that when an appellate court decides a case, he's deciding all cases like that, and the cases we get on appeal, for the most part, I'd say 50% on the intermediate court and I'd say 85% in the Supreme Court, they're there because there is no rule on it. It's a borderline case; it's a ridgepole case, or it's out on the edge of the law.

GUITTARD: Well, they're not always that way in the court of appeals.

POPE: I'd say about 50% of them are, and I cringe. I did one time when one of the judges from the bench on our court said to the lawyer, "Have you tried to settle this case?" This bothers me when it comes from an appellate bench, and the answer was, "Judge, we can't settle this case." This was a case that involved about $9,000 interest. He says, "We have 3,500 lawsuits that will turn upon what the court does in this case." They were talking about a refund of quarter of a billion dollars worth of so-called overpayments. Settling that lawsuit would have been the worst thing. Of course the answer to that is they would just simply say, "No, we can't settle this case." But, we got into plea bargaining in criminal cases, and in my judgment, watered down that body of the law, and it bothers what we're doing when we do this. That's just a lame duck confession that our system is not working.

KRONZER: To give everybody one awesome illustration, and I'll say the case in court. I had an appeal, about a ten million dollar judgment, fortunately it wasn't me who got wrapped, and it was in the Corpus court, and the Corpus Chief Justice is one that subscribes to this view, very strongly, and they pushed it and they pushed it since they started talking this in San Francisco. We argued the case in the morning. That afternoon he asked us to come back at 4:00 o'clock, the lawyers, and read a prepared statement ordering us, the lawyers, to appoint a representative to undertake to settle this case in 30 days before they undertook any consideration of the merits of that controversy, and I asked him if he would reduce that to the record for

purposes of review by this court, which the court refused to do and to me that's what just scared me to death. The Judge is familiar with the case. I just am opposed to that type of interference.

MCCLESKEY: Franklin?

JONES: What this rule is addressed to what you would do would be to enact the procedure that is current in the 5th Circuit on the summary calendar, and I don't think that procedure's going to get very many votes in this room.

SPARKS: I think it's worse than that. I think we're doing totally different philosophy than we've always had from the appellate court and say the appellate court is to make legal decisions based upon a record and you're not to go outside the record, and here you're inviting the lawyers to tell a member of the court all sorts of things that may have happened before it got there.

MCCLESKEY: I believe we're ready for a vote. How many of you think that as a matter of policy we should have a rule setting up a preliminary conference of some type? Judge Tunks thinks so, 1,2,3. . . How many of you think we should not have such a rule, 1,2,3,4,5,6,7, 8,9,10,11,12,13,14,15,16,17,18,19,20,21,22.

SPARKS: Lame duck's still have influence.

GUITTARD: Well, Gentlemen, you're in the nineteenth century really, and I think most of us think nostalgically. We love the nineteenth

century. I think that's our situation, I think we ought to study what the actual experience has been in the States that have this, but let's go forward to Rule 364, on page 104. This rule has to do with supersedeas bonds, and there's some textual changes, but the only thing of substance is the subdivision(f) on page 105. The problem here is that when temporary injunction is granted, the appellant, the court may deny supersedeas and continue the bond in effect pending the appeal, a continuing injunction effective pending appeal, but at the same time the temporary injunction bond is in effect to protect the defendant in the case in the event of a reversal. Now that same situation doesn't apply in case of a summary judgment, a final and permanent injunction is granted. The defendant in that situation has an absolute right to supercede the judgment by giving a bond in such amount as the court may fix, even though the injunction is granted on the theory that money damages is not an adequate remedy, and this proposal would simply permit the judge to deny supersedeas, but at the same time require the plaintiff to put up a bond to secure the defendant from any damages he might suffer if the injunction continues in force pending the appeal, and there's this problem about it. For instance, in a suit to restrain contribution for an ex-employee which has a limited time. The efforts of the appellate courts has been to discourage appeals from temporary injunction, to a discourage hearings on temporary injunctions and to encourage trial courts to hear the permanent injunction case at an early date and to avoid two trials and two appeals, but under the present law, the plaintiff would prefer a temporary injunction because he can have that in effect pending the appeal, rather than to try it on a permanent injunction, which the defendant could supersede, and this would remedy that situation.

JENNINGS: Judge, I have a question about subparagraph(b), provides the amount of the bond on the money judgment, to cover the judgment and interest. It doesn't say for what period of time, and in a large judgment that can be very significant, and I was wondering if we shouldn't say, interest for a two-year period.

GUITTARD: Well, that would be fine, but that would be changing the present, . . . This is not a change of the present rules. This is brought down from what is structured, striken out in the first paragraph that says "a sum at least the amount of the judgment, interest and costs." I don't know how much interest is. Do you want to make some provision about interest for a period, well that's o.k.

JENNINGS: I think this would be a good chance to do it. It's not just a theoretical problem. I've got a case now on which the defendant is in bankruptcy, and he filed a supersedeas bond that is not sufficient to cover interest during the period of the appeal, and I think that the rule should provide a guideline since the bond is approved by the clerk. I'd like to see a two-year period, interest thereon for a period of two years.

KRONZER: What do you provide for interest except until the judgment is paid? I mean any period other than. . .

JENNINGS: Well, the bond is in a stated amount. . .

KRONZER: All right.

DORSANEO: There's caselaw that says for the interest part you just say for, as Mr. Kronzer said, with interest. . .

KRONZER: The surety has to come up regardless of what you think. . .

JENNINGS: Well, if that's the law then it's not a problem

DORSANEO: . . .I can't remember the case name--a San Antonio doctor

KRONZER: But, Frank, my understanding is if the judgment provides properly, the approved surety has to come up with the scratch when the judgment's over.

JENNINGS: O.K. I'll withdraw the suggestion.

MCCLESKEY: Are there other comments on Rule 364? Hardy?

MOORE: On (c) wouldn't it be good to say here, that's where the suit is for the recovery of land had said, the rule is as it is now, but wouldn't it be good to add to it to the pay the appellee the value of the rent or hire of such property during the appeal in any suit which may be brought therefor, and the bond shall be in the amount estimated thereof, in an estimated amount as fixed by the court, because you're going to make a supersedeas bond and aren't you going to have difficulty in getting that bond if you don't some amount that can be put in there that the bonding company will know it will be the extent of its liability.

MCCLESKEY: What is the language you're suggesting?

MOORE: I was just to suggest that the bond to be in the recovery of land that it is also to be conditioned that in case the judgment is affirmed to pay the appellee the value of the rent or hire of such property, during the appeal I added here, and that the amount should be estimated and fixed by the court as the amount of the bond.

MCCLESKEY: You're adding that at the end of the paragraph, and what is the language you're adding?

MOORE: Well, the language as I had it now, I have it written down here, scribbled, that pay to the appellee, I'll read the whole thing: "When the judgment is for the recovery of land or other property the bond or deposit shall be furthered conditioned that the appellant shall, in case the judgment is affirmed, pay to the appellee the value of the rent or hire of such property," and I put in there, "during the appeal" . . .

MCCLESKEY: Are you inserting something right after property?

MOORE: Yes sir, "during the appeal and the bond shall be in the amount estimated by the trial court, bond or deposit, estimated fixed by the trial court."

MCCLESKEY: Alright, any objections to that, you think that's a good suggestion? I take by your silence that that is satisfactory. What

other comments do we have on 364?

MOORE: Well, if you're going to use forcible detainer now for all kinds of things involving property of real value and the amount of the bond, I don't know whether you can do it, the amount of the bond is not established. It's just that you're going to pay. It seems to me that again presents a problem about getting a bond made.

MCCLESKEY: Which paragraph is that?

MOORE: Oh, it's not in there. I was just thinking about it as something that could be considered.

GUITTARD: I would suggest that we limit our discussion to things that we have definitely proposed.

MCCLESKEY: Alright, in view of the time element, I think that's a proper suggestion.

WELLS: Well, I hope I'm not transgressing on that, but if you're providing for this, for the addition in (f) on 105, don't you have to change 365 to allow the sufficiency of that kind of bond to be reviewable?

GUITTARD: Yes.

WELLS: Well, you haven't done that. 365 says, "The sufficiency of a

cost or supersedeas bond shall be reviewable," and it seems to me that the sufficiency of the kind of bond that you're talking about in (f), ought to also. . .

GUITTARD: That is also a supersedeas bond and is included.

MCMAINS: I think what he is saying is that bond by the appellee is not a supersedeas bond.

GUITTARD: The appellee's bond. . .

MCMAINS: That's right.

GUITTARD: Oh.

MCMAINS: That's more like a replevin bond than it is a. . .

GUITTARD: Yes, I see what you mean now.

ELLIOTT: It's a responsive bond isn't it?

GUITTARD: That should be reviewable. Perhaps we can draft that subsequently. It's just like a temporary injunction bond, the same problem.

MCMAINS: Why don't you just add language after the deposit which says "or of any other bond or deposit under Rule 364."

MCCLESKEY: "Or of any other bond or deposit under Rule 364," and we're talking about the second line on page 108, Rule 365.

GUITTARD: Yes, that's right.

DORSANEO: We just need to say the one we're talking about.

MCMAINS: Well, we ain't called it nothing.

DORSANEO: Well, it has a name, it has a number, a letter.

POPE: Where are we, 108?

MCCLESKEY: Well, we're a little bit diverted Judge, from Rule 364 trying to make 365 cover it. We're on 108 at the top of the page, the second line, let the sentence read, "The sufficiency of a cost or supersedeas bond or deposit or of any other bond or deposit under Rule 364."

GUITTARD: That would do it.

MCCLESKEY: Alright thank you Nat. Any other comments on 364? Alright, by your silence we are recommending 364 as amended. That gets us to 365 and did you want to go to 365, Judge?

MCMAINS: We just came from there, I think.

GUITTARD: The only thing in 365 that is changed is to permit an

appellate court to review a supersedeas bond for excessiveness. In case a trial court may put up such as bond arbitrarily that can't be met. That's the only substantial change in 365.

MCCLESKEY: Alright, any comments on that? That stands recommended by a consent. What do you have next, Judge?

GUITTARD: On page 113, Rule 376 with respect to the transcripts. Our previous amendments to the rules have made it the responsibility of the clerk to go ahead and prepare the transcript as soon as the appeal's perfected without any request. The problem is that the clerks frequently wait until some request or designation from the appellant and that was not the intent of the amendment. The intent of the amendment was that the clerk should go ahead and prepare a transcript with the minimum documents provided in Rule 376 and then if any additional material was not designated at the time of perfection of the appeal, then that could be done by supplemental transcript. Ordinarily the appellant should designate his transcript by the time he does perfect his appeals. Rusty?

MCMAINS: Judge, I would add to the automatic list what's left out of a lot transcripts and the only thing I end up designating a lot of times is the docket sheet, cause there are frequently notations on rulings that are there that there are no formal orders on otherwise, can we . . .

GUITTARD: Well, docket sheets don't help that much really, Rusty, sometimes they do, but why can't you just designate that like anything

else?

MCMAINS: Well, I can, but I'm just saying, I mean if you didn't do that, then I would be satisified by and large with what you've already got in the rule with him going in there.

GUITTARD: We seldom look at those even when they come up.

MCMAINS: Well, the only one you're pointed out, when you've got a ruling by the court that don't show up anywhere else, that's when it's necessary.

GUITTARD: But the other thing in Rule 376 deals specifically with this problem where the appellant or appellee either designates everything in the records, subpoenas and notices to take depositions and all that trash. The clerk ought to be directed to disregard that kind of a designation.

MCCLESKEY: Are you in agreement with the suggestion on 376?

DORSANEO: What's this last sentence mean? I don't understand it.

GUITTARD: "If no additional papers are designated by a party when the appeal has been perfected, the clerk shall treat the perfection of appeal as a designation by the appellant of the papers specified in this rule and shall include any additional papers designated before the transcript has been completed." In other words, if a transcript hasn't been completed and the clerk gets designation by the appellant,

well he should go ahead and put those in.

DORSANEO: Oh, it seems that could be clearer.

GUITTARD: That's all I have on that one.

MOORE: What if the appellee fails timely to make an additional designation or request of the clerk and there's no . . .

KRONZER: Rule 428.

GUITTARD: He makes a supplemental transcript which under our previous amendment, the appellate court has to grant if it matured.

MOORE: Under this rule that he proposed I thought it did away with a supplemental transcript.

GUITTARD: No it does not.

MOORE: Well, it's all right then.

MCCLESKEY: Any other questions? Judge, what's your next rule?

GUITTARD: Rule 377, on page 115 with respect to Statement of Facts. The main change here is to require the appellant to make a written request to the reporter, designating the evidence for the statement of facts at the time he perfects his appeal. We have a continual problem under Rule 21c is when has the appellant designated his statement of

facts? If he comes up and designates it say 2 days before the final--- before the 60 day period runs, and then he gets the affidavit of the court reporter that says he doesn't have time to complete it, then we have a decision, we have to determine whether the designation was made promptly, and there's nothing in the record usually as to when that designation was made. So, the proposal is to have the designation made at the time the appeal is perfected, and we have in a case in my court, we held that if the designation is made at the time the appeal is perfected, that's the time of the designation.

MCMAINS: When you say in here "in order to present a statement of facts, the litigant shall," how does that dovetail with 21c or any of the other? I mean is there, I don't see a sanction rule here specifically, but looks to me like if he didn't designate it until the day after he filed his bond, suppose he filed his bond early, the appeal's perfected. In fact it's perfected at the date of judgment if he files his bond before he gets the judgment signed, under the rules. You ain't going to request a court reporter to do it before you get your judgment signed. You got mandatory language here.

GUITTARD: Of course, if you don't designate it at that time, then you've got 21c, you've got a reasonable explanation.

KRONZER: Why don't you, Judge, rather than get into that just say "a request will be considered prompt if it is made within thirty days of the judgment." That keys you to your appeal bond ordinary time. You don't limit it to that. You give some outages.

GUITTARD: Well, thirty days or ninety as the case may be.

KRONZER: Yes.

GUITTARD: Well, that's just saying ------.

KRONZER: Rather than peggin it directly to the perfection of the appeal, just put "a request will be considered prompt if it is made within thirty days from the day of the judgment or ninety days if a motion for new trial is filed."

GUITTARD: I have no objection to that.

KRONZER: And that way you're not really definitely tying it to another jurisdictional step.

GUITTARD: OK.

MCCLESKEY: How would you accomplish that change in 377?

KRONZER: I don't know if that's the place. Where is your prompt rule?

MCMAINS: 377. It's in the old rules in 377.

DORSANEO: It used to be in 377 when notice of appeal, was promptly after giving notice of appeal.

GUITTARD: It says "promptly he shall file with the clerk a designation." It doesn't say he shall make it of the reporter and that creates a problem. This is to avoid the "promptly" problem, and I think that Jim probably has a good idea that you either say it's okay if you do it at the time you file the perfected appeal or within which time you could perfect an appeal.

ELLIOTT: Why don't you just say "at or before the times prescribed for perfecting the appeal?"

MCMAINS: That's fine.

KRONZER: That's better.

GUITTARD: Fine.

ELLIOTT: Doesn't that fit that situation?

MCCLESKEY: Where is that Frank? Where would you ----

ELLIOTT: On line 2 "In order to present a statement of facts on appeal, the appellant, at or before the time prescribed for perfecting the appeal, shall."

GUITTARD: Yeah, that's fine.

DORSANEO: Of course that'll really be too late for a statement of facts.

GUITTARD: Well then you have a good 21c.

KRONZER: Well, it may not be good but at least he has a ----.

GUITTARD: Yeah, right, right.

DORSANEO: Well, that's pretty tricky. I mean if he complies with that it still might not be good enough.

KRONZER: That's right. Because you're appealing to the discretion of the court. That's always true.

DORSANEO: I'd rather not have that information then.

GUITTARD: This rule 377 also changes around the situation where the federal rule 377 seems to assume that the ordinary appeal is a narrative statement and only in exceptional cases do you have one by question and answer and this brings it up-to-date a little bit.

MCCLESKEY: Any other comments on 377?

DORSANEO: May I ask a question? Judge Guittard, are we still having a hundred days under this item? I haven't done all my homework here for filing a record?

GUITTARD: We have not addressed any question of changing that amount but

DORSANEO: Then this is really going to say in 377a that you request a statement of facts at the time, the nineteenth day, when you can't get it before the time required by 386 for filing that, that's ok.

GUITTARD: That's alright.

DORSANEO: But that's just crazy to say that if it's not sufficient time, given the fact there's only ten days between the time you make the request and the time you need to prepare to file.

GUITTARD: Well, it just means that a motion be granted as a matter of course.

MCMAINS: The only way to do otherwise would be to say "promptly but in no event later than."

KRONZER: But the court held last year, the Supreme Court, as long as you're in affirmative compliance with the rules, there is no discretion by the courts to reject the statement of facts, as long as you're doing things. The third court was trying to force some things -----.

MCMAINS: I really don't think there will be a problem with this. We have the delay anyway.

MCCLESKEY: Upon hearing no further comments on 377, it will be recommended by consent. What is the next rule, Judge?

GUITTARD: The next is a new rule 377a which has to do with premature appeals. There's two situations there. One, you have a judgment which is modified after the appeal is already perfected after the first one. You ought not have to perfect another appeal from the modified or corrected judgment. In other cases where a bond is filed prematurely, a transcript is filed prematurely, or where the appeal isn't filed, where the judgment isn't filed, and appeal is attempted, and appellate court says, "Well, we don't have any jurisdiction." Then they go back and get a final order, and it just cures it. Are you going to make them perfect another appeal from the second judgment and have another bond and all that sort of thing? Simply under this rule that would eliminate the necessity for perfecting another appeal and just permit the record to be sought from there.

MCMAINS: Judge, what happens if the appeal is not final because of the fact that it hasn't disposed of all issues or all parties? And under this rule you say therefore we treat that as having been premature. We send it back and all of a sudden when the trial judge does decide the issues that were left out, somebody else got a complaint.

GUITTARD: Well, they'd have an appeal.

MCMAINS: Well, that's what I'm trying to figure out. Have we got another parallel set of time tables? I mean we got different time tables again under 329b?

GUITTARD: Anybody can perfect his own appeal, sure.

MCMAINS: Well, I understand, but this says that we don't have to, we can just take it right back up. But all of a sudden now we go back and when he gets a new judgment, then the trial court has got to face all the appellate steps perhaps with another party. Is that possible under this rule?

SPARKS: It is for the convenience of the court when you have a lawyer that doesn't know exactly what he's doing.

KRONZER: Or for the convenience of the lawyers when you've got a court that doesn't know what it's doing!

GUITTARD: I would say probably both. I think we could handle those on a case-by-case basis.

ELLIOTT: This rule doesn't change any time tables for anybody.

KRONZER: No.

ELLIOTT: It just says that it's just like trying to file a premature motion for new trial or premature motion for anything. It's in that other rule. It just means it can mean something once the event, the trigger hits, that is, the judgment's there.

GUITTARD: Well, is there any objection to that?

MCCLESKEY: Anybody have any problem with this rule? Hearing no objections, it is to be recommended by consent.

KRONZER: It seems reasonable.

GUITTARD: Rule 384 on page 120 would permit the appellate judge to accept papers for filing. Sometimes district judges who have that power are elevated to the appellate court, and they don't have any better sense to know that they don't have that power when they get it on appeal. But there's no reason why they shouldn't, so this would just give to them.

KRONZER: That's fair.

MEYERS: Puts an unfair burden on the appellate judge though, when at 11:30 he's getting a call to receive a paper. But you're asking for it!

POPE: I tell you, I really think that this rule needs to be, because sometimes you know, you won't believe this, but a judge will be working on a holiday, and somebody shows up and that document ought to be filed by the judge and otherwise some hardships can result.

MCCLESKEY: I hear no objection to rule 384 as submitted. What is the next rule, Judge?

GUITTARD: The next change is rule 385 on page 121. It would permit the appellate court in an accelerated appeal to hear the case on the

original papers sent up from the trial court or on sworn and uncontroverted copies of such papers in lieu of a transcript.

KRONZER: Boy, that's a great change.

GUITTARD: We originally had a case in which we had an appeal from a temporary injunction that restrained the holding of a stockholder's meeting in England and this reached us on Friday and the order was restraining a hearing on the following Monday, and this is a big long record and we couldn't get a transcript for a week. And we heard that argument without the transcript and we didn't know quite what we could do until we got the parties to stipulate that the original papers could be considered in lieu of a transcript, so this would permit that procedure.

KRONZER: We already have in effect that by agreement under the rule that permits the sending of original papers, anyway.

GUITTARD: By agreement.

KRONZER: Yeah.

GUITTARD: I don't know whether the original papers include transcript papers.

KRONZER: It doesn't. And I would say this is a great change.

GUITTARD: OK.

MCCLESKEY: Any objection to rule 385? Hearing none, it will be approved by consent as recommended.

GUITTARD: Rule 385b is a new rule which I hope you've read carefully, because it undertakes to define the respective spheres of action or authorities of the trial and appellate court pending an interlocutory appeal. When the final judgment has been rendered, and an appeal is taken from a final judgment, the courts have spoken in terms of the jurisdiction of which court has jurisdiction to act in the case. And in the case of the final judgment, then the trial court has lost jurisdiction and the appellate court has jurisdiction. In a case of interlocutory appeal, particularly injunction or receivership matters, the courts have a tendency to apply that same jurisdictional analysis and the problem is that it really doesn't apply very well because both courts have jurisdiction to some extent. And there's conflicts that have arisen. We had a very serious problem recently in our court on this very same matter, and this rule would define the relative authorities of the two courts pending an interlocutory appeal. It would also permit to settle the problem as to whether when the order of the appellate court becomes effective in an interlocutory appeal. It's been held a dissolution of a temporary injunction becomes effective immediately whereas the dissolution of a receivorship does not. And that creates all sorts of problems and this would permit the appellate courts to determine when its judgment shall become effective and to issue a mandate in such a case.

KRONZER: Judge, may I ask a question? Is this not the case arising

out of the Giddings area you're referring to?

GUITTARD: Yes.

KRONZER: I recuse myself from this one. I'm actively interested in that. I'm not passing one way or the other.

GUITTARD: Okay. Of course this wouldn't effect that case, but the problems of that case have led to this. There's also provision for permitting the appellate court to deny the right to file a motion for rehearing in which case appeal could be taken directly, and I think we ought to defer that until we consider the proposed rule which I think Judge Pope represented as motions for rehearing in other cases. Are there any other questions about this rule?

MCMAINS: Judge, just primarily the (h) section on the rehearing which you'd already talked about which gives the court the power to deny the right to file a motion for rehearing. I'm just not sure that we ought to allow the court to. I realize that it may not present a problem with the Supreme Court review as it's drafted, but if you've got a situation where the appellee who's never filed any points or really designated what his basis is, he loses. He's going up to the Supreme Court and presenting the issue for the first time up there and nobody knows what it's about until he gets there.

GUITTARD: There's a question about how urgent it is to give that additional time. That's the judgment we'll have to make.

DORSANEO: On this last part of (c) "but it shall not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas." Does that mean that the trial court's decision on whether or not to permit an interlocutory order to be suspended would control, or does that mean that a bond can be required?

GUITTARD: It means that a bond can be required. In other words, the law now is that the appellate court can't give them any mandamus relief and to stay a judgment if the appellant could get proper relief by supersedeas. And this is to preserve that rule.

DORSANEO: I think it should be clarified to make it that the appellate court can require the posting of a bond and then require the posting of the supersedeas bond. Who would set that? Would you send that back down to the trial judge?

GUITTARD: The trial judge would in a temporary injunction.

DORSANEO: I may be seeing a problem that's not there.

GUITTARD: I don't know that there is one. There may be, but in other words, if it's a case that the appellant could get the order suspended by a supersedeas in the trial court, well, he ought to do that. He ought not come up to the appellate court for relief.

DORSANEO: What I'm saying is that if you can't get the trial judge to permit the order to be suspended?

GUITTARD: Then you review that.

WELLS: I have a question. There's a broad order on temporary basis in the district court and the district court retains the jurisdiction under your rule and the ~~defendant~~ goes back to the district court and somehow gets that relief narrowed but still there is no relief. Is that really treated in (d)?

GUITTARD: Under this, as I understand it, if you get a new order in the trial court that modifies the old order, then rather than having to perfect another appeal from the new order then the appellant can bring forward by supplemental transcript that new order in the same appeal and the court can consider it all at once.

MCMAINS: It's under (f).

MCCLESKEY: Other questions? If there are no other objections or suggestions for changes rule 385b will be considered recommended by consent.

KRONZER: With one abstention.

GUITTARD: Now we get down to the interesting part about rule 386. You may recall that our amendment effective 1981 purported to eliminate the filing of the record as a matter of jurisdiction or as a matter of authority to consider the material filed late and to permit the court to proceed under rule 387 to dismiss a case or affirm it if

material was filed late. In other words, to eliminate the jurisdictional requirement. One thing that we failed to do was to take into consideration rule 437 which in categorical terms says that the court cannot enlarge any time for filing the record except as provided under rule 21c. There was then at least an apparent conflict in the rules which the Supreme Court resolved in Click v. Safari Drilling Company. [638 S.W.2d 860]. The remedy for that is proposed in the alternative. One remedy is to redraft the rules in line with the Click case to make clear that the court has no authority to consider late filed transcripts or statement of facts except as proven by rule 21c and to strike out that language that says that the failure to file the transcript shall not affect the authority of the court to consider materials filed late because that is apparently directly contrary to the Click case. And if we do that we also need to amend the rules 389 and 389a. Rule 389 on page 133, in our last amendment we eliminated the duty of the clerk to determine the timely filing of the transcript and then 389a the same with respect to the statement of facts. So that under the Click case the problem is, and it has arisen in our court with disastrous consequences to at least one appellant, that he comes up and tenders his transcript for filing late but within the fifteen-day period. The court then goes ahead and files it. It doesn't tell him it's late and then the appellee waits until after the fifteen days have gone by. Moves to strike the statement of facts and it has to be striken. So this would, in line with the Click case, restore the rules substantially, rules 389 and 389a substantially as they were before the last amendment to the rule. Now the alternative to that would be to resolve the conflict in the other direction. Let's look at 21c at page 87. You remember in the Click case the

Supreme Court was concerned that if the motion was filed late and not within 21c, there's no standard to determine under what circumstances the court could permit such a late filing to be made. And proposed subdivision (b) here of rule 21c would provide that standard. "After the expiration of the fifteen-day period, the court may permit late filing of the statement of facts if no other party objects within ten days after notice of the filing or if an affirmative showing is made that the delay will not prejudice any other party or unduly interfere with the business of the court." That gives the court some discretion to permit late filing but gives it ample authority to deny it as to prevent undue delay. In other words under this proposal, an alternative proposal, that would be to change the Click case but to provide the standards which the Click case was wanting.

KRONZER: As I understand that, you're saying that if the party that has the favorable judgment catches it within ten days after the expiration of the fifteen-day period that terminates the chance to perfect it anyway under Click.

GUITTARD: Well, this would change the Click ruling.

KRONZER: But it just means that if the party with the favorable judgment directs the attention of the court to the fact that it's not filed within ten days after that fifteen-day period in 21c expires, there's no motion and the court can't consider it under any circumstances.

GUITTARD: Well, the alternative language is "or if an affirmative

showing is made that delay will not prejudice any other party or unduly interfere the business of the court," then the court could consider it.

MCCONNICO: Has a motion for rehearing in Click now been overruled?

POPE: Yeah.

DORSANEO: I think the amendment to 21c is a more desirable approach. It provides more flexibility here under circumstances where there is no harm to have flexibility.

MCCLESKEY: The question is do you want to follow Click by amending 386 or do you want to change the rule in Click by amending 21c?

KRONZER: I thought there was a motion to do 21c.

MCCLESKEY: There is, and that's what we're about to vote on. How many are in favor of changing Click and adopting 21c changes rather than 386? One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one. How many would go with 386? Where does that leave us with respect to 386?

GUITTARD: 386, 389, and 389a would not be amended.

POPE: 386, 389, and 389a?

GUITTARD: Yes - would not be amended.

MCCLESKEY: In other words, there would no recommendations for any changes from the present rules of those three.

GUITTARD: Right.

DORSANEO: 437 is not now a problem because the change is in 21c.

GUITTARD: Right. There's another problem that I'd like to point out that has to do with "timely" motions under 21c. And that's the amendment in subdivision (a) of 21c. A "timely" motion, the question is whether or not does the court, if there's no objection made, the question is if there's no opposition to the timely motion or it's agreed to, does the court have to look at the record to determine whether there's a reasonable explanation. And that's something that occurs in appellate courts every week. And the proposal here is that if the motion is agreed to or if there's no objection to the motion within ten days after the notice provided by rule 409, then the court can go ahead and grant it without looking into the record to see whether or not there's a reasonable explanation for the late filing. In the real world, that's what happens anyway. We might as well spell it out in the rules.

EDGAR: Judge Guittard, the underlined portion there at the bottom of paragraph (a) relates only to the instance in which there is no explanation. Does that automatically include agreement? You said that, but could we state "agreement" there also?

GUITTARD: I suppose so. I assume that there's no objection. If there's agreement, there would be no objection.

EDGAR: That's what I'm asking. If that was implicit.

GUITTARD: That's the intent.

MCCLESKEY: Alright, are there any objections to the changes proposed in 21c, subparagraph (a)? Hearing no objections, we will assume that that is to be recommended by consent.

GUITTARD: On page 141 we have rule 402a which has to do with withdrawal of counsel. There's no present rule that has to do with withdrawal of counsel pending an appeal. And we have that problem from time to time and the lawyers don't know how to withdraw. They don't know, for instance, that they ought to send a copy of their motion to their client and tell them when the time schedules or time deadlines must be met or whether to get an acknowledgement of acceptance of employment by new counsel and so forth, and this would spell that out. However, Judge Quentin Keith, on reading this, he concurs in it, but he's got a new version of it which I'd like to read you here, and I think I like it better than mine, and if you'll listen carefully here I will read you what Judge Keith proposes. "Counsel shall be permitted to withdraw and other counsel may be substituted upon such terms and conditions as may be deemed appropriate by the court of appeals. The motion for leave to withdraw as counsel shall be accompanied by a showing that a copy of the motion has been

furnished to the party with a notice advising the party of any ensuing deadlines and settings of the cause or written acceptance of employment by new counsel indicated." Any problem about that?

MCCLESKEY: No objections? Could we have a copy of that Judge?

GUITTARD: Yes.

EDGAR: Judge Guittard, since that relates specifically to the court of appeals, will there be a corresponding rule for withdrawal in the Supreme Court?

GUITTARD: That is another proposed rule which I didn't think was really necessary to present here, but perhaps we ought to discuss. It says that, "All rules applicable in the court of appeals shall be applicable in the Supreme Court so far as appropriate and not otherwise inconsistent." That would take care of it.

DORSANEO: I don't like that.

SPARKS: I have another question. Shouldn't the motion have some grounds or reasons for the withdrawal? The way I read this is that as long as he's notified his client he's going to, he's allowed to.

MCMAINS: It says upon such terms.

GUITTARD: Upon such terms as the court of appeals may determine. The court can consider whether the grounds are adequate. This doesn't say

he automatically can -- as I read it. Look at page 156 where we have a proposed rule concerning the power of the court over its judgment. Rule 443 would determine a problem as to what power the court of appeals has over its judgments. How long does that power last? Apparently, except for such time as it may be pending before the Supreme Court on a writ of error, the court's judgment, the court has power to change its judgment to the end of the term. The Supreme Court probably has the same power and this would provide a six-month period rather than to the end of the term. And the corresponding proposed rule 509 from the Supreme Court would provide 12 months for the Supreme Court. Any questions?

MCMAINS: What effect does that do? As I see the way the rule reads you went into court of appeals, go up to Supreme Court and it's n.r.e.'d, court of appeals has got six more months at some point in which they can change their judgment again. What do you do if you don't like the way they changed it? Do you go back up?

GUITTARD: You go back up. And that you can do now if it's before the end of the term, as I understand the rule.

MEYERS: Does this amend 1816?

MCMAINS: That's article 1816. The jurisdictional statute.

GUITTARD: Well article 1816 provides the term, but of course there's got to be provided in terms of district court. But there are also rules that say when judgment, when the power of the court, and this

follows that pattern.

MCCLESKEY: Any other suggestions? Hearing none rule 443 will be recommended.

GUITTARD: Rule 423. Now we get to the oral argument question. Now I am not going to be in position to explain this rule really because it's really not my suggestion. On page 149. I had another suggestion. My suggestion was a simple one. Simply to eliminate that part of rule 423 which has to do with written arguments filed at time of submission. I thought that was unnecessary because we have another rule that has to do with supplemental briefs, and then let that rule govern written arguments, but the written argument practice is obsolete. We never see it so I would just take that out, and I believe this suggestion comes up to us from someone else. Judge Pope?

POPE: The appellate judges meet from time to time and make recommendations, and the recommendation came to our Court that, if this is the one I'm thinking, that we limit the time of argument and I have a thing about cutting lawyers off. I think that judges hire out to listen to argument, and I think it has a very therapeutic effect. Sometimes even a legal effect. In any event, we've got a rule that says that argument can be for an hour, but it can be reduced, but the recommendation came to us that the argument be cut down to twenty minutes. That's part of this rule, the other part of this rule is that I on my own undertook to incorporate into this one rule a collection of rules. I've got another thing about these one sentence rules that we pulled out of statutes, so I put them all in one rule.

Over on page 150 I wrote this "The court may, in its discretion, shorten the time for argument. It may also align the parties for purposes of presenting oral argument." We do that all the time. And I thought we ought to write into the rule what our actual practice is about amicus arguments. Amicus frequently appear assuming they have the right to argue. We always explain to them that you have no right to argue, but if one of the counsel wants to share his time with you, then you may use that part of his time. None of this is earth shaking.

KRONZER: Mr. Chairman, the part and I'm very sorry, Judge Pope, to be addressing myself to the part where you say "the court may in its discretion shorten the time for argument" because that's the part that concerns me the most greatly. I think you already know that the 1st court in Houston promulgated the set of rules that muchly parallels those in the courts by the 5th Circuit, and I guess most everybody here practices before the 5th Circuit and enjoys that sort of whipping match, and the constant restriction on the, really, advocacy in that court, an increasing belief that they don't need the help of the lawyers or they're not getting anything from them in the colloquy between the court and counsel. Right or wrong, up or down, I don't believe that's true of the appellate system. I did get myself in pretty bad shape with the 1st Court, maybe, except they're great judges and I really do believe that, by writing to the court here about their new set of rules in which they have adopted a twenty minute time limit, as in the federal court, a summary calendar, in which they can just boom you right out of the court, reduce transcript period of time. All was brought about by this alleged impetus of the

influx of criminal cases, and I would be the last, but I love him, to fault Frank Evans, but the truth of the matter is that we started out with the rules with an hour time. It's even that way now in the rules except they can be reduced to the time allowed in the Supreme Court, but there is no discretion to go below that unless the Supreme Court itself approved a period below that under rule 817 or as I understand it, the proposal that you shift back to the start of these rules the caveat to the trial courts and courts of appeals. Let's don't be changing these rules to suit your own autonomous convenience without clearing them with you. But to me this ever-decreasing attack upon the value of the lawyer in the appeals system, as I view it, is exemplified in these areas of giving the power to reduce.

POPE: Jim, that one sentence on page 150. The first underlined sentence. I put that in in response to the request by the justices of the courts of civil appeals. Now, that is the issue right there. We could vote on policy matter as to whether that sentence should stay in or stay out.

KRONZER: I feel for all of those who practice in the 5th Circuit, and you'll know what I mean.

MCCLESKEY: How many of you feel that that sentence that Judge Pope has just referred to should remain in the rules as recommended? Will you show your hands? Show "0". How many of you feel it should be deleted from the rules and that unanimous without a dissenting vote. [All voted to delete.]

GUITTARD: Mr. Chairman, I would move the following amendment. In subdivision (a), the fourth line before the word "argument" insert the word "oral."

POPE: Let me address that. I don't know what the practice might be in the court of civil appeals but we frequently have written arguments submitted.

GUITTARD: Yes, but there is another rule which covers it. And that's the rule with respect to supplemental briefs and that's rule 431.

POPE: Well, the oral argument doesn't follow the form of a brief.

GUITTARD: Well, an amendment or rule 431 says, "Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe,." Doesn't that take care of it?

POPE: I don't know what harm it does to permit somebody to file a written brief. Sometimes they can't come. A written argument. Frequently we get a ten-page argument. They cite some case, and they don't want to put it in the form of points and argument and index, the usual things that you have to do to file a brief.

MCMAINS: Well the other thing is that an argument, the oral or written argument is something they're entitled to, and the supplemental brief is still discretionary. I'm not saying that the court would ever refuse it.

GUITTARD: I withdraw it. I just don't ever see it, so if anybody uses it, well let's keep it in.

MCCLESKEY: Alright, are there other comments on 423? If not, do you have any objections to it, and your silence will indicate that we'll recommend approval by consent.

WOOD: Mr. Chairman, I might mention this, the court in Corpus Christi limits argument now as I understand it to twenty minutes with a ten minute rebuttal. And we just voted against it as discretion may shorten the time for argument which means they can shorten it to two minutes, for example under this rule. Any objection to what that court does on giving each side twenty minutes when they tell them a ten minute rebuttal?

MCMAINS: It's illegal.

POPE: They can't do it.

WOOD: But they're doing it.

MCCLESKEY: I think under the rule they're not allowed to do that.

KRONZER: Well, what you have to do is just be crazy enough like me to write them and tell them they can't do it.

MCCLESKEY: Allen, I think you now have permission to write to the Supreme Court and sign Jim's name to it. Rule 423 will be

recommended.

GUITTARD: Mr. Chairman, I believe that covers all the things I had intended to bring to the attention of the Committee although I invite the Committee to make comments on all of these other things in here which may or may not also be of some consequence, but I think we ought to refer to some of these other rules that I'm not particularly responsible for and get the Committee, and I'll undertake to make selection of which one of them we should discuss including this one about briefs.

SPARKS: Mr. Chairman, I would like to have some discussion on rule 451, page 162. I feel that this is a move to parallel to the 5th Circuit procedure with what we have.

MCCLESKEY: What is that page and rule number?

SPARKS: Page 162, rule 451, where the proposed change is to make the court of appeals decide controlling issues rather than all issues. I find sometimes there's a difference of opinion as to what may be a controlling issue, and I've had the experience several times on rehearings to finally get a court to look at a point that they have not written on. It's my preference to keep the rule as is.

GUITTARD: Do you have to write on a point, where you've already reversed it on some grounds. Do you have to reverse it on all the grounds presented? That's the problem that they could present.

DAWSON: You are going to bring about intolerably lengthy opinions,

I'll tell you that.

MCMAINS: We've already got them.

GUITTARD: We're trying to limit opinions to what is necessary to dispose of the case.

.....

MEYERS: In my experience this is what the courts of appeals do anyhow.

GUITTARD: That's correct. That's just bringing it down to the real world.

MOORE: Mr. Chairman, I move adoption of this rule.

DAWSON: Second the motion.

MCCLESKEY: Alright that gets us to a vote. All in favor of recommending the rule 451 on page 162 as is submitted indicate by raising you hand. 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18 in favor, and how many against? one.

MOORE: Mr. Chairman, may I ask a question about another rule? What's the merit of rule 447 page 159. What's the merit and/or the necessity for recording the cost bill? Send the cost bill to the clerk of the trial court who shall record such costs and issue execution. Does that mean record the cost bill to the court of civil appeals?

GUITTARD: Well, that's just to give the trial a basis for issuing a bill.....

MOORE: It will be filed but what is the need for cluttering the record by recording it to minutes.

GUITTARD: Well record it as other costs are recorded. It doesn't necessarily mean in the minutes.

MOORE: Well, I asked that question. It says, "record the cost." Does that mean put it in the minutes? File to cost bill or something.

KRONZER: Well, wouldn't you want to do that, Hardy, under the new roll over statute? The new roll over statute automatically starts collecting for you on your judgment. Wouldn't you want that, to have all your costs?

MOORE: Recorded. I'm talking about--they say "record it in the minutes." I don't see the need for that.

KRONZER: I'm going to look at the roll over statute. I'm satisfied that would cover it.

DAWSON: It's not going to make much difference.

MOORE: It's not a major thing.

MEYERS: If the rule means record in the minutes, it's not intended to because the trial court costs are not recorded in the minutes. That's not the intent of the rule at all, is it?

GUITTARD: That's right.

MOORE: Well, why even put it in there? Just send the cost bill to the clerk of the trial court, who shall issue execution thereon, for the collection.

CUNNINGHAM: That's probably right.

MCCLESKEY: How would you word that, Hardy?

MOORE: Just say, "transmit it to the clerk of the trial court who shall issue execution for collection of the same."

GUITTARD: Strike out "record such cost and." Then you would probably do it anyway, so there is no problem. I'll accept that.

KRONZER: They don't do it too easy if you've had to pay the costs already yourself, it's you getting it back, not him.

MCCLESKEY: What I have there that you recommended Hardy, is, "who shall transmit such cost bill to the clerk of the trial court who shall issue execution per se." Anybody object to that?

GUITTARD: Wait a minute, that's not the way I have it. I have it

simpler than that, in the sixth line, the only change is to strike out the words after shall," record such cost and."

MCCLESKEY: "Who shall issue execution?" Will that get what you want done?

MOORE: Yes sir.

GUITTARD: If there is no objection to that, I will go to the one about the briefs. This rule with respect to the brief, page 148, rule 418, is not one that I suggested. I understand that this proposal was made once before and rejected, and it says, "Any point that challenges the sufficiency of the evidence to support a particular issue or finding shall be treated as a contention that the evidence is both legally and factually insufficient unless otherwise expressly stated." And then would strike some following language, which I don't know why he wants to strike. Anybody have any comment on that?

KRONZER: The only trouble with that is not historical anachronism but at least in Texas we still have the true difference in what one does. One measures all the evidence in the record, and the other only that which is favorable to the finding or the scintilla rule, and if you don't have some delineation of what it is you are saying about what you are going to discuss, the adversary can't know what he is supposed to be talking about in his response. He then is required to come at it both ways.

POPE: I've talked with Sloan about this. Now his point is basically

this, that if an attorney, and you know not all attorneys are as appellate-wise as those I'm talking to and sometimes a fellow brings a case up once every four or five years, and he hasn't read Judge Calvert's intricate article, but his point is this, if you are attacking the evidence in the court of civil appeals, that court of civil appeals shall exercise its jurisdiction on that attack, and whether the point makes the distinguishment between factual insufficency or legal insufficency that that court should exercise its jurisdiction with respect to that point. Then when you get to the Supreme Court, if you have a point that's really not a very good point, but it shows that what he's talking about is evidence, that the Supreme Court would then exercise whatever jurisdiction it has, which is legal insufficency or no evidence. Now that's his point. I'm not arguing for it.

KRONZER: Judge, I would agree with that so long as you would add the phrase, as you have with respect to the briefing rules historically in the caselaw, because of the requirements to approach them liberally if from a reading of the argument under the points you can tell the relief sought. In other words, if from the reading of the points you know where it is they're going.

POPE: Of course we do that, but you know then there are even fewer lawyers who know about Fambro v. Wagley.

ELLIOTT: With that in mind, shouldn't Sloan with his appellate experience have added the business about overwhelming weight and preponderance of the evidence or establish it as a matter of law,

reading Judge Calvert's intricate article, to the language he has here, because I think that, with some Latin maxim if he is including only the insufficiency, either legal or practical, he is excluding the other end of the program.

MCMAINS: Judge, there is another problem too, I think in the way that the rule reads. Any complaint as sufficiency even though the only thing briefed by the appellant might have been a no evidence point, and it may be in fact in the context of, most of his points maybe like on an n.o.v. or instructed verdict, but, or motion to disregard. If this rule is read literally, then in every case that goes up to the Supreme Court and the no evidence, and there is some point that has to go back for, they say well there is not any "no evidence," but we always send it back all the time. Even though they have never briefed it, you may never know it's in the case on a cross point.

KRONZER: Suppose you have it cast in an insufficiency mold, and you've got it written in the court of appeals in an insufficiency mold and you get poured out in that matter. And then you say, I am now going to go in the Supreme Court on a no evidence mold.

MEYERS: You want to change your mind. You've got the right to do that.

POPE: I'm not making any plea for this. It was submitted in good faith, and it's presented to you on the basis of what his argument is.

DAWSON: Mr. Chairman, because I think it causes more confusion than

enlightenment, I move that we not recommend the rule.

MEYERS: I'll second that.

MCCLESKEY: Alright, I have a motion to vote on. Bill wants to say something just before we do.

DORSANEO: Well, I think I'm in favor of the spirit of it. I continue to see cases where somebody doesn't use exactly the right words and there they go out the window on...

POPE: Not very much so. I mean we do look to the briefs; we really do.

MCMAINS: After Hanks Airways I just don't see...

MCCLESKEY: How many of you are in favor of rule 418 as submitted? 1,2; and those opposed? It overwhelmingly is lost.

GUITTARD: I think the next thing we need to consider is the proposed amendment to rule 458 which would eliminate the requirement of a motion for rehearing in the court of appeals as effective for the application for writ of error, on page 164, and along with that rules 468 and 469 which modify the provision with respect to applications for writ of error. Judge Keith has written me a letter saying he is opposed to these changes on the ground that the court of appeals ought to have an opportunity to rectify its errors before they are exposed to the Supreme Court.

POPE: I was reading another note here, I will pick this up. This is another rule that was submitted by Sloan Blair, and his point is that we have undertaken to shorten the time while cases are in the appellate pipeline by doing away with the motion for new trial, and he says why not do the same thing with the motion for rehearing? If you have read the rule, the rule would eliminate the motion for rehearing but would not exclude one if one wanted to file one. That's it.

KRONZER: Mr. Chairman, my only thought about the problem is that there are occasions in which the intermediate courts either correct some error in their opinion and judgment by reason of what you say in the motion for rehearing, and that happens on numerous occasions, or write on rehearing by reason of what you include in it, and there are occasions in which they try to clean up a little slop language that might have given you a better chance to get it looked at by the Supreme Court, but the hardest part about the motion for rehearing practice is its jurisdictional nature. If there was some way that you could perhaps require one to be filed but to not make it exclusive of any error appearing in the opinion and judgment of the court of appeals, and proscribe that error. I'm for that, I just have the feeling that keeping the stumbling blocks in there requiring you to assert all potential grounds for error in the court of appeals may be depriving somebody of a fair review of some point they are missing in a long and turgid opinion of a court of appeals. That is why I basically favor the practice of not requiring it as a condition to the Supreme Court's jurisdiction.

CUNNINGHAM: But you think it ought to have to be filed? I mean if the party just decides that....

KRONZER: Joe Bruce, I was opting between the two to prevent the waiver of rights. I would rather not make it mandatory, make it an optional right.

BECK: What would be the penalty, Jim, for not doing it?

KRONZER: Well, you'd still have to comply with the time limits. If you file it, then you do postpone it. Again, I think most lawyers that are contemplating going to the Supreme Court as a result of the opinion of the court of appeals, are sufficiently aggrieved in their thinking at that stage, where they are going to file one anyway.

CUNNINGHAM: It would be crazy not to.

KRONZER: And ask for the, cause you know this hurdle through this discretionary review process to the high court in the sky here, that ain't no easy bird, and you'd better get all of your relief out in the court of nearly last resorts that you can, and I just think that the cut-off aspect of a jurisdictional-type motion has got a lot of danger to it that I would like to see eliminated from our practice.

SPARKS: Then that would make the motion for rehearing formal or meaningful if it is not jurisdictional.

KRONZER: That's true. It's sort of like we have now got the motion

new trial below, which is partly necessary.

MCMAINS: Well, the problem I have is once again the situation where the appellant all of a sudden wins, and then the appellee here has never presented, may never have presented by cross point or any other way, you know, some of the grounds that he may want to be talking about, for relief in the Supreme Court, and all we are doing now is eliminating any requirement to articulate those at all until you get to the Supreme Court, I mean until you file your application for writ.

DORSANEO: Rusty, does this go that far? It doesn't go so far as to say that you can raise things that you have never raised.

MCMAINS: Sure it does, if it originates in the court of appeals. If you get reversed.

KRONZER: Conceptually, the court of appeals cannot act beyond any point or cross point. So if all you ever do in your motion for rehearing is say the court errs in not sustaining point of error number one, reading as follows and go all those, and state in all these, you've got everything you could have.

MCCLESKEY: The issue before the Committee is whether or not we are going to recommend 458, 468, and 469, or recommend against them. All those in favor of the proposals as printed in the agenda, which would waive the necessity of filing a motion for rehearing indicate by raising your hand. 1,2,3,4,65,6,7,8,9,10,11,12,13,14,15, and those against the proposals in these rules. 1,2,3,4,5,6,7.

GUITTARD: Mr. Chairman, if that proposal is adopted, I have a related proposal and that is that if the losing party in the court of appeals elects not to file a motion for rehearing, that he be required to file his application for writ of error in the court of appeals, of course he has to file it there now, but that the court of appeals be given a limited time in which to review the application for writ of error before it is forwarded to the Supreme Court. It eliminates the additional step. If what they are concerned about is a shortening of the time, this would accomplish that.

MCCLESKEY: How many of you would be in favor of that type of a rule and asking Judge Guittard to submit that to the Court and copies to the committee members for comment? 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22. Anybody opposed?

KRONZER: It seems to me, Judge, though that there ought to be a time within which the court has to act to send it on, so put a rational time in there.

GUITTARD: I agree. OK.

MOORE: May I ask a question? I suppose everybody else in the room understands for sure, but my understanding is that if you elect to file a motion for rehearing you're not going to be confined to the grounds on it anymore. In your application for writ of error.

MCMAINS: That's right.

KRONZER: But you are confined to the grounds appearing in the court of civil appeals record, in the brief in the court of appeals. That's correct. You're limited to what you made in that court.

DORSANEO: Well, it doesn't say that.

MOORE: That's not the rule now. You are limited to what you say in your motion for rehearing but not in your brief.

MCMAINS: It just says motion for rehearing is not ..... It doesn't say what is a correct assumption.(?)

MCCLESKEY: Are there other questions about the rules, the appellate rules, group two.

EDGAR: In some way, let's talk just for a moment about the appeal by writ of error. Page 100, Rule 360, I presume that what has been done is to incorporate from the statute into these rules so that the writ of error practice now appears in the rules. I think that is a very salutory result, and I also presume, and I'm looking in paragraph number 4, that, and when I saw this I cringed for Judge Pope, when it said 6 months after final judgment is rendered and signed. I presumed that the "word rendition" appears there because it also appears in the statute.

POPE: That's correct.

EDGAR: And this was to make so that we wouldn't have a conflict between our rules and the statute as to when to trigger that time period. My question is, is the Committee on Administration of Justice going to ask the Legislature to repeal articles 2249 through 2251?

POPE: I have made a note that I plan to submit a repealer list. There are some three or four statutes that are involved in this group, and when we submit to the Legislature we will submit a repealer list of these statutes.

GUITTARD: Let me suggest the reason that the rule was not, that that statute was not incorporated in the rule in the first instance back in 1941, as I understand it, is this, at the same Legislature that passed a rule making act, the Legislature amended the writ of error statute to limit it to cases where the parties that had not participated. The rule making committee at that time were a little skiddish about repealing a statute that was enacted contemporaneously with the rule making act. Therefore, the original committee left that as a matter of statute. I think now, as Judge Pope indicated, there are really no problems as listing it as repealed.

EDGAR: Alright, that's fine. Now my final question then Judge Pope, if those acts are repealed prior to the time the rules are adopted by the Court, I presume that you will come back and eliminate the word "rendered," and just simply say, the date judgment is signed.

POPE: Yea, I see what you're talking about.

EDGAR: To be consistent with everything else we've done to try and get away from this distinction between rendition and signing of the judgment.

POPE: I see your point.

EDGAR: All right, thank you sir.

GUITTARD: Why can't we just take it out?

CUNNINGHAM: Shouldn't it be done anyway, even though there is an inconsistency? The effect of it is to be the same.

MCMAINS: No, but you could orally render it.

KRONZER: But the affect of it now would be to modify the statute, wouldn't it judge?

POPE: Well, we can do that. In other words we could take out the word rendered, submit it to the Legislature, and if they don't put it back in, that's the way it is.

CUNNINGHAM: It sure would help.

SOULES: Isn't the judgment always rendered by the time it's signed?

GUITTARD: Yea, but it's not always signed by the time it's rendered.

SOULES: No, but this says rendered and signed, it's got to be both.

ELLIOTT: Everything else just says signed. Let's just say "signed."

MCMAINS: It may be two different dates.

SOULES: If we take them out now then we don't have a conflict with the statute because by the time it's signed, it's been rendered as a matter or law. Isn't that right?

KRONZER: Well, the thing about signed, Luke, is that you don't want to get into this can of worms having to do with the judge pronouncing oral judgment.

SOULES: No, I'm saying take out the words now. Go ahead and take 'em out. Take out "rendered and" at this time, because they are superfluous. By the time it's signed it's been rendered anyway.

MCMAINS: Except that I think it does conflict with the statute, cause I don't think that statute says signed, the statute says rendered.

EDGAR: The statute just says rendered.

POPE: Well, yes it does conflict with the statute, but we have the power to conflict.

MCMAINS: Right, I agree, but Luke, as I understood him though was saying he didn't think it necessarily did, but I think it does.

MCCLESKEY: By consent in paragraph in 4 we delete the words "rendered and," and leave it, "is signed." Other comments on 360? There are some housekeeping things that we need to get to on other parts of this. If you do have something on appellate rule, group two, we still have a few minutes to take them up, but we are going to have to move away from these shortly and get to other matters. Do you have anything else that you think warrants our discussion among group two rules, appellate rules.

JENNINGS: Rule 469, page 171. Perhaps I'm missing something but on page 172a, subparagraph(i)6 refers to rule 471 and then immediately below that we are repealing that rule.

KRONZER: Well, that would be easy to certify, Judge! Judge Pope that bears your brackets and signature, what do you have to say about that?

POPE: What are we talking about?

KRONZER: They're wanting to know why we have to certify to a repealed rule.

SOULES: Right here, Judge. "Petitioner shall certify that he's complied with "Rule 471."

MCCLESKEY: Turn to page 172a.

POPE: 172a. The (i) part I have striken out, is that what we are

talking about?

JENNINGS: It wasn't striken on mine.

POPE: I know, I read that the other night, and I said I sure hope we don't reach that rule. Now if you are talking about that housekeeping rule, in view of some of the action that was taken later in that (e) part, commencing with "Such points will," all that underlined stuff, all of that would come out, but that just needs to be rewritten.

MCCLESKEY: That's on page 172.

POPE: The (e) part, the underlined part, that gets back to this sufficiency and no evidence bit that we have already talked about.

MCCLESKEY: Alright, are there other matters pertaining to group two, the appellate rules?

KRONZER: Mr. Chairman, I move that we thank Judge Guittard, and those that have contributed so heavily to that section.

MCCLESKEY: I think that is an appropriate observation, Jim. I do say to you, Judge Guittard, you've done an excellent job, and we appreciate the load you've been under and the responsibility you've taken and the job you've done.

GUITTARD: Thank you, you notice how very carefully we scheduled all these other things so that it's always past time before you can

consider anything.

MCCLESKEY: Well, you have done a good job, even as Luke and Bill have, and I am amazed at this Committee constantly with all the work that goes on in preparation for these kinds of meetings and the good lawyers who pass upon them and yet you get before this group of experienced lawyers and you find new suggestions and good suggestions and we appreciate the fact that you do that. By way of housekeeping and other matters there are two things that I think we might move to first. Mr. Don Baker is here and has been for some time and has made a suggestion with respect to rule 185 on page 217, or has made some proposals concerning it.

POPE: Mr. Chairman, may I say in connection with that rule, just a little bit of the background. There was pending over in the House and in the Senate, a revision of this rule, and it had been in committee and had been voted out of the committee favorably. Chief Justice Greenhill and I went over and talked with the sponsors and others and told them we thought that that was an infringement upon our rule making power and that we wanted to discourage that sort of thing. So, now this was two years ago, and they pulled down the proposal and upon our representation to them that this matter would be considered by the Court. Mr. Baker is here and I have told him to come. He has written a full explanation of why he thinks that rule 185 is out of step with our pleading and exception, our fundamental error rule, but I think that he can speak to this and give .... but that is the background. It was presented to the Legislature by members of the commercial bar. So Mr. Chairman, I wanted to lay that predicate.

MCCLESKEY: Thank you for those comments Judge. Mr. Baker we would be glad to hear from you.

BAKER: Thank you. I don't want to take time of the Committee unnecessarily on this, noting the heavy agenda. I don't know whether anybody has had a chance to consider this or read this or not, but there are two basic simple proposals that are incorporated in this one changed draft. The first arises out of the problem that has arisen in a few reported cases in recent years and the nature of the problem is that it is very common in industry nowadays to conduct business by the miracle listings on invoices and so forth, to sell goods by stock numbers, part numbers, model numbers, and such. Lots of goods in industry don't even have generic English language names. There are electronic parts that are only known by such things as a model 2830. This, of course, generates documentation in conduct of business which bears model numbers, part numbers, and stock numbers. When we then use these documents as exhibits to sue on in suits on account, we are met with a rather archaic rule that the goods must be described in English language words, and so it means that people have to go in, in Texas, in Texas as far as we know is the only state in the Union to have such a rule. You have to recreate all of your documents in order to sue in Texas. Now this rule is designed to help bring us into the modern age where records are kept by model numbers, part numbers, stock numbers, and so forth, and allow people to bring actions based on the documents actually used by the parties in the economic transaction. The reservation, of course, is there, that in the event that any party is aggrieved by that and wants a further explanation,

they are entitled to acquire that, and if they don't know what is referred to in the invoices, they are entitled to require the English language description. The other problem addressed by this division, has to do with....

MCCLESKEY: This first matter you are talking about is in that last sentence on page 217.

BAKER: Yes sir, that's correct. No particularization or description is necessary unless demanded. The party may demand it by special motion or by pretrial documents, by special exception, or by any method. That is the practice that is followed in all of the other states as far as I know. I know that it is the practice in all the other major commercial states, Illinois, California, New York, New Jersey, and so forth, because we've checked that. This also conforms to the federal practice, so that we can in effect bring our procedure more in line with what is now done in the federal practice and all the other states with respect to pleading on verified accounts. I will be glad to try and explain it if there is any question about that aspect of it and then go on to the other.

KRONZER: This experience in these other states though, that demand is just made as a matter of delay or delay purposes, I don't know that that can be solved.

BAKER: No, I don't know that it could be either, and I suppose that could become a defensive tactic. I think we would have made some progress nevertheless. Even if it were. But I understand from

talking with lawyers who practice in this area in other states that it is not a common problem, it's an occasional problem.

KRONZER: Particularly between people that are used to dealing in these type of things, they don't.....

ELLIOTT: I just want to say that I agree one hundred percent with what Don has stated, but I would also like to go further if we are going to mess with this rule and change the requirement of the defensive pleading to put it in English too, so that you don't, as many of the court of civil appeals have held, to have this "just and" or "just or" language precisely like the rule states and allow an English denial instead of an archiac rule denial also. I would like to, if it were up to me, I would move for the repeal of rule 185, but I think if we are going to adjust it on one side we should also adjust it on the other.

BAKER: I don't know what you wanted. I would be glad to respond to that but that's not necessarily a part of the consensus of the Committee.

ELLIOTT: No that's right, I was adding a substitution there. I agree with what you say.

MCCLESKEY: What is the other change, Mr. Baker? You said there were two changes.

BAKER: The other change comes from the timing of the filing of the

verified denial that we account in the language required by the rule. The time for filing amended pleadings prior to trial is generally specified in other rules, but we have a unique situation in this rule historically for actions on verified accounts only. Which, by implication, says the defendant can come in on the day of trial up to the moment of the announcement of ready and file his amended pleading denying under oath in the language of the rule and thereby requiring evidence for the first time. What it amounts to in practice is a sandbagging sort of deal to hide behind the law getting an automatic continuance from a trial setting by simply not filing your amended pleadings in a timely fashion, waiting until the last moment. The other change would simply say you treat this kind of case like all other kinds of cases with respect to the time for filing amended pleadings. You file them a more reasonable time before the trial setting.

CUNNINGHAM: But this isn't an ordinary type case, but you're saying if you don't file it that it's admitted, and that's not the normal type case.

MCMAINS: I'm not sure that this rule doesn't go a lot further. Because, while it doesn't say it, it appears that if your initial pleading is not timely and not in total compliance with this, you may not have a right to amend. You may have already admitted.

CUNNINGHAM: That's right.

MCMAINS: I think that's what the rule literally says. I have a

problem with that.

POPE: Why don't you strike out timely.

MCCONNICO: I think we could strike out, Your Honor, from "provided", (7 lines from bottom) just say "as are required in any other kind of suit." There on page 217.

BAKER: This draft saying "unless the party resisting such claim shall timely file;" the timely filed is intended to refer to the general rules on timeliness of filing pleadings.

MCMAINS: Well, but the point is that the timeliness to file a pleading in your initial answer, is 20 days from the first Monday. If you file it late and don't have a default, as I read this rule, I expect you are going to have an appellate decision that says, "it's admitted", and he can't defend on the justness of the account.

BAKER: That's not the intent. That's timely but not the only timely.

MCMAINS: I realize that. I realize what you are saying. You're concerned about amended pleadings, and I don't think this is confined to amended pleadings.

CUNNINGHAM: Well, what is the law under 93, someone? Can't you do it at any time that pleadings would permit as far as the verification that has to be done?

MCCLESKEY: But he's trying to change that.

BAKER: No, we don't propose to change rule 93. 93 doesn't speak to timely...

KRONZER: You can actually amend. You can have unsworn denial under 93, and in fact go to trial on it if they don't raise it by exception or something. It invokes the sworn parts of it.

DORSANEO: ..... the denial, they don't have to accept to an unverified...

KRONZER: Not, well, they wouldn't under this rule.

DORSANEO: ..... the denial, it doesn't shift the of approval.

KRONZER: That's correct, but I'm talking about under the operation of rule 93, in other respects, you don't have to do it within 20 days. You can amend your pleadings at a later time before trial.

EDGAR: George couldn't we simply down here put, in the first sentence, well first of all, strike the word, "timely", that appears up here where it says, before "file a written denial." Just say "shall file a written denial" and leave the word "timely" out. Then simply eliminate that whole sentence beginning with, "A party resisting such claim." That simply says he has got to file a written denial, and then

we just leave it at that, and let the rules take .....

MCCLESKEY: I'm not sure what you're changing, Hadley.

EDGAR: The first addition that he proposes is adding the word "timely" in the middle of that rule. I propose that we just remove that word, then we move the first sentence, which he adds, beginning with "A party resisting such sworn claim".

MCCLESKEY: And go into the middle of line four from the bottom?

CUNNINGHAM: All the sentence. The whole sentence.

EDGAR: Just eliminate, you see he wants to add, he is suggesting we add two sentences. I'm suggesting we just eliminate that first sentence and the word "timely".

MCMAINS: But the problem Hadley is that that doesn't get to his other concern, that he wants, unless you do that, he wants it had been deemed admitted; be the same in effect as a deemed admission. He doesn't want the ability to file an amended verified conforming denial once it gets ready to go to trial, as I understand. Once you're at trial... He wants it just like under anything.

EDGAR: The court can control that though because you have a right to amend seven days prior to trial, otherwise you've got to go before the court and have it approved. If the court wants to grant you that approval why should you be denied that right? I don't....

DAWSON: It's not an absolute right. You've got time to timely file your pleadings else there may be surprise. The seen day rule just merely provides that, presumptively, there is no surprise.

EDGAR: I don't see why we should treat a defendant any differently here than you do in any other case?

DAWSON: I don't either.

MCCLESKEY: Bill Dorsaneo is going to solve all the problems.

DORSANEO: I don't know that I can solve any problem but, the language aspect of the proviso, as I see it, is a prophylactic device that's given to the person making the denial because of the special nature of the answer that's required. To say, I agree with Frank basically, that there is a real problem here in requiring not only a specific denial but a very technically sufficient specific denial. In the first instance and then to say that even though your answer has to be more detailed than would ordinarily have to be for other defendants, the other rule with respect to amendments etc., should be the same nonetheless. I just find unsatisfactory, actually, rule 185 has been the subject of quite a lot of writing in recent years. There is a nice law article by Thomas on the subject. It annotates our summary judgment practice to do away with unmeritorious claims, and I frankly question the necessity for this procedural device for creditors in the first instance. To say that we are being brought into the twentieth century because of the fact that the pleadings don't need to give fair

notice to me is not coming into the twentieth century. That's doing something else entirely different. I would suggest that the answer part if you want to require a defendant in this creditor's rights context to file a specialized answer, that that be worked on a little bit and then maybe the problem on what the amendment of the answer would go away: if the whole rule doesn't go away as totally unnecessary, given summary judgment practice.

EDGAR: Bill, isn't what the defendant is required to file though already expressly provided in rule 93k? It's just.

DORSANEO: Change it. I'm not scared of it.

EDGAR: We've got that in existence though.

ELLIOTT: We've got a lot of things in existence that we've recommended changes for already. What I'm saying is that the rule as it is now written provides that this sworn denial be made before announcement for ready of the trial in the cause. Then it says if it's filed right at the time that they are going to trial, and if this is an amendment I assume that the judge has got to let him do it, says that the plaintiff can have a postponement for a while. So if we are striking that, we are striking something that is of benefit to the plaintiff. A late filed sworn affidavit denying in the form it's stated gives the plaintiff an automatic right for postponement. If we strike that, we are saying, all right, the plaintiff doesn't have an automatic right for postponement; that's fine too. But I think we need to really look and see what this whole rule is saying, and as

Bill said, I have no objection to the pleading of the plaintiff not being ....., I think you're right. I think that the requirement of the pleading of the plaintiff to be in some language other than the language that the plaintiff and defendant have spoken before when the claim arose is not necessary. I also have got to say that the portion of rule 93 and this portion in bad English as it is written requiring the specific denial in that bad English, is just as bad as requiring the pleading by the plaintiff to be in a different way. This is something that gets me. It's a fetish to require the pleading and the answer to be "just or true" in one case and "just and true" in the other case when they mean two different things and are not logically in the English language reasonable. It requires that in order to defeat it, fine, if you are going to keep this sort of thing require a sworn answer, an answer under oath, but to put it an answer under oath in bad English just doesn't make sense at all.

MCCLESKEY: So that we can move along on this, is there any objection to the first change that Mr. Baker has suggested, found in the last sentence on page 217?

MCMAINS: No.

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MOORE: There is this objection if I'm not --- and here it says that "the party resisting such claim shall timely file a written denial, under oath, ..." Now I don't think "timely" belongs in there.

CUNNINGHAM: They're talking about the last sentence, I believe.

MOORE: I think he said down to the end of the first sentence.

KRONZER: They're talking about the underlined sentence.

MCCLESKEY: The last sentence on that page. That's the one that has to do with the manner in which the plaintiff lists the items on his .....

MOORE: No objection to that.

DORSANEO: I object to that, because if we're going to require somebody to answer with a great deal of specificity per item, I want it to be particularized that way. If I have to respond to it one by one I want to know what it is, and the fact that the parties may have had some business dealings in the past doesn't mean that they've got business dealings concerning a one, two, three, X-four zippidyzap, whatever that might be.

GUITTARD: But isn't that taken care of by saying that unless demanded by the party resisting the claim?

DORSANEO: So what do I do, file an answer and say I demand it in my answer before I make my specific denial?

GUITTARD: Yes ...

EDGAR: Why don't you file a special exception?

GUITTARD: File a special exception ...

DORSANEO: Well, it's upside down. It's inside out to require me to do that when I'm penalized unless I file a specialized form of answer.

KRONZER: I think we may be losing the sight, Mr. Chairman, of what a sworn account is all about. You're talking about somebody that sold some itemized material or say they had, and they're listing that, and they want to say if we didn't do that, tell us where we didn't do it, and that's what they're trying to arrive at to a pleading basis and not cluttering up the courthouse, and I think maybe the rule is not, needs some artful work, but I don't see the principles.

DORSANEO: Aren't we talking services, and just about any, and if you look at the top, it says services, not just good wares and merchandise, and it may be interpreted to include any liquidated money demand.

MEYERS: Mr. Chairman, I move that the substance of the last sentence be adopted, but at the same time the substance of what Frank Elliott says that the archaic, incomprehensible form of the denial be changed also.

MCCLESKEY: You're putting that, both of them in the same motion?

MEYERS: Yes, sir.

ELLIOTT: Yes, that would include an amendment to 93k.

MCCLESKEY: How many of you are in favor of ...

KRONZER: Well I want to add a third part to that. The brilliant scrivener, Frank Elliott, be the one that clarifies that!

MCCLESKEY: How many of you are in favor of this proposal?

KRONZER: With the third part.

MCCLESKEY: Alright, 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18, and how many are opposed to that?

KRONZER: Elliott, do you oppose?

ELLIOTT: No, cause I've already got stuck ...

POPE: Frank, will you submit a draft to us on that, and also take a look at 93.

ELLIOTT: Yes, sir.

MCCLESKEY: Let us make sure we have some notes on that. What we're saying is that the first proposal which is contained in paragraph, or the last sentence on the page, the substance of it is approved together with the proposal that some language be prepared by Frank Elliott. It changes-the other side of the coin the same way where you don't have to plead in archaic language a denial.

DORSANEO: Mr. Chairman, I suggest we can look at Federal Rule A for specific denials, admitting or denying the claim or saying why you can't; maybe because it doesn't make sense in English.

MCCLESKEY: That gets us to the second point that Mr. Baker has ...

MCMAINS: Yes, about the time limits?

MCCLESKEY: About the time limits. That's what we're ready to, are you ready to take a vote on that?

JENNINGS: Well, what is the question? Whether you can do it at the last moment or whether you have to abide by the rules generally?

MCCLESKEY: At the present time it can be filed any time up until you go to trial.

JENNINGS: And that's what we're voting on?

MCCLESKEY: And the proposal is to change that to where it has to be filed according to the ordinary rules of the pleading.

POPE: Let me ask a question here. Would that be solved by striking out the word "timely" up there that Hardy was talking about, and retaining in the underlined part at the bottom down to the word "provided," I'm asking.

MOORE: Judge, Pope, what I had, of course Mr. Elliott will shape it up, what I had --- striking the word "timely," removing that up there, and then file a written denial under oath stating that each and every item is not just or true or that some specified item or items are not just and true, the time therefor, being subject to the provisions of Rule 63, which is the rule governing amendments.

GUITTARD: You could say within the time allowed by Rule 63.

MOORE: That's right, so leave of court you would file it after 7 days, but you'd be expected normally to file it within 7 days, before 7 days.

EDGAR: Well if the court has that power anyhow, why do we have to add it here? Isn't that redundant?

DAWSON: Apparently we called it a court interpretation, in the application of it, they gave special treatment of it.

EDGAR: Well I know, but if we don't even have a provision like that in the rule, then wouldn't the normal time period under Rule 63 apply to the suits on sworn account like any other suits? I would think so.

DAWSON: Mr. Baker, is your point that they treat sworn account cases differently insofar as timely filing your pleadings are concerned?

BAKER: Yes, that particular ...

DAWSON: And your point is that because of the different treatment by the caselaw, we ought to specify in the rules, is that right?

BAKER: No, not by the caselaw, Different treatments as come out of the language of the rule. I don't think there's been any particular difficulty in the of the rule, just follow the rule.

MCCLESKEY: How many of you would be in favor of asking Frank as he works on this particular rule, to draft some language that would be designed to cause this type of pleading to follow the general rules of pleading as distinguished from filing it on the last day, and submit that to the court. Any opposed? Everybody's in favor of that, Mr. Baker, do you have any other matters on 185 or does that cover it for you?

BAKER: I believe that does it. Thank you, sir.

MCCLESKEY: Thank you for being here, and thank you for the work that you've done in preparing it.

BAKER: I appreciate you hearing it ...

KRONZER: Don't go tell what you heard on the outside, though.

POPE: You can stay for the rest of the meeting if you just enjoy this sort of thing.

BAKER: Thank you.

MCCLESKEY: Professor Newell Blakely has called to our attention that probably the adoption or promulgation of some rules of evidence will be forthcoming from the Supreme court shortly and there are a couple of housekeeping duties we need take care of in that respect. Newell, will you explain that to the group?

BLAKELY: On pages 213 and 214. When the Evidence committee came to the problem of judicial notice, we felt that notice of the law of sister states was taken care of by the Rules of Civil Procedure in 184a, so we decided to let that alone, but we decided that questions of foreign law, law of foreign nations, ought to be dealt with, ought to be judge business instead of jury business, and we picked up from the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure a rule that made determination of foreign law a question of law for the court and we simply bought word for word the language of those two rules. They were the same word for word, and we simply bought that. Doak Bishop on the Administration of Justice Committee saw our rule and didn't like it and proposed on page 214, 184b, which appeared to be a large improvement, and so I recommend that we buy 184b. Now the question is where do you put all these things and in the comments and so forth you see various recommendations. It strikes me that it may be appropriate to put 184a and 184b, (184b if you buy it on 214,) in the Rules of Civil Procedure and in the Texas Evidence Code, word for word the same. Now, why would that be necessary? Well, it would just settle all questions. You wouldn't want to put one of them in one set and the other in the other; somebody might make something of that, or you wouldn't want to put both of them in one set

and only one in the other, somebody might make something of that, so I'd recommend that we'd put both 184a and 184b in the Rules of Civil Procedure and in the Texas Code of Evidence. So that's two points I've made, one is recommending 184b as written on page 214; second, where to put these things, and third on Rule 184 you've got the common law applying unless it's inconsistent with the provisions of the statutes or of these rules and that would mean the Rules of Civil Procedure. Probably that ought to read from now on, "provisions of statute or rule" and "or rule" would refer both to the Rules of Civil Procedure and the Texas Code of Evidence.

MCCLESKEY: You're talking about 184?

BLAKELY: Yes sir, the top of 213.

POPE: How would that be again ...

BLAKELY: Well, it would read just as it does there. "The common laaw of England as practiced and understood shall, application tro evidence, be followed and practiced in the courts of this State, so far as the same may not be inconsistent with the provisions of statutes (make it singular) or rule."

POPE: Singular.

BLAKELY: Yes.

MCCLESKEY: Alright, we have three proposals here ...

GUITTARD: Does "rule" mean a formally adopted rule rather than a rule established by precedents?

BLAKELY: Well, that's what I had in mind. If it's ambiguous, we would spell it out and say "provisions of statute, these rules, (which would be the Rules of Civil Procedure) or the Texas Rules of Evidence." Now that's an alternative if you think "rule" is ambiguous.

POPE: That would be "provisions of statute, these rules or ..."

BLAKELY: "the Texas Rules of Evidence"...

SOULES: Or the Texas common law rules!

KRONZER: Let me ask your opinion about that. What are we talking about, federal regulations or regulations of another state passed pursuant to their law?

POPE: That last one looks to me like it covers any problem we'd have.

KRONZER: In other words, let's say you were trying to prove Alabama, a regulation of their transportation commission, you'd have a certified copy of it, but then the court on that basis takes judicial notice of it without evidence.

BLAKELY: Well, you're referred to 184a on the law of sister states

and its coverage.

KRONZER: Right.

BLAKELY: Now you may want to tinker with that, but ...

DORSANEO: Doesn't say administrative regulation.

MCMAINS: Doesn't have anything to do with it actually ...

KRONZER: Federal regulations come in by reason of a federal statute.

MCCLESKEY: Steve, what do you have?

MCCONNICO: Well, I think we also ought to put in there "commissions," because a lot of the regulatory agencies in other states, like in Utah,k they don't call themselves an administrative agency when they regulate the oil and gas industry they say a commission, like our Railroad Commission.

MCMAINS: How about administrative body?

MCCONNICO: Administrative body might handle it.

MCCLESKEY: Well, if you're going to say that the common law rules will be followed in Texas, unless it conflicts with the statute or rules of some other state. Have you said a whole lot? It seems like to me you've opened it up to where you don't know what it may be in

conflict with, and we may prefer the common law, and we know what it is.

MCMAINS: You're talking about 184a.

BLAKELY: You're referring to Jim's argument.

MCCLESKEY: Of, you're talking about a?

MCMAINS: 184a.

MCCLESKEY: Oh, well I was still looking at 184, are you satisfied with 184, Newell?

KRONZER: Yes, no problem with that, yes.

MCCLESKEY: Are we through with it?

BLAKELY: I take it we're approving it reading, not inconsistent with the "provisions of statute, these rules, or the Texas Rules of Evidence."

MCCLESKEY: Would that be Texas Statute?

BLAKELY: No.

MCMAINS: No, because it may be inconsistent with the federal statute and still be required to be followed.

MCCLESKEY: What if it's inconsistent with the Utah statute?

EDGAR: George, I've got another question. It's probably just be but, in Rule 184 we're saying that the common law of England shall be followed, and then in 184a we say "the court upon motion shall take judicial notice of the common law." Now does that mean that if you want, in other words, if I want the court to consider "the common law," then am I going to have to comply with 184a and go through a judicial notice provision, or can I rely upon Rule 184 which says a court has to do it with no judicial notice?

MCMAINS: No, 184 though says in its application to evidence. That's all 184 says. 184a is generally a substitute problem.

GUITTARD: Common law doesn't mean the common law of England as stated in 1984. It means the common law of the state that, of the foreign state your talking about.

DORSANEO: 184 comes from the Fourth Congress of the Republic? ... and we don't really know what it means ... that common law of England.

MCMAINS: Yes we do, 1841 ...

MCCLESKEY: It says as practiced and understood ...

BLAKELY: I'd be afraid to tinker with 184 very much.

DORSANEO: That's right. That's what I'm saying.

MCCLESKEY: We're happy then with the language of 184 as you read it, Newell? Anybody object to that? If not, we're ready for 184a and Steve, I ...

KRONZER: I would move that we add after statutes in line two, "rules and regulations."

POPE: Are we still on 184?

MCMAINS: No, we're on 184a, Judge.

KRONZER: "rules and regulations, and court decisions ..."

MCCLESKEY: Right after public statutes, "rules and regulations?"

KRONZER: Yes.

BLAKELY: Of what bodies?

KRONZER: It doesn't make any difference to me. The governance of the rule, whether it's even an ordinance from another city, is still a matter of law.

MCCLESKEY: Steve, doesn't that get to your problem?

MCCONNICO: It does. I think it solves it.

MCMAINS: Do you think that covers ordinances?

KRONZER: To me, if you have an accident happen in Alabama in a city and you want to prove an ordinance there, it's still a rule or a regulation or an ordinance.

MCMAINS: I'm not sure that it is an ordinance, I think there may be a distinction between ...

KRONZER: Then we might say, "a rule, regulation or ordinance."

MCMAINS: Well, that's OK if you want to ..... but I'm not sure.

GUITTARD: .....notice of an ordinance in the State of Texas .....want to take.....give him notice at al.

MCMAINS: That's exactly true --

KRONZER: Why not? Why submit those to the jury like we do now. That's the same problem.

GUITTARD: Well, that ..... problem is.

MCMAINS: That's true.

KRONZER: Why not, the judge is going to decide whether it's ---

GUITTARD: .....not arguing the merits of it.

KRONZER: Yea. well, I'm saying -- it seems to me that deals with duty, and the jury's got no concern with that. That's all we're talking about. What can be probem to the judge or he'd take judicial notice of to determine what obligations are by foreign law.

GUITTARD: I think perhaps the evidence though would deal with the question of whether or not the court could take judicial notice of ordinances of Texas municipalities, for one thing.

MCMAINS: Yea, I know.

BLAKELY: We didn't deal with it.

MCMAINS: Why don't we just deal with rule and regulation?

GUITTARD: Yes, well that a separate problem, judicial notice and ordinances. I'm suggesting it should be dealt with, but I'm not sure this is the place to do it.

MCMAINS: You didn't deal with it at all, did you?

BLAKELY: We did not.

KRONZER: No.

MCMAINS: In the rules of evidence, I mean.

BLAKELY: That right.

MCCLESKEY: How many are in favor of just adding "rules and regulations" as distinguished from rules, regulations and ordinances? 1,2,3,4,5,6,7,8,9, nine. All those in favor of including ordinances?

KRONZER: I'm in favor ...

MCCLESKEY: One, Jim you voted on both sides ... 1,2,3,4,5,6,7,8,9..

KRONZER: Well then I'll withdraw my prior vote!

MCCLESKEY: We've got it 9-7 for including ordinances.

KRONZER: I don't see, you know the theory that we're talking about is a judicial decision about what that foreign law is, and not a jury decision. That's all you're talking about when you're putting an ordinance in and you're letting a jury decide it, and that ridiculous.

SOULES: On motion with notice after decision put it in evidence ... other sides got a fair opportunity to meet it. So why not have an ordinance.

DORSANEO: You don't have to put it in there. I still read some cases that say that it's wrong. - Say that you should have a certified or authenticated copy of this foreign statute book, etc.

KRONZER: Oh yea, that's true.

MOORE: I have a question, Mr. Chairman.

MCCLESKEY: Yes, Hardy.

MOORE: Well, here it says, what I've got in here, what I've sort of interlined was, "shall take judicial notice of the common law, statutes, public rules, regulations and ordinances and court decisions of every other state, territory, or jurisdiction."

MCCLESKEY: That's what we have.

MOORE: Alright now, what about jurisdiction? Would that be a political subdivision, a city, ...

SOULES: That's what it's intended to be.

MOORE: Is that what it's intended for? ..... jurisdiction would that include would include city wouldn't it?

MCMAINS: Well, and also includes the United States.

MOORE: I understand, but I'm talking about jurisdiction. That would include a city, wouldn't it? Water district, political subdivision, that's fine.

DAWSON: Wouldn't it also include a Texas jurisdiction?

KRONZER: Well, the way this particular one, Matt, is worded is ... it only is taking notice of out of state, other law. We just don't have one that Rules of Evidence .

DAWSON: other states or jurisdictions.

MOORE: state or territory, so jurisdiction must have some other meaning.

DAWSON: Well, that would include every political subdivision of Texas.

BLAKELY: Well, that's what they said.

MCCLESKEY: Well, I think what they meant was to have the word "other" apply to state, territory and jurisdiction.

MCMAINS: Why don't we just change the title and just take out "other," and then we now have a rule that allows us to take judicial notice of the common law of the, I mean of ordinances in the state.

KRONZER: I think that's a good operation.

GUITTARD: You mean have notice of law?

MCMAINS: Yes.

MCCLESKEY: It's now proposed by Rusty McMains that we change the, recommend the change of 184a by deleting in the line, the third line the word "other," and in the caption delete the word "other." All those in favor of that proposal hold your hand up. Is there anybody opposed?

POPE: Question, on the caption, did I understand that the caption will be judicial notice of law? Is that it?

MCMAINS: Yes.

MCCLESKEY: Well now, why don't we just say judicial notice, because we include things other than law.

MCMAINS: Well, this of course is not the restriction of judicial notice. There are other things that can be judicially notified as a matter of common law.

MCCLESKEY: O.K. I believe you're right.

GUITTARD: Under this now, are we taking judicial notice of local zoning ordinances?

MCMAINS: Yes.

KRONZER: As long as you can have your hearing, you're providing ...

MCMAINS: Still got a hearing, a motion.

SOULES: ... on notice with an opportunity to meet as this requires.

GUITTARD: I'm a little bit concerned about some of these municipalities that operate so informally don't have anything to occupy them (?) and somebody comes up and says here's the ordinance and ...

KRONZER: Judge Guittard, wouldn't that be at your hearing? The judge says, "I just found that's not a properly promulgated ordinance in that hearing." He could just say, "I don't think it's applicable, because that's what that hearing's for."

GUITTARD: But suppose the evidence really got into court, suppose there's no satisfactory evidence showing that this ordinance is in fact in force, and the judge just takes judicial notice of it. What can you do?

SOULES: You meet it. You have to be given a fair opportunity to meet it, so you can go down to the same city hall and find our whether or not, what is in fact properly enacted. You serve the judge and me with the copy of what it is that you're going to use, and I have to have a fair opportunity to meet that and argue that it should not be used the way this rule is written, and the judge makes the decision.

KRONZER: In providing for-a review, I don't know how you can get a more, ...proscribing around judicial notice. The federal courts don't require anything.

MCCLESKEY: We voted on that. Sam Sparks of San Angelo?

SPARKS (San Angelo): I've just got one question. I want to make sure I understand this, by taking out in the title "other" states and marking out the word "other" in the third sentence, we are not putting the burden on the trial lawyers to plead the laws of the State of Texas before we try the case are we?

MCMAINS: No

SPARKS (San Angelo): Well, because this reads that way to me now, because ... you've said to even get ...

KRONZER: You still have the presumption though.

SPARKS (San Angelo): Well, it doesn't say that ... I want to be sure I'm ...

GUITTARD: As a party requesting judicial notice be taken of such matter. In other words before you can get the judge to look at the Black Statutes, you have to give him a copy.

SPARKS (San Angelo): That's what I'm afraid of. I want to be sure we're not doing that.

KRONZER: I think the presumption is ... because right now you have this applicable to other states and the answer to proof of the other

states for a motion to take cognizance of it, you're presuming it's like your law right now.

BLAKELY: I believe we've gone too far, too quickly there. He's raised a legitimate point. You got to give the other fella notice that you're going to ask the court to notice Texas statutes, sitting right there in the Black Statutes. When you get down there in that sentence putting the burden on the moving party, it a good point.

SOULES: Well, a judge is required in Texas to apply the Texas law, not just take judicial notice of it.

BLAKELY: But that is judicial notice.

GUITTARD: It is a judicial notice, and to require the other party to present a copy of it before he can apply his own law, well that doesn't make any sense.

KRONZER: Well, in auto accidents the court's held you've got to plead the statute.

POPE: Well, we'll keep "other" in there then, don't we?

BLAKELY: Yes, I guess so.

DORSANEO: Where does it say that copy?

BLAKELY: We might just go back and leave it applicable to law outside

Texas you see ...

KRONZER: What we're not solving then though, Dean, is we're not solving the internal problem ...

BLAKELY: I know, that's ...

KRONZER: I can't see that the problem of when you're going to have to plead a statute or prove a statute or tell the judge what statute you're relying on, that's a serious problem.

BLAKELY: We ought to deal with Texas in a separate rule, I think.

JENNINGS: I so move.

DAWSON: Could it be done by just adding the words, "Texas Municipal Ordinance," and while we're striking, we've got the word "common law" in there. Some states operate under the civil law.

MCMAINS: Well in that case, it's public statutes.

EDGAR: Well, in that context though, isn't common law being the decisional law of the jurisdiction as distinguished from, is common law really a word of art there ... or does this simply mean decisioned law of cases?

KRONZER: Let me ask you something ...

DAWSON: I don't know ...

MCCLESKEY: Let's hear Judge Pope's comments.

POPE: Well, we've got to put common law in because some states have it. If it's not be common law, then it's by statute, and Louisiana is the only non-common law state that I know of. So we've covered it when we say common law statutes. We've covered all of them, I think.

KRONZER: And also to deal with, Sam and Dean Blakely's observation, if there has been no effort to plead the law of Texas, then it's presumed that the Texas law, which is known to the judge, would be applicable.

SPARKS (San Angelo): Except the ordinances.

KRONZER: Except the ordinances.

DAWSON: That's right.

SOULE: This rule doesn't require any pleading.

KRONZER: That's right.

SOULES: It requires that the judge take judicial notice of these matters, first of all, that's the first sentence ... he shall. Then the next thing is requesting himn to do so by giving him enough information and then the judge decides what notice, if any, is fair to

the other side. Now doesn't that take care of the Texas statutes? First of all, he's got to take judicial notice of them, then a party requesting him to do so has to give him information, i.e., what does it say, and then the other side is entitled to fair notice if any, none of the Black Statutes; he ought to know those anyway. So can't we make this apply, the way it's written to in the state and out of the state, the way it's written, and take "other" out and just utilize it. If it doesn't require a pleading, it only requires the notice that the judge determines a ... should be given, if any.

POPE: I think we're going to get ourselves into some problems if we do that, because the Rules of Evidence are addressing foreign law, and that's the problem, and we would be putting this in because we are trying to conform to the same thing. I heard the suggestion made that we ought to ... judicial notice of state, of our own law, separate to foreign law. Look at all of the commentary attached to this thing; all of this is addressed to foreign law.

MCMAINS: Judge, if we can solve this problem and I don't know that, I know that we're real close to getting the Rules of Evidence out but, why don't you just adopt or put into the Rules of Evidence a section on judicial notice of ordinances in the State of Texas. I mean in addition to this, can we get that done without ...

CUNNINGHAM: You were proposing that, were you not, Newell? Newell was proposing that it be in both places.

KRONZER: Judge Pope, I stillk don't see any inconsistency between the

proposed rule 184b, the one that Doak Bishop prepared and what we're talking about here on this one. I mean I just can't see it.

POPE: No, I don't either ...

KRONZER: If we've got a real crack to drop to, if we're really talking about the unseemly thing of passing regulations, you don't have that problem any more because there's a federal statute, which makes federal regulations admissible, or a lot of them, but if we're talking about unseemly thing as the jury taking all those regulations to the jury, it's like a JP trial.

POPE: Jim, what I was talking about, I was not, I agree with that, but I thought that we were drifting into trying to write a rule on judicial notice without other states, not foreign countries, other states that would also apply to our Texas ordinances, and our Texas things, and it would seem to me that we ought to keep them separated, maybe not.

BLAKELY: I think we ought to keep them separate, Judge.

MCCLESKEY: Hardy.

MOORE: Mr. Chairman, we're talking about words there that are getting into details. Would it be amiss to appoint someone a committee to draft out ... I think everybody knows what we're trying to do.

MCCLESKEY: I think so, but I'm inclined to get at least a policy vote

on this.

ELLIOTT: I think that the policy vote should be on just what Judge Pope has said. I think that judicial notice of foreign law ought to be judicial notice of foreign law and not judicial notice of Texas law and if we're going to get that, we need to work on some place else. Trying to scrounge an ordinance into what's always been the judicial notice of foreign law act in rule form in texas just doesn't seem right to me. I think you're really going to confuse a lot of people, and it's going to be a terrible thing. We can handle the proof ordinances someplace else.

MCCLESKEY: We had voted once upon the issue of whether or not to delete from the title the words "of other states," and also to del;ete from the third line of the rule the word "other," but in view of the discussion, I think we need to vote upon that again. How many are in favor, I beg your pardon?

WOOD: One question before that that I don't understand, to clarify to me, I don't quite understand what we're doing here. Why do we need judicial notice that we're talking about in the Rules of Civil Procedure and also in the Rules of Evidence? Judicial notice is an evidence question. Basically, why are we dealing with it here?

MCCLESKEY: Newell, I believe that's your question.

BLAKELY: Well, I can't argue it. One of the commentators down here said that 184a is more procedure than evidence, here on page213 down

here, I guess this is Doak Bishop's comment, two comments, "184a may appropriately be included in both places, 184a probably should not be deleted from the rules of procedure because it relates more to procedure than evidence," I don't want to debate it, actually.

POPE: Well now that, we can obviate this by putting it in both places, but I had made a note very early in this thing that I thought that this was more procedure, because it says what a person has, he's got a body of information he wants to get into the court. How does he get that before the court? He does it by requesting the judge to do something after notice. To me, this is procedure.

KRONZER: Well it's a mixed bag, but it certainly is a matter of record ... Getting at their pre-trial is a procedural matter and ...

MCMAINS: But what you get in the record is also evidence.

KRONZER: I think it's a mixed bag.

SOULES: Yea, but it's on a law point.

MCCLESKEY: How many are in favor of leaving the words "of other states" in the title and the word "other" in line three of the rule? 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17, and how many are wanting to delete those words? 17-2 in favor of leaving the words in there. Are there other proposed changes in 184a? If not, what do you think of 184b? Have you commented all you wish to on that, Newell?

BLAKELY: Yes.

MCCLESKEY: Alright, is there anybody opposed to recommending to the court the adoption of the changes in 184 and recommending 184a and 184b? If so, indicate that and if not, we will, yes Rusty?

MCMAINS: Judge, I only have one question about the procedure in 184b. It says that the court shall determine it. It's got a time limit on when the parties have to file their things to get it determined, but there's no time limit prior, as to when the trial judge has got to determine it. You ought to know what the law is at the time you start trying your law suit, as I view it.

MCCLESKEY: Newell, how do you react to that?

BLAKELY: Well, I don't think that's a, take Texas law, you don't have to say, now judge before I try this lawsuit, please tell me what the law of Texas is on the following four points. You're not entitled to that.

SOULES: That's just whether or not he's going to take judicial notice.

KRONZER: This requires a hearing within 30 days ...

MCMAINS: It requires a hearing, yes, I mean, there is a hearing, but what I'm saying is that if there's a conflict as to what you've got to prove, or this side or the other, it doesn't appeal to be any

requirement that the judge make the determination until after you've already had to try to prove it.

KRONZER: The difference of that supercilious argument, Dean, is that you're presumed to know Texas law, but not the other.

MCMAINS: That's right.

EDGAR: Well, don't you have the same time problem with Rule 184a, Rusty?

ELLIOTT: Is that the same time problem that, figuring out what the judge is going to say?

MCMAINS: Yes.

EDGAR: It seems to me like that's just a continuing problem you've got anyhow, and I don't really know that it's something we ought to deal with.

MCMAINS: I understand, but you see this is a change in practice for Texas. This has been determined to the jury, and the jury has made that determination before. Now we are withdrawing it from the jury without instructions.

MCCLESKEY: Rusty, in the interest of time, we've got some other matters we need to get to, and we're fast running out of time. Could I see a show of hands of those who are in favor of recommending these

three rules as they are? Well, that's obviously a majority, and we recommend those three rules.

SPARKS (San Angelo): I have one question, and I still think we need to deal with the Texas rule of ordinances, and what's wrong with 184c added that, that's the only thing that's not taken judicial notice of in Texas. Why can't we add a 184c?

MCCLESKEY: Sam, let me think this way with you. That is a matter that literally is not on the agenda, and I believe we do have matters on the agenda we'd better move to. We'll make a note of that for a future agenda.

SPARKS: (San Angelo): Can we get a policy vote on it?

MCCLESKEY: Probably run it through the Committee on Administration of Justice of the State Bar. I've asked Luke Soules to select some rules in group three that may need some discussion. At this time I'll recognize Luke.

SOULES: OK, I've got about six or seven items. Some of them I think are going to be more informational to the court. It may not take a lot of discussion there in the group three rules, one of them I think may be over in the group four rules. The first one is this jury demand, Rule 544, on page 186. A justice of the peace in Harris County wanted a seven-day ahead of time jury demand in JP courts. The committee on Administration of Justice debated that fully and determined that such a requirement should not be made, feeling that

because there is a fair amount of pro se appearance in justice courts where the people don't know the rules and they show up and they say I want a jury trial. The justice of the peace can reset the case to a time when he's going to have a jury and handle it that way and that there should not be a denial to a lay person basically of a jury trial because he didn't comply with the rules that he hadn't the slightest idea about. So, the Administration of Justice Committee took this matter up and decided that it should not be adopted. Maybe that report is all that is necessary on that.

MCCLESKEY: Anybody here want to propose that it be adopted? If not, we'll go along with the recommendation.

SOULES: That doesn't appear, of course, in the notes because we shucked it as it were and didn't write anything to the court about it. OK, Rule 89, on page 199. This deals with what happens to a plea of privilege once it goes, once it's been sustained, transferred, arrives at the new venue place. This was raised by the district clerk of Harris County. The district clerk had no power, of course, to do anything with the case. He couldn't enter a judgment, dismiss it or otherwise. District judges were thought not to have any power over the case because no filing fee had been paid, therefore the case had not been filed, therefore it was not before any court. So what this rule does is it gives the judge in the court to which the plea has been transferred, the power to dismiss the case for failing to file, to pay a filing fee, and that has been a problem because there are many cases pending that can't even be posted on the dismissal docket as perceived by many courts. So that's just curative of that

particular problem and maybe that needs only a report, so that the court realizes what it is that that's all about. Some of the others are very, yes sir?

MOORE: Does this contemplate and require that the clerk go on and file that record in order for the court to be able to dismiss it, without the payment of the costs, because that is a real problem.

SOULES: It does not.

MOORE: Alright, then do you think the court does have jurisdiction dismissing cases not on its docket, that's not ...

SOULES: I think the Supreme Court can give it that power.

MOORE: Well that's fine, I'm all for it.

SOULES: By this rule it does so.

KRONZER: Venue is a privilege of the defense, basically, to be sured at its selected place, and I don't think if you filed this suit in one county, paid your fee there, that it ought to ergo just because it has been moved; automatically invest that transferee clerk's office without at least notifying you to come up with some gaittus to just knock it out and tell you that it is dismissed.

GUITTARD: What provision of law requires another filing fee ...

KRONZER: I don't know of any, other than him to ask for more costs cause he's got charges against them, posted charges, but to me the transfer is not a jurisdictional decision.

GUITTARD: I had assumed that once it's transferred, it has to be filed in a court ... The clerk's not entitled to a filing fee, is he?

KRONZER: I'm not opposed to that being done if the clerk's office notifies that there's a defect for non-payment of cost.

SOULES: Alright, "the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within 30 days from the mailing of such notification."

MCMAINS: Ther is no filing fee ...

POPE: Wait just a minutes, here is the problem. I've referred this to the Committee on Administration of Justice and asked them to look into it because it was reported to us by the clerk over in Houston that they had scores of cases that had been transferred there, and they were in limbo and they had maybe appellate costs that were unpaid, large sums of money, nobody would set the case, and they just wanted something to be done with those cases. They're lost up there some way or another. I don't really know what the problem is.

KRONZER: But if it's other than the original filing fees, I have no

objection to the dismissal for other costs that have accumulated against the cases. But the case, the transfer in the first instance did not reach the level of a jurisdictional action. It was filed properly, and the filing fee paid to some clerk, and you ought, it seems to me that the clerk to which it's transferred has no power to generate a dismissal except for costs that accumulated after the filing and transfer in his court.

GUITTARD: He doesn't get it if any of the cost has been paid in the original court. So, if we think he ought to have some of that, there ought to be some other provision of law that requires another filing fee, and I don't know of any now.

MCMAINS: What has happened in Harris County and what they are doing is they do have uncollected costs to actually ship. They're going to ship it, and they're going to charge you with the cost of shipping it and also any accrued and unpaid costs on the appeal, and they refuse to do anything about it until they're paid and yet I have had situations where they didn't bill me for it. I didn't know, I never knew where the case was, which is a problem that they themselves had created because they don't bill you for it. If you will call up there and try

to find out where your case is, they will ultimately tell you, well I'm waiting for you to send me a check.

MCCLESKEY: Hardy, do you have a comment?

MOORE: I have a situation, I mean in talking about cases being filed. I had a couple of cases transferred into Lamar County, and the clerk notified the plaintiff's attorney. They were companion cases with different lawyers, notified the plaintiff's attorneys that the papers had been received but would not be filed until they turned up the fee and wrote several letters, and I couldn't get the cases dismissed. I finally, the company notified me to pay the court costs, go ahead and pay the court costs so I could put up the deposit and get the case on the docket so we could file a motion for dismissal. Now that's what happened up there, and I'm sure it's happened many other places. In fact like you say Judge Pope, they've just got a carload of them down there in Harris County. So, I do think it's got to require something or direction to the clerks to file those papers. After notice, if that notice to the plaintiff's attorneys is ignored. So that the court will have jurisdiction to dismiss.

WELLS: Well, it seems to me the receiving clerk has a duty to file the papers. On the fourth line in the underlined portion deleted the words "the filing fee in the proper court" and inserted "costs which have accumulated." That would mean that the receiving clerk would have to file, them, but he could then promptly notify the party that owes accumulated costs, and if he didn't pay the cost they could be dismissed.

GUITTARD: Mr. Chairman, I think that he has the correct solution to it, but I would suggest that if you do that, you ought to change the word "shall" up here to "may" . In other words say "the clerk of the court to which the cause has been transferred may mail notification to the plaintiff or his attorney that transfer of the cause has been completed, and that the accrued cost (rather than filing fee in the proper court) are due and payable," and make corresponding changes for that.

MCCONNICO: The problem is now is that the courts aren't transferring them unless their costs have already been paid. See in Harris County recently I had a case that I got transferred to Travis County on plea of privilege. They won't transfer it until the costs in Harris County are paid. Only then will they transfer the case although my plea of privilege has been granted.

GUITTARD: Yet another filing fee should be required, which is not now required.

POPE: Well, the fellow who won has to pay the costs.

MCCONNICO: No, no.

POPE: In other words, you got the case transferred to this county on your plea of privilege. Harris County won't transfer it because of unpaid costs.

MCCONNICO: It forces me to pay all the costs.

POPE: Alright, you're the defendant, you don't want to pay the costs.

MCCONNICO: That's right, because some of them might be substantial.

POPE: And so you've got an order that the case be transferred; the clerk won't transfer it until the costs are paid, so you've got a statement.

MCCONNICO: That's exactly right.

POPE: Well, that's not good.

KRONZER: Well Judge, in the first place the action of the Harris County clerk in that situation is not authorized. The only power he has regardless of the collection of costs is to transfer that case. I think the rule ought to provide that it would be transferred and the accrued costs would be chargeable in the new court, and he can't proceed to trial or it can be dismissed in the transferee court if those costs are not picked up. But I do not think that the clerk in Harris County ought to be able to withhold a transfer.

MOORE: He's responsible for those costs. Strictly speaking under the law, present law, he's responsible to collect the costs that are due his office.

JENNINGS: Conversely, I would think that the court to which the case

is transferred would have no discretion but to go ahead and file if the case has been filed in the original court. I don't think you're really talking about refiling, you're talking about transferring. You've got questions of limitations involved.

KRONZER: That's correct.

MCMAINS: I think technically the clerk could be mandamused to transfer.

KRONZER: I don't think they know ---

SOULES: It says in the present rule that the court shall transfer it and the clerk shall make up a transcript and send that. That's the first two sentences of the existing rule.

KRONZER: But I surely have no objection whatsoever to the case being dismissed before the nonpayment of the costs accruing both in the transferor court and the transferee costs save and except for the original filing costs. But I don't think we ought to interfere with what is the juridical act of transferring the case or the duty to transfer it, or let the clerks make that decision for economic reasons at their level. They just ought to provide for power to, that just seems to me as elevating the clerk's office to the power to dismiss.

SOULES: Well that's what the rule requires the clerk to transfer.

KRONZER: Yeah, and I think that

GUITTARD: Doesn't require them to collect costs.

KRONZER: Or to dismiss the case as a result.

POPE: The clerk is willing to transfer it, but the clerk says, "Look, there's $180 owed us here. You pay us, because when we transfer it, we're never going to see that case or the money again."

MCMAINS: Some of it may be the court reporter's charge.

SOULES: The court is charged when it transfers a case with taxing the costs against the plaintiff at that point.

KRONZER: Costs ought to include in that situation the costs to reasonably transfer the case, and those accrued costs in the new court, the transferee court, ought to all be collectible against the plaintiff before he can proceed trial or his case is dismissed for nonpaymentof costs in that court, but not because the first court can't hold it up or dismiss it because he didn't pay filing fees in the new court.

SOULES: I think the early part of the rule takes care of the court shall transfer the case, shall tax the costs against the plaintiff. That's gives a writ of execution against the plaintiff. He probably already made a deposit for the costs anyway, may not have. There may be depositions or what have you, but anyway there's a writ of execution available at that point in the court of first filing against

the plaintiff for the costs and the court's got to forward the . . . .

KRONZER: Let there be no doubt about it, Luke. Ray Hardy, our clerk, he wants $55.00 when he gets that transfer in there for him just for original filing.

JENNINGS: That's a cost deposit, it's not really a filing fee.

KRONZER: Yeah, but he wants it as original filing.

JENNINGS: But I think the language here, filing fee, probably really means cost deposit.

SOULES: Costs accrued, accrued costs?

MCCLESKEY: Steve, what do you think?

MCCONNICO: Well, I think it's going to get real difficult because when you have a hotly contested plea of privilege matter like I did in Harris County you're going to have deposition costs, you going to have a lot of court reporter costs, and they're going to be considerable and then after that plea of privilege hearing the plaintiff might find out that he doesn't have as good a case as he did prior to the plea of privilege hearing. And so his aggressiveness for his case is just going to diminish, so then if you do transfer it, you make the case in the court where it was transferred responsible for collecting all the costs, they've got to somehow go back and compensate all those folks down in Harris County for something that might have happened months

before. I think it's going to get real complicated.

MCCLESKEY: Well don't you have a possiblity of an execution to collect those costs?

MCCONNICO: I guess so if the court reporter and the judge are willing to use them but as long as they've got you prisoner down there they don't want to go to the trouble of doing that.

MOORE: Of course you could issue an execution but that doesn't pay your costs you've got to collect. And some of them are not solved. What about the situation where you have two defendants and one files a plea of privilege and it's sustained. The rule provides for a transcript to be made up by the clerk of the proceedings to keep the original papers down there in the court but you make up a transcript for the portion of the case that's transferred out of the county. Do you think the clerk's going to make that transcript up maybe for a rather voluminous record? I don't know what you're going to do about it, but . . . .

POPE: Maybe we'd better transfer this back to the Committee on Administratiion of Justice because it needs some more study. It looks to me like we've got to provide some kind of mechanism for the payment at the time the order is made transferring the case. Those are the people that are owed. Those are the people that have some mechanism to get their money now.

MCCLESKEY: Does anybody have any objection to referring this back to

the Committee on Administration of Justice?

KRONZER: Certainly not, except Judge I would say that McConnico is right in the sense that the winner ought not to be required to pay the costs to get it transferred. I think it ought to transfer as now but all those accrued costs go with it and then the clerk of the transferree court accumulates them subject to dismissal for nonpayment then. It's just no filing fees, it's just costs as accrued.

SOULES: I don't know what else can be done on this at the A.J. level from what I hear. I've heard the argument there and I'm hearing it here. It seems to me like what we're looking at is if we start with this rule which may help them where these cases are, the documentation in the Administration of Justice files shows the pending of literally hundreds of cases in many counties and they go from Anderson County in the A's and I think just about every letter in the alphabet is here, not just Harris, and it ends up with Wise County. Well, these cases are all over the State. It may be that it seems to me the way this rule works, the plaintiff files his lawsuit, the plaintiff files his plea of privilege, the plaintiff wins. Then the court must then transfer the case and enter an order that the plaintiff pay the costs in the original court. The clerk must then make up his transcript. He may do that or not do it without a deposit. I don't know, but at any rate he's supposed to make that up and send it to the clerk of the transferree court. At that point, with Jim Kronzer's suggestion, the clerk of the court to which the cause has been transferred may mail notification to the attorney for the plaintiff that the accrued costs are due and give 30 days to pay it. And if those accrued costs are

not paid, then the clerk who's sitting there with the case on which accrued costs are due can make that known to the trial judge and the trial judge in the transferree county dismisses it. Now that's the way this rule works. It's not that bad. We'll may be able to do something better with it but for now, it seems to me that this is a workable solution to the problem that is present.

GUITTARD: That's fine, but it won't take care of the case where the clerk of the transferree court says "I'm entitled to a filing fee, and I won't touch this case until I get one," even though he's not entitled to it.

SOULES: Well, either he is or he isn't, if he's not under the statutes, they ought to mandamus it. There's other ways to get that problem. But I feel like this rule will work for at least a part of the problem. It seems to be out there in a fairly . . . .

KRONZER: Well, Luke, are you willing to leave that filing fee business out?

SOULES: Take filing fee out, use your words "accrued costs," in two places. So that the first underlining would read thus, there would be no change in it except in the first unlining, "the clerk of the court to which the cause has been transferred may (in lieu of 'shall'), mail notification to the plaintiff or his attorney that the transfer of the cause has been completed, that the accrued costs in the proper court are due . . . "

MCCLESKEY: Why do you need "in the proper court"?

SOULES: Do we take out "the proper court?"

MCMAINS: Yeah.

SOULES: "that the accrued costs are due and payable within 30 days from the mailing of such notification, and that the case may be dismissed if the accrued costs . . . ."

GUITTARD: "if such costs."

KRONZER: Yeah.

SOULES: "if such costs are not timely paid;" and then continue with the balance of it as is.

MOORE: Well, what's the balance of it?

JENNINGS: You've got one other sentence.

SOULES: I'm sorry, down in the last sentence, it will be "if the accrued costs are not timely paid."

SPARKS (from San Angelo): Luke, one question. Why are you changing "shall" to "may?"

SOULES: Somebody suggested it. I don't have any problem with it.

SPARKS (from San Angelo): I think it should be mandatory that they have to mail it out. That's the only way the parties are going to be assured. . .

SOULES: Why don't we show an up or down on that? How people feel that "shall" is right? Okay. How many people feel that "may" is right? It goes back to "shall."

GUITTARD: It's going to be "may" anyway. (Laughter)

SOULES: And then the court may dismiss it.

JENNINGS: George, there's one other problem with this rule.

SPARKS (from San Angelo): If they pay it and it's dismissed, then you're in good shape, because they had mandatory shall and they never notified the court.

SOULES: And it's without prejudice, dismissal is without prejudice.

MCCLESKEY: Frank has a problem --

JENNINGS: The last part, the underscored part, provides as I see it, for dismissal without any notice or hearing which is completely inconsistent with what we've done with all of the other dismissal situations that we've considered at this meeting, and the first time someone gets burned they're going to be in here asking for a change in

this rule consistent with the other rules that we've considered. I would suggest that to give a court power to dismiss 30 days after a notice is mailed by a clerk in the first place, the clerks don't always keep very good records of the notice they've sent, and I think before there's a dismissal, there ought to be a notice and a chance to be heard.

WALKER: I advised that as a member of the Administration of Justice Committee and it was turned down, but I think, I said "shall be dismissed in accordance with rule 165a," I believe.

SPARKS (from San Angelo): Reinstatement.

SOULES: That's fine.

GUITTARD: Why not just say "dismiss for want of prosecution" and that would invoke 165a?

SPARKS (from San Angelo): Yeah.

MOORE: "shall dismiss the cause as if for want of prosecution"

SPARKS (from San Angelo): "subject to reinstatement"

------everybody talking at same time.

POPE: Where is that last change that we're are making? Is it down at the bottom?

MCCLESKEY: It's in the last line which will be changed to read "may dismiss the cause" and then insert "as if for want of prosecution."

SOULES: I didn't hear the words "as if."

MCMAINS: Somebody else said "as if."

GUITTARD: I don't think you need it.

MCMAINS: I don't think you need it either.

SOULES: Just say "for want of prosecution."

KRONZER: That's really what you're doing.

MCMAINS: That's what it is anyway.

GUITTARD: Strike out "without prejudice."

SOULES: There's another "filing fee" that needs to be changed to "accrued costs." There's three places where --- 4th line from bottom, and the 9th line from the bottom, use "such costs" and in 10th line from bottom, and 12 lines from bottom use "accrued costs." ----.

MCMAINS: The only other problem is that when you say "accrued costs," that sounds like it's all the costs in the case, whereas in reality it may be only a transfer of part of the case.

JENNINGS: Unpaid accrued costs.

MCMAINS: Well no, what I'm saying is, you may have costs that have been paid by a party who's still in the transferring court. Does this mean that the plaintiff now has to pay as for those people that he properly sued in the county, as well?

MCCLESKEY: What are we talking about? Applicable accrued costs?

MCMAINS: No, I'm taking about taxed costs. If it's taxed in the order.

GUITTARD: Accrued costs in the transferred cause.

MCMAINS: Yeah, now that's fine. Okay, I have no problem with that.

SOULES: Up there, the first time we talked about accrued costs in the fourth line of the underscored language "accrued costs in the transferred cause are due" and then skip down one, two, and we'll say "such costs are" in lieu of "filing fee is" and the next line, "such costs are" in lieu of "filing fee is" and then five lines further down "such costs are."

GUITTARD: Yea.

MCMAINS: OK.

MCCLESKEY: Sam?

SPARKS (from San Angelo): I've got one more question. I don't mean to belabor the point, but the last sentence as I hear you've changed it is that it won't be dismissed as a want of prosecution case.

MCCLESKEY: No, for want of prosecution.

MCMAINS: Yes.

SPARKS (from San Angelo): But my problem is this and it might be dealing with semantics. I think we ought to use clear, I don't care how it's dismissed, the person reading the rules should be able to determine how they get it put back on. Say limitations is wrong. I think the rule should, instead of doing it that way, should read just like it is and say "provided, however, it can be reinstated according to provisions of rule ---, the reinstatement rule.

MCMAINS: Well, you want to say "may be dismissed subject to the provisions of Rule 165a?

SPARKS (from San Angelo): I just want them to know they can get it put back on under the reinstatement rule.

SOULES: Well you've got rule 165a that says...

SPARKS (from San Angelo): I know, but you're not saying it here in this rule.

SOULES: But you have dismissal for want of prosecution in the title of this other rule.

SPARKS (from San Angelo): But if I'm sitting here reading this, I've got to go read that rule which refers to another rule.

SOULES: I just have a bit of aversion to referring to one rule in another rule because when you go back and change one or renumber, you get the rules all fouled up. I'd rather not say it, but I will say it.

KRONZER: It looks like the way they do tax regulations.

POPE: "May dismiss the cause for want of prosecution" what? Subject to?

MCCLESKEY: "Pursuant to rule 165a."

SOULES: OK.

MCCLESKEY: Alright, those in favor of recommending rule 89 as amended here in this discussion, indicate it by raising your hand. (Unanimous). That seems to be without objection, and it will be so recorded.

SOULES: There's a rule 296 that's proposed in the materials that the Administration of Justice fixed with a rule 306c and the rule 296 is

on page 231 and the rule 306c didn't make it into the materials. For whatever reason, these rules were misdirected and sent to Peggy Hodges in care of the State Bar. I apologize but that's what happened and it's in these materials that I sent you. After study of the proposal that is shown in 296 that came in from Ed Lavin of San Antonio, the Administration of Justice Committee decided that rule 306c was a better place to hear this and nearly all of the language necessary to hear it was already in rule 306c, because it deals with prematurely filed motions for new trial, appeal bonds and all the other things. What the problem was is this Williams v. Royal American Chinchilkla, it held that early filed request for findings of fact and conclusions of law were a nullity, and the fix is to make early filed such matters being timely filed, as we have done with motions for new trial and other matters. So, rather than do a lot of writing in 296, we just added to 306c in two places ("request for findings of fact and conclusions of law.") So it took care of all prematurely filed matters that we could envision and then "date of signing" was changed to cure rendition. That problem was, the rendition in rule 306c survived the last cleanup. It should be scrubbed out and changed to signing. So what we recommend is that rule 296 not be changed as Lavin proposes, but that 306c amended as proposed be adopted.

WELLS: So move.

SPARKS (from San Angelo): I second it.

MCCLESKEY: Any objections? It will be so ordered. What do you have left?

SOULES: I have recusal and the refiling of the, recusal is probably the most, I don't really know how much of a problem it will be. Let me just start there. Rule 18a and 18b.

MCCLESKEY: It's 1:00 and that's what we were shooting for. We're losing our members one at a time here. They're drifting away. What is your pleasure? Do you want to go into recusal? Is there anybody in taking up recusal?

GUITTARD: I move it we approve it.

SOULES: I second it.

MCCLESKEY: Do you want to discuss it?

POPE: What page is that on?

SOULES: Page 195 and 196.

JENNINGS: Do any of the judges have a problem with it that they want to discuss? If not....

POPE: Judge Calvert is not here, and Judge Calvert has retired now from the Committee. He expressed a view that he was afraid that on the appellate level that we were creating a problem that we don't presently have. He said that we have caselaw in which we have resolved the problem. I don't know what would happen if they sought

to recuse four, five, or six members of our court. We've never had any problem with it, and he's just afraid that we might be generating problems that we don't need. As I've said to Luke before, this is really no problem over the state except when you have a problem and then it's a very serious problem.

SOULES: Responding to that, this gives a way to take care of recusal if all the court ..... and all the judges on the appellate court are challenged. They sit down, and they decide one by one if one leaves the room and the others decide where they ought to sit. And that's what it says. Or if a majority is challenged. The background on this, the Supreme Court adopted the Code of Judicial Conduct and it applies to all judges, justices of the peace, county judges, appellate judges, all of the judges. Now we thought we were getting all trial judges covered last time but it didn't survive the scrutiny of the Supreme Court to leave in all trial judges. Now we're going back and asking them to cover all trial judges with this, and they're saying that the presiding judge of the administrative judicial district can send a judge to any court; a justice court, a county court, or a district court, to hear whether or not a judge should sit. Somebody's got to have that authority. Why shouldn't that person have it. He is administering a lot of things there anyway. So that's just a convenient way to have the person appear at whatever trial level.

POPE: Luke, I wasn't opposing it. I was merely transmitting that information from a man whom we all respect.

SOULES: Very much so.

POPE: I frankly don't like to promulgate a rule that applies to everybody but me. I really don't. I think it looks bad.

JENNINGS: But are we encouraging crackpots and people who lost cases and are mad at the court and file motions claiming the court is prejudiced against them and that sort of thing?

SOULES: There was a rash of motions for recusal when 18a was adopted, but it has very much settled down. Now it is used only when serious as I perceive it. In South Texas that certainly is ...

JENNINGS: Well, I can see a distinction between trial courts and appellate courts.

KRONZER: 18a is just another way of saying who will be the first to tell the queen she's grown old and fat. It doesn't get you anywhere.

DORSANEO: So, where do you want to go?

SOULES: So the Administration of Justice Committee, in order to have a procedure by which the Code of Judicial Conduct could be invoked by a lawyer to all the judges to whom the Code applies recommends that this approach be set forth, and it would be uniform throughout the courts of appeals and the Supreme Court.

KRONZER: I move that we amend it so that when all of the judges are under such a challenge, I'll be permitted to do something.

MCCONNICO: Luke, you just said as soon as 18a was first promulgated that we had a rash of these in South Texas and obviously some of them did get into books and there were appellate decisions on them that we're all aware of, but I'm wondering if we're going to have the same rash now with the Supreme Court and Court of Appeals?

SOULES: There may be, but if so, they'll be taken care of and it'll settle down and then the procedure will be in place.

MCCLESKEY: Let me ask you this. There are thirteen members of the Committee left here. That obviously is not a quorum. We can continue without a quorum and nothing says that we have to have it. How many of you feel we should proceed with discussion of this and other rules without any recess?

KRONZER: I just have one matter of policy I'd like to mention to the court.

MCCLESKEY: Alright, how many of you think we should proceed with the recusal rule under the present circumstances?

JENNINGS: Could we see how many people have problems with other rules we might want to discuss?

MCCLESKEY: Alright, let's ask about the recusal rule first. How many of you want to proceed with it?

MCMAINS: You mean adopt it?

MCCLESKEY: Act on, either recommend it or not? One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve.

MCMAINS: I move we adopt it.

SOULES: Second it.

MCCLESKEY: We've got a motion and a second that we recommend rule changes to 18a and a new rule 18b. All in favor indicate by raising your hand. One, two, three, four, five, six, seven, eight, nine, ten, eleven. All opposed? (Moore)

MOORE: I'm only opposed to it, because I don't think the few of us left here should be taking the matter up for consideration. With full attendance, I'd vote for it probably.

SOULES: The other matter that I had raised, and this was not taken to the Administration of Justice because it was old, I'd forgotten about it by the time I got there. I wrote this I believe shortly after we had our last session. Rule 680, page 188, Temporary Restraining Order. My understanding of the rule, and I may not understand it right, was that you weren't supposed to get but one extension of TRO except by agreement and the rule doesn't say that and I've never been able to find a case that says that.

MCMAINS: That's right.

WELLS: There's a federal case called Ex parte Green, I think. I'm not sure of the style of the case, but that's with the federal law.

SOULES: So I propose that we add. The first underscored language to me just gets rid of some hard to understand language and substitutes. Well let me take up the second matter first and then look at this one. "No more than one extension may be granted" and that needs to have this added "unless a subsequent extension is unopposed." Now there's a difference between agreement and not opposing. I'm not sure an agreed order can be enforced by contempt but I think if a court extends without opposition that it can be enforced by contempt. So no more than one extension may be granted unless a subsequent extension is unopposed.

MCCLESKEY: Does that leave you with just two?

SOULES: Now that would be the first one and one extension. That is the temporary restraining order and one extension. If the first TRO is for ten days and it can be less than that and then it is extended for ten days and it could be less than that, you would have a total of twenty, but twenty is all that can be granted if opposition is presented. I believe that's what the rule means but except for that case you cited.

MCCLESKEY: Do you want to say "unless a subsequent extension" or "unless subsequent extensions?"

SOULES: "unless subsequent extensions are unopposed" and that's fine too.

MCCLESKEY: Anybody have any problem with that? Alright, what's the other?

JENNINGS: I have another problem with another part of this rule. It provides that the TRO shall expire ten days after service or actual notice. How about the guy that's evading service, but he comes in later and says he had actual notice, and his TRO has expired due to his own conduct?

SOULES: I don't really know that that change is necessary. It would take care of the situation where the TRO actually expired before you could get service or actual notice.

JENNINGS: Well, you don't always know when a guy has actual notice. You know when he's been served.

SOULES: I usually have my paralegal take a copy of it to the person if we can find them the moment we get it.

POPE: Yeah, you go out of your way to put them on actual notice very frequently so that you don't have this delay.

SOULES: If the sheriff is on the doorstep selling your ranch, you can take it to him right then.

JENNINGS: Well I'm concerned about when he hasn't received any kind of formal notice at all, but he comes in and asserts that he heard by the grapevine and went to the clerk's office and read the record and he's got actual notice and you have no record of it and your TRO has expired. He's not in violation.

SOULES: I don't know whether Rule 683 helps that, it says that --- I'm sorry, I withdraw that.

MCMAINS: It's a problem existing in the present rule, anyway.

SOULES: Whether or not we have that middle underscroed language, actual notice, is a problem."

MCMAINS: What he's saying is that if you get the order entered on day one, and you don't actually serve him until five days later and then ten days later he violates the order but he claims he had notice the same day you entered the judgment, then the order wasn't effective and so he can't be punished for violating it because it expired by his own admission.

SOULES: Well, let's don't make that middle....Just leave the language the way it is except I think that the language that I proposed to delete is in brackets, entry should be changed to signing. Is that right, Judge Guittard?

GUITTARD: Yes, I think so.

KRONZER: Why can't you say within ten days of actual notice or service, whichever is the later?

MCCLESKEY: Doesn't that get you back to Frank's problem?

WELLS: Yes, it does.

SOULES: He's going to come in and say well you think I only knew about this five days after it was signed but I really knew about it two days after it was signed, so the TRO expired on the twelth day and on the thirteenth, fourteenth and fifteenth day is what I did that was prohibited, so you can't punish me for contempt. Now if you were right.

KRONZER: -- saying whichever is the later.

WELLS: I think it's much better the way it is in its present form, changing the word "entry" to "signing."

SOULES: I agree. I would adopt that.

JENNINGS: And then that means if you don't get service, you've got to renew it. Well, you can do that as long as it's not opposed the way we have now, you can extend it. OK, I withdraw that dissent.

MCCLESKEY: Alright, we have on 680 two proposed changes. Wll no, just one proposed substantive change. The deleted language there just

above the middle of the page will be changed only by changing the word "entry" to "signing." The underlined language will be deleted in the middle of the page, or above the middle of the page, and then just below the middle of the page, there will added to the underlined language "no more than one extension may be required unless subsequent extensions are unopposed." All in favor of recommending that indicate by raising your hand. (All agree.) Any opposition? (None), and it carries.

SOULES: Rule 233. I've got two more, I've got the number of peremptory challenges, and I think what we've written just codifies the law. And if everybody agrees to that, we don't even need to talk about it.

POPE: What's the page?

SOULES: It's page 228, Rule 233. We felt should be in the rule what the law is. If you read the rule the way it is you can't tell what in the world you really are entitled to. This gives the court the right to balance the strikes. It tells you that the adverse interest must be as focused on a special issue in the court's charge, what the law is. Is that OK? (All agreed.)

MCCLESKEY: Okay. And what else do you have?

SOULES: Okay, the last one then is the, let me check, the others I think are pretty much straight up, unless ya'll have had problems with them they were fairly noncontroversial. Okay, rule 306d, page 252.

Let me do something else before we do that, because I think this is another one that is noncontroversial. In the materials that I mailed out we have a rule 166a. There are two kinds of proof on something we feel should be utilized on summary judgments that have held not to be usable; authenticated or certified public records, and the other one is stipulations of the parties, and that just adds those two types of proof. I didn't have stipulations of the parties in there because I haven't heard Mike Hatchell's talk on summary judgments until the St. Mary's thing the other day when he found the case that said stipulations of the parties were not summary judgment proofs in that case, so we're trying to cure with the rule some things that ought to be obviously summary judgment proofs by adding stipulations of the parties and authenticated certified public records. Any problem with that? (No.) I wrote that in the Judge Pope material. This is 166a. If that's okay, then we'll go to 306d. The real problem in 306d ....

WOOD: Just one question about that. Does the rule that you sent us here the other day affect in any way the requirement that if you refer to a document in your affidavit, that you have to serve a copy of that document on the adverse party?

SOULES: It doesn't say anything about the other rules. It just adds two new types of proof. Rusty?

MCMAINS: Do you have a copy of that rule? The new rule?

KRONZER: Here it is.

MCMAINS: I'm just wondering, as I remember reading it, authenticated or certified public records, the question I have is I know what you're trying to do is to get government records, right? Or not?

SOULES: Of these?

MCMAINS: Well, those are all fine. What I'm trying to figure out is, what you do with, for instance, a deposition in another case. That's a public record. Does this allow you to use a deposition in another case automatically? Filed instrument in another case?

SOULES: Yes, you can use filed instruments in another case. You betcha. That's why I took a bill of review from another case. Filed a new case, took a bill of review.

MCMAINS: What I'm saying is, subject to what limitation, I mean? You're saying that is now summary judgment evidence. I guess for whatever, it's worth, obviously ....

KRONZER: Well, right now you have to use it in affidavit form and to be a competent affidavit, it has to be as though the witness could testify if he was there, and so that deposition has to have been in the third party case before you can prove unavailability in the affidavit or it's not usable even though it's sworn to. He's said that in some other proceedings.

MOORE: This is needed. It's a good amendment. I move ---.

MCCLESKEY: Alright, any opposition to 166a? In not, it will be recommended.

SOULES: Page 252, now rule 306d, I think with the word we've done, the last sentence would now be, should be stricken. Is that right, Judge Guittard, "failure to comply with the provisions of this rule shall not effect the finality of the plenary powers of the court?"

MCMAINS: Well, why don't you just say "except subject to 329c" or something?

SOULES: Some change would be needed in the last sentence, but the purport of my proposal was that the judge would deliver the judgment to the court for entry in filing in the case. And on the day it's filed, the clerk will serve a copy of it and that's subject to rule 21a. That would be by certified mail, return receipt requested, properly addressed and so forth in order to get a fix to start all these appellate ---

MCMAINS: Do you know it costs a lot of money to send certified mail? You understand they can't send a post card certified.

SOULES: That's the change in this proposal.

MCMAINS: I understand. I'm just saying that no longer can they send things in bulk. They've got to actually make the purchase or whatever it costs, 75¢, $1.25 or what, for everyone of these notices in addition to.

SOULES: It's a final judgment or other appealable order.

MCMAINS: Well, I understand that. First of all, this is a mandatory duty on the clerk. I'm not sure a clerk can necessarily tell what an appealable order is. For instance, a class action certification. He has to be told by the judge probably as to...

MOORE: Mr. Chairman?

MCCLESKEY: Hardy?

MOORE: Judge Meyers is gone. He told me that he's took judgments in 150 tax suits a week here in Travis County. That's $1.25 multiplied by, think about what it's going to run up to in the way of, you're going to have more clerical work required in certified mail, you're going to have more deputies, you're going to have the commissioners in some of these counties just balking paying that additional expense. First class mail, I think, everything should be post card first class mail, and another thing is, if it has a return address, if it's not delivered it will be brought back to you.

MCMAINS: A problem might be that the clerk might be required to maintain a log or something showing that it was mailed.

MCMAINS: Might be signed by the attorney anyways, probably the attorney's agent. Nine times out of ten that is the case.

MOORE: If you say deliver to addressee only or restrict the delivery, they will come back half the time.

MCMAINS: That's right, they will come back three-fourths of the time.

SOULES: I think that will be part of Bill's project, to write on 329b and c and that last sentence in this rule will have to be addressed at that point.

GUITTARD: That's right. I don't think you need it if you have a proper provision....

MCMAINS: Except as provided by rule 329c. Add that.

SOULES: I guess what we're really talking about is what kind or type of notice does the clerk mail? To me, if he's got a return receipt from a person who is or purports to be the agent of the person against whom a filed judgment or appealable order has been rendered or signed, you've got good constitutional predicate for starting the appellate period to running and telling him he's out. But that may be more than we want to require the clerks to do, and if so, then we're taking something less than what I presume to be pretty clear proof.

MCCLESKEY: How many of you feel that responsibility ought to be placed on the clerk to send it certified mail, return receipt requested? One, two, three, four. How many think that it should not be placed upon the clerk? One, two, three, four, five, six.

SOULES: I suggest then that we try on these new rules that we're going to try, 329b and c and see if the post card works. If it does, fine, if it doesn't we can look at this thing again.

MCMAINS: As long as it's mandatory and they have to keep a record, all it's going to be is evidence anyway, with an actual notice standard.

POPE: Mr. Chairman, right in connection with that, we won't take up the rules to discuss them, I'd just like to have a policy expression. I prepared immediately following, well you'll find 306d on page 253 that I prepared and then following that there's a 486 and I prepared those at the request of the Chief saying that he thought post card notices should not be used, that we should go first class mail on these communications from the clerk. Now just tell me what to do. We don't have to discuss it but those next two rules change it so that it's by first class mail.

MCMAINS: I agree with that.

KRONZER: Let me say that I heard some testimony in a case not long

ago about the effect of post card delivery against first class mail against certified against registered by postal authorities. I'm talking about the actual receipt and recognition, and it's an amazing difference. It really is. Even though the actual physical receipt in somebody's box may be roughly the same, whether it's advertising or what.

POPE: Well, what did that study show?

KRONZER: Well, it just shows that the higher step of service you go, the much greater guarantee you have of use. In other words, first class would be much greater than post card. Post card is way down on the scale. It's the bottom of the scale.

MCMAINS: For one thing it's all non-conforming mail.

MCCLESKEY: How many of you think that the policy should be that these rulings by the appellate courts should be by greater than post card level?

JENNINGS: Did you say appellate court?

MCCLESKEY: Appellate court, yes. I believe everybody here is in favor of that, Judge.

POPE: OK.

SOULES: Should the clerk send a copy? If he's going to put it in a wrapper, he could ....

KRONZER: Well, what Hardy says is right. A great volume of that material is stuff that the parties could care less about but then there are those cases about which we're all really concerned. I don't know how to answer that. I just say the more notice you can give to people that have been defaulted, the better.

MCCLESKEY: I think Judge just wanted a policy decision. Did you have a policy decision you wanted?

KRONZER: Yeah, I wanted to say I certainly hope the court gives favorable consideration to this rule 108a on page 202 By Doak Bishop, and I wanted to add, Judge, I have a very --- reaction. I know this court's got an advisory body, and it may be that you have solved the problem in part not necessarily, but with your liking, by Hall v. Helicopteros, but in terms of rule 4 in your reading in that area, I don't know if you've noticed the language of a panel of the 5th Circuit in Placid Investment vs. Girard Bank , but the panel of the 5th Circuit in that decision said that your power, in fact they invalidated service under rule 108 on the ground that you did not have any power to wire around Article 2031b under 1731a and I brought that just to leave with the court because if there was any way, now that we're catching in federal court citations that are bank diversity

actions, is they're saying, well you can't get it under the broader base of 108, which as you know we passed a long time ago but just so I leave no doubt as to what I'm saying. Finally, Placid contends that jurisdiction over Girard was obtained under Texas Rules of Civil Procedure 108. However, a rule of procedure adopted by the Texas Supreme Court may not be used as an --- around the substantive jurisdictional requirements enacted by the Texas Legislature in Article 2031b. To allow such a device would render Article 2031b a nullity. What seriously concerns me is that what is hurting parties bringing actions in the federal system is we're now being constrained by that kind of reasoning without any knowledge of the operation of Article 1731a to where the federal district courts are quashing service based upon rule 108, and I just, to me if there's any way ya'll could just come out, I know you don't advise it, but to make it real clear of what 1731a means and when you enacted rule 108, it's purpose was to broaden the base of due process jurisdiction to its maximum limits and you do have that power. It's just very offensive, but it's working against us in the federal system.

POPE: What do you do with 108a?

KRONZER: I move we adopt it. It's subject to the same debility, if the court's right, they just say you can't do it.

MCCLESKEY: Rule 108a has been moved for adoption. All in favor, hold your hand up. And that's unanimous.

POPE: I'd like to have that material.

KRONZER: Yes, sir, I'll bring it to you.

MCCLESKEY: Gentlemen, I really appreciate your patience and hanging in here with us, and we'll see you next time, which will be sometime off in the future.

Meeting adjourned 1:34 p.m.