ORIGINAL

SUPREME COURT ADVISORY BOARD MEETING

Held at 1414 Colorado
Austin, Texas 78701

Volume II of II

Taken on November 1, 1985

By Mary Ann Vorwerk

AFFILIATED REPORTERS
Computer Aided Transcription
805 West 10th, Suite 301 · Austin, Texas 78701
(512) 478-2752

NOVEMBER 2, 1985

CHAIRMAN SOULES: It's 9:30 and we're going to go ahead and convene.

For purposes of your planning -- and I don't know whether you'll be able to -- how many of you will be able to stay, but I'm committed to Sam Sparks and Bill Dorsaneo to complete review of their rules today, and we'll stay until that's done. I will and I guess they will. So that's what we're going to do. Sam has several rules to speak to and then Bill has those items -- particular items that he raised yesterday as well as trying to wrap his package up.

Judge Clinton has joined us I believe. Is he here?

HONORABLE CLINTON: Right here.

CHAIRMAN SOULES: Your Honor, we're pleased to have you this morning to confer with us on these harmonized appellate rules.

And, Judge Cofer, welcome back, too. We appreciate your being here this morning.

Because we have Judge Cofer and Judge Clinton here, I think it would be appropriate to take the appellate rules first so that if they would like to stay for the balance of the session, they are

certainly welcome, but if not, then they would be free to go about the rest of their day wherever else.

So, Bill, if you would resume. If you have any thoughts you need to go back and gather up from yesterday, well, just take over.

We're now in this Joint Report of the Standing Subcommittee on Court of Civil Appeals Rules & Supreme Court Rules.

Judge Clinton, do you need a set of those materials or do you have a set?

PROFESSOR DORSANEO: All right. I'm going to try to go through this in the same manner as yesterday. And I think we can proceed fairly quickly.

To refresh your recollection, yesterday we finished, aside from our discussion of the remittitur rules, with the consideration of old Rule -- or current Rule 373 and proposed Rule 42(b). Remember that 42(b) dealt with offers of proof and bills of exception in question and answer form, the problem of Texas Rule of Evidence 103. And please also note that this is the one substantive area that will have to be worked out with the Advisory Committee for the Court of

Criminal Appeals. This is one area where we appear to have some further work to do.

But at any rate, I think we got through that 42(b) for our purposes yesterday. If you'll look at the little memoranda and if we follow the items along, 376a, that particular proposal by Jeremy Wicker (Phon.) has already been taken care of, I believe.

377 -- is Ray Judice here? That problem has always also been taken care of, I believe, by the Supreme Court by its order of December 19th.

385. This little memoranda says that this change had also been made in Rule 385, and that's accurate. The change that the memoranda is about concerns a proposal, I think, that was made initially to the Supreme Court by this Advisory Committee November 11th and 12, 1982, and finally got put into the rules December -- by the Supreme Court's order of December 19th of this year.

But there is one other matter with respect to accelerated appeals that we could take up now. If you look in the Table of Contents for the proposed rules, accelerated appeals are now on Rule 32, and that begins on page 44 of the text. At the suggestion of one of the Houston Court of Appeals,

I forget which one now, what is currently Rule 385 has been modified in this draft such that accelerated appeals are divided into two types. The one type is the type we have now, the type that are accelerated appeals as a result of the mandatory provisions of the rule, that is to say, "Appeals in quo warranto proceedings" and "Appeals from interlocutory orders (when allowed by law)"...

At the suggestion of one of the courts of appeals a new sanction has been added, Section (b) which indicates simply that the court of appeals on motion of any party or on order of the court may advance any appeal and give it priority over other cases.

Now, Justice Guittard and I talked about what this proposal would mean and debated about whether the matter should be defined further as to what it means that an appeal may be advanced and decided that the matter was clear enough, that it simply means nothing more than that this appeal can be taken out of its regular order and dealt with before other cases, not that the timetable could be changed or anything like that for filing a record, et cetera, et cetera. So that's the idea. The note indicates that I, at least at an earlier

point, would have preferred to have the term advanced, defined a little more. My interpretation of this is that it would not authorize a court of appeals to impose an accelerated appeal, in the old sense, timetable on a regular appeal that is advanced. Understand what I'm saying? But there is that problem.

So, I guess the issue is whether you want to change Rule 385 or not with respect to giving the courts of appeals additional authority to what they already have, I presume, to give some cases priority.

For our purposes I'll move the adoption of this language that's in proposed Rule 32 either for inclusion in the whole package as proposed Rule 32 or as a replacement of current Rule 385.

MR. ADAMS: Second.

CHAIRMAN SOULES: Discussion? Those in favor of the motion, then please say I. Opposed? It's a unanimous approval.

PROFESSOR DORSANEO: All right. Moving along back to the memo which will be pretty -- be through with pretty soon. All right. Now, current Rule 438 you will recall, whether you do or you don't, we have two rules in our current Rules of

Civil Procedure that deal with the subject, in effect, of damages for delay.

CHAIRMAN SOULES: I don't know if the record properly reflects, that last action dealt with the materials on page 44 of the committee's report, styled Rule 32.

PROFESSOR DORSANEO: The current rules on damages for delay are Rules 438 and a part of Rule 435. Now, one of the things that our subcommittee, going back to the whole subcommittee appointed by both courts and the Legislature, decided was that we ought to have one rule for damages for delay. That rule is now embodied -- or the proposal is embodied in Rule 84 which begins on page 117 of this text.

The second thing, at the suggestion of, I think, mainly Chief Justice Guittard and, I think, Justice Shannon of the Austin court was that the current rules don't provide strong enough medicine in terms of the problem of persons taking appeals for delay purposes. And the proposed rule contains in its first sentence different language from both current rules -- both current Rule 435 and current Rule 438. Look at the first sentence of proposed Rule 84, please. "Where the court shall find that

there was no sufficient cause for taking an appeal or writ of error, then the court of appeals may award just damages and single or double costs to the appellee." That language, as the note reflects, is patterned upon language in Federal Rule of Appellate Procedure 38 and gives the -- in our view it gives the court of appeals more discretion to punish, quite frankly, punish someone who makes a frivolous appeal.

MR. WELLS: Couldn't -- previously couldn't they apply a 10 percent --

PROFESSOR DORSANEO: 10 percent. A 10 percent limit.

MR. WELLS: Why is that out of there? Are they just wholly unlimited in whatever is just?

PROFESSOR DORSANEO: Yes, yes. Limited by justice, not limited by an arbitrary percentage.

MR. SPIVEY: What has been the complaint from the appellate judges in the bar about the extent of this abuse?

PROFESSOR DORSANEO: Well, I don't have any report from the appellate judges. All I know is that Judge Guittard thought that both Rules 435 and 438 weren't very good and that they didn't provide enough flexibility. I don't think that his

attitude expressed -- or any of the other judges on our committee that they had an attitude that they were going to immediately start awarding large sums of just damages. But --

MR. SPIVEY: I'm concerned about the chilling effect on that because I've had both sides of the case where an appeal was taken and there was a white horse civil appeals' opinion directly in point against the appellate and the Supreme Court ultimately granted writ and reversed. And it seems to me that it is -- unless there's some clear abuse present that it has such a detrimental effect to discretion to appeal, that it's not warranted. It doesn't seem to me that it's particularly one side of the bar or the other is affected, but it seems to me that we ought not to just look for ways to close the door to the courthouse, trial or appellate.

CHAIRMAN SOULES: Justice Wallace.

CHIEF JUSTICE WALLACE: One problem with the 10 percent is where you have a case and somebody -- it's just so clear all the way up that they had no hopes of getting anything reversed, but there's no -- there's not a liquidated damage situation where you don't have any amount to assess

a 10 percent on and that would give the court flexibility to assess a reasonable penalty for frivolous appeals.

MR. McMAINS: Plus there are cases where their 10 percent is not very much money. I mean --

PROFESSOR DORSANEO: There still has to be no sufficient cause for taking an appeal. I mean, that's a pretty tough standard.

MR. SPIVEY: Maybe Justice Wallace can answer that. I just am not that aware of an abuse, and I know that the judge has obviously seen more than the practicing lawyers do. But I have no hesitancy in considering it if it generally is a problem of abuse, but I'd rather see us attack the specific problem of those instances where no relief is available now, rather than just open it up to everybody.

CHAIRMAN SOULES: Buddy.

MR. LOW: I think what Broadus is mainly concerned with is it discourages somebody from attempting to improve the law or change the law.

Isn't that what you're saying? That is, if you feel the law is a certain way and should be changed by the appellate court, it discourages one. You might have a situation -- in Turner the law was

fairly clear. And I'm not saying there might not be other points, so it would be a dampening factor on somebody that just had a strong belief that we should change the law on a particular point. And it would give the appellate court the right to say, "Well, look, he has no Texas case that supports this." That would encourage him then to look for a whole bunch of other points whereas he may want to take it up on one clean point where he can argue the philosophy of the law, but has no cases to support him. And it would discourage that, I think.

MR. SPIVEY: I was thinking specifically the case of Patton versus Shamberger (Phon.). It's a Supreme Court case. And they granted a writ in that case and reversed the court of appeals when there was a two-year old court of appeals opinion -- at that time the court of civil appeals -- directly against the petitioner, the appellate. And we just thought we were right and the court was wrong and, you know, the Supreme Court agreed with us. And, of course, you would have no problem if the court granted relief, but it seems to me that you're running a mighty big risk to appeal with the case in directly on point.

We just filed an amicus brief in a case this week or last week that there's a two-year old Supreme Court opinion, with all deference to Judge Wallace, that we think is just absolutely wrong, and I was glad to see the appellate lawyer have the guts to challenge it because he had a case that, I think, showed that the -- the Supreme Court case was white horse, directly on point. It just had such disastrous results in his fact situation, and the facts were a little different, but the application of the law would have been the same.

MR. BEARD: Shouldn't it be more bad faith than anything else? A couple of years ago we had a canon in the Supreme Court that you can't even appeal a divorce case on the ground that, of course, they didn't have jurisdiction in the divorce, but the parties -- one of the parties didn't believe in divorce, their religion didn't allow it. I would think that's kind of frivolous myself, but I don't know that the man should be assessed damages for it. I really think it ought to be bad faith.

MR. SPARKS: You know, we rejected yesterday a rule under the federal rules of Representative Hill. It was, in effect, a

frivolous lawsuit rule. So we're doing something in the appellate courts that we're not doing in the trial courts. That doesn't make a whole lot of sense to me.

PROFESSOR DORSANEO: Well, it makes sense to me to have this kind of rule because it is fairly clear to me that a lot of lawyers continue with a case and appeal it because they've had it so far, and they just continue to do the appeal and maybe if they had a rule that they could show their clients, say, "Well, we may run into a problem if we continue this bad adventure," maybe they wouldn't proceed.

MR. SPIVEY: You know, I wouldn't have any problem with a bad faith requirement because I agree that if somebody is just appealing for the purposes of delay, then they ought to be struck. But it seems to me the interest on judgment would take care of much of that.

PROFESSOR DORSANEO: Let me point out one other thing, Broadus, that I didn't mention. Rule 438 also is a little bit different in another respect. It says, "where the court shall find that an appeal has been taken for delay and that there was no sufficient cause." This draft says, "where

the court shall find there was no sufficient cause." Now, the reason in our meetings why that was cut down eludes my memory.

MR. McMAINS: Well, the reason actually is that the interpretation the courts should put on the delay only penalty is that it had to be that there was the bifurcated or dual test that you had to find both that it was frivolous and that it was taken for delay only before you could impose the mandatory penalty. And the way the courts have always gotten around that, the ones that do impose the penalty, and there aren't that many, probably a dozen in the last 20 years, but the way they got around it was to apply the just damages rule, which was the other rule. And that one you couldn't exceed the 10 percent but you could award somewhat less.

PROFESSOR DORSANEO: Yeah, I think that's right, Rusty, right. Now, but to put this in context, too, I personally, I do, you know, some appellate work and I am not afraid of courts of appeals punishing a lawyer who is acting in good faith if this is put into play. I'm not worried about that. I would be a lot more worried about trial judges doing a Rule 11 number on me than I

would be worried about the courts of appeals, you know, assessing damages against people or just trying to do their job.

MR. McMAINS: Would you feel more comfortable if you put a limit on it? I mean, is that your problem?

MR. SPIVEY: Well, I think it just needs a little bit more identification of a specific problem that's addressed to without being subjective. We would never had the -- perhaps if we hadn't had Judge Tunks on the trial bench, Shamrock versus Tunks might never have come up because poor Kronzer would have been afraid he was going to bankrupt him.

PROFESSOR DORSANEO: Well, what should we do?

CHAIRMAN SOULES: Well, I haven't heard anyone make remarks about the courts, but it doesn't seem to me that we've seen a lot of appellate court, appellate judge persuasion that an attempt to change the law is just going to get squelched. I mean, it may be overruled, but the lawyer who feels he's got a cause like you have had, Broadus, and told us about and we knew about, who really feels that, I don't believe is going to

run afoul of a court finding that there was no sufficient cause for taking an appeal where it's clear in your brief. You say, "There's the law. It's against me, but I'm -- it's not right. It should be changed." And that's your shot.

MR. McMAINS: If you file it.

MR. SPIVEY: But the best example given over here -- and I'm just guessing that Pat was talking about the Shelby Sharpe (Phon.) case. You know, I think a lawyer ought to have the right to challenge something -- the unconstitutionality of something no matter how absurd it may seem to others. You know, I've been accused of being absurd before and the jury would agree we me and occasionally a judge would agree with me. And it seems to me that's part of what the process of law is about.

Now, on the other hand, if we have somebody that's creating a specific abuse or you can build in some constraints so that it doesn't have that chilling effect, I see nothing wrong with occasional examples of bad faith or just pure delay, because -- but you ought to have something in there that it would at least place the lawyer on notice that he's fixing to get zapped. Let him

brief the point and show the court why there's not an absence of good faith there.

MR. SPARKS: Or at least advise his client of what just damages are.

CHAIRMAN SOULES: Tom. And then I think -- David Beck, do you still have some comments you want to make, too?

MR. BECK: I had a question to ask. I mean, the courts have a rule now that they can impose for what they believe are frivolous appeals, and I would be curious to know how many times that rule has been invoked, say, in the last year. I mean are we talking about --

MR. McMAINS: Three times.

MR. BECK: I'm sorry?

MR. McMAINS: Three times that I know of.

MR. BECK: That's all? Just three times? And so what -- Bill, what are we trying to do, just put more teeth in the rule?

MR. McMAINS: Yes, that's -- the real problem is that a lot of them simply say on their face -- "we can't even" -- "it is true that they don't have" -- "didn't have any reasonable basis upon which to appeal, but we're not going to hold that it was for delay only."

MR. BECK: Well, were any of those cases the type cases that Broadus is concerned about?

PROFESSOR DORSANEO: No, they're cases where there really is no -- where there's stupid appeals. I mean, that's just -- that's just where somebody is appealing because -- well, the ones -- my opinion of them is somebody is appealing because we're still fighting. We've been fighting all this time and we don't want to quit.

CHAIRMAN SOULES: Okay. Tom Ragland.

MR. RAGLAND: Under this proposed wording of this Rule 84, what is the standard of review by the Supreme Court or does the Supreme Court have jurisdiction to review a finding or an assessment of damage by the court of appeals?

JUSTICE WALLACE: Where the court of appeals has assessed the penalty?

MR. RAGLAND: Yes, sir.

CHAIRMAN SOULES: They've applied a legal standard. It says there was no sufficient cause of taking the appeal.

MR. RAGLAND: Sufficient cause, is that the --

MR. McMAINS: Well, I would assume that your position was that there was no just cause. I

mean --

MR. RAGLAND: That's the question. I don't know the answer.

MR. McMAINS: No, I'm saying, but the court of appeals is having to make that determination and the just cause is probably a legal issue, a legal standard, and therefore, reviewable on writ, would be my opinion. Now, we might ought to put that in the rule.

MR. LOW: What? The Supreme Court, in other words, could affirm the case but find that the court -- that there was just cause? Is there a procedure for that now that that can be done, the appellate steps can properly be taken? That's a new point.

MR. McMAINS: Well, you would be offended by the judgment, so I would think you would have a right to file an application for writ because the only way they can get to you is by judgment.

MR. LOW: Yeah, but's a new point to the Supreme Court, right?

MR. McMAINS: Right.

MR. LOW: I just wondered if the present practice is the rules are sufficient to preserve that point so that the Supreme Court would have

that right. That was the question I have.

CHAIRMAN SOULES: Okay. Specifically what does someone suggest we do with proposed Rule 84?

MR. BEARD: Well, I'm opposed to anything that has a chilling effect on what a lawyer thinks he ought to do. When the Legislature put that penalty on doctors' cases, a lot of lawyers are not going to start against the doctor looking for that evidence because if they don't find it, they get burned, personally, in the process. I just think it's bad to have a chilling effect on what lawyers are going to do.

PROFESSOR DORSANEO: Well, I think when you call it a chilling effect, that you -- and just to characterize it, I think that lawyers perhaps take appeals without sitting down and analyzing beforehand whether they really have an appeal. And I think the rule ought to encourage lawyers to function in a lawyer like manner and not to do something without getting into due consideration.

MR. SPIVEY: But what do you do about --

PROFESSOR DORSANEO: That's not a chilling effect.

MR. SPIVEY: What do you do about the

case where you -- there's a case on point all right. But it's directly against you and it's fresh, it's Supreme Court and yet you generally think the Supreme court is wrong and you want to exercise your right to challenge the Supreme Court because you've got a set of facts you say are different.

CHAIRMAN SOULES: We've got a 10 percent penalty now which doesn't work in unliquidated damage judgments.

PROFESSOR DORSANEO: Or when cases don't have damages.

CHAIRMAN SOULES: What?

PROFESSOR DORSANEO: Or non-damage cases.

CHAIRMAN SOULES: Or a non-damage case. So we -- we've got a -- at least a ten percent penalty and liquidated damage awards. And we don't have anything -- Judge Wallace pointed out to take care of awards -- judgments for other than liquidated damage amounts.

MR. BEARD: If we've only had three cases out of all the appeals and everything -- I think it's kind of like the guilty that we turn loose because of their constitutional rights. And I would rather just leave it alone.

CHAIRMAN SOULES: Okay. But we do have one point here that Justice Wallace wants to speak to and it's this last sentence, which is an important change and probably a real needed change as far as the appellate court's burden would be concerned.

Justice Wallace, do you want to speak to that?

JUSTICE WALLACE: My impression is that more often than not the appellate court is more prone to want to assess this penalty when somebody just screwed up his appeal, I mean it should never even be in appellate court from the brief they write.

And with that on us, on the appellate court, okay, if you're going to assess a 10 percent penalty, then you're going to have to brief the case for him from the word go and make sure there's no point there upon which he could appeal. Now, if the -- if the judge is so upset with a lawyer he's willing to do that, then maybe we ought to let it be. But if we take away that burden, just say, "The guy just screwed up and he doesn't know enough to be in the appellate court, so we're going to slap a penalty on him," I think that is that

chilling effect we've been talking about. So I have questions about this last sentence, that you don't -- that the court doesn't have to look for non-preserved errors. In other words, you don't have to do the briefing for him, you don't have to check into the case to all that extent. Every appellate judge I know is so busy right now I don't think he wants to take on a briefing job for some lawyer who screwed up his brief.

CHAIRMAN SOULES: Are you suggesting, Judge, that that change be made or not be made?

JUSTICE WALLACE: Not be made.

CHAIRMAN SOULES: Well, there's the quid pro quo to the court. The way it is now if the judge is going to try to find for delay only and no sufficient cause, he has to go through the entire record and find out if there is any other reason than what's been presented, basis on which that appeal can be taken.

MR. SPIVEY: Well, why not put the burden on the lawyers to raise this issue? I don't want somebody taking just a meritless appeal against me, but I guarantee you if you stick All State or TEIA, for instance, in a property damage or a small case, they're going to appeal anyhow. I'm not for

sticking TEIA and All State either, because they're litigants, generally, in this judicial system. And I just don't like the concept of discouraging them from appealing unless they're -- you know, if you have a clear abuse, if it's a clear abuse, bad faith, but you ought to have a finding like that rather than just leaving it discretionary, because --

MR. McMAINS: It's always been.

MR. SPIVEY: I'm not sure that the appellate court's discretion is a heck of a lot better than mine sometimes.

CHAIRMAN SOULES: Well, what if this were changed to say that the appeal was taken in bad faith and that there was no sufficient cause for taking the appeal?

MR. McMAINS: That would suggest that bad faith is something different. And what I'm trying to get at -- what is it?

PROFESSOR DORSANEO: It's subjective. We want on objective standard, I think.

MR. McMAINS: As long as you change anything -- I mean, if you change anything from where we are, you're still creating a standard uninterpreted which is going to be discretionary with the court of appeals. And that's what the

function of it is.

CHAIRMAN SOULES: Other than the point made by Justice Wallace --

MR. McMAINS: No matter what you call it.

CHAIRMAN SOULES: -- that there's no avenue for punishment other than cost for frivolous appeal in a case other than liquidated damage award, what's wrong with what we've got? It's got a ten percent cap, it's got some standards in it that have been used -- the "for delay only" has caused the court some problems. They can't seem to really find the evidence that, you know, that's what's in the other guy's mind. Those are the problems with it. But do we need to change it or are we willing to live with it?

David Beck.

MR. BECK: I have another question aside from the philosophical concerns that Pat and Broadus have. I don't know what "just damages" means. I mean, does that mean that a court of appeals in its discretion can just arbitrarily assess any damage sum they want? I mean there's going to be no evidentiary hearing, obviously, and I'm just not sure I want them to have that much discretion.

CHAIRMAN SOULES: That's the difference between just damages and 10 percent.

Harry Reasoner.

MR. BECK: Maybe the way to handle the non-money judgment problem is just to come up with some multiple of costs rather than just to have this open-ended just damage provision in here.

CHAIRMAN SOULES: Harry. P MR. REASONER: Well, I see from the notes that the just damages, as I understand it, was adopted from the Federal Appellate Rules, and I've just been curious whether there's any learning on that. You know, my impression would be that this is something that the court is going to very rarely apply. I am concerned about eliminating delay and injecting sufficient cause standing alone, because I don't think you ought to sock people for stupidity, having done some stupid things myself in practice. And the way it's written now, delay implies bad faith to me. Now, of course, that does make the courts very reluctant to apply it.

CHAIRMAN SOULES: How many feel just on a quick show of hands that we can take care of the unliquidated judgment by some multiple of costs? All right. How many feel that that should not be

the answer to that problem? Well, it's pretty --

MR. ADAMS: I think there's an alternative, and that is you can put a percentage, like 10 or 15 percent -- or not to exceed -- just damages not to exceed 10 or 15 percent.

CHAIRMAN SOULES: Well, I'm talking about the -- where the judgment does not have a liquidated amount. It's for -- it's an injunction proceeding or something where there is not any liquidated amount.

MR. REASONER: Well, does anybody know what the federal courts do in this area?

MR. McMAINS: Yeah, not much.

MR. LOW: They also have a procedure where sometimes they interview -- you know, they -- they're now starting to arbitrate, you know, and get to talk to the lawyers after the appeal is filed and that kind of stuff. They got a lot of things they do that we don't want to get into.

MR. McMAINS: If the truth be known, the 5th Circuit has penalized less than the state courts have.

CHAIRMAN SOULES: Let's get a consensus. How many feel that the rule ought to be essentially left as it is with a 10 percent cap and then speak

to the problem of how to handle the judgment other than liquidated amount? How many feel that that's what we ought to do? Okay. How many feel that it shouldn't be changed at all? That's pretty much an even division.

MR. REASONER: What about in the unliquidated cases putting a "such multiple of cost as the court shall find just?"

MR. McMAINS: Well, that's about 300.

MR. REASONER: Well, let me say, you know, that the places that I think you'll find abuse are in the unliquidated cases where somebody is trying to create an uncertainty or something to prevent a deal from closing.

MR. McMAINS: Cloud title or whatever.

MR. REASONER: Typical abuse is in tender offer cases where law firms really ought to be assessed. They just use the courts until the investment bankers can cut deals.

MR. LOW: But the thing is, do you want to close the courthouse doors to people because there's been only a slight problem? The problem just doesn't seem to have been that great. And then --

PROFESSOR DORSANEO: Why do you distrust

the judges so much that that's what they're going to do? They're not going to do that. They haven't.

MR. SPIVEY: Bill, let me test your good faith. Instead of penalizing the client who's incapable, we assume, presuming a good lawyer is making this decision, why not address the penalty to the lawyer? That's us. Because that's who really makes the decision on the recommendation of the client and doesn't have to accept employment for appeal.

MR. LOW: Well, you've started meddling now.

MR. SPIVEY: That's right.

CHAIRMAN SOULES: Okay. Does anyone have anything new on this now? We need to move on with our agenda.

PROFESSOR DORSANEO: Let's vote.

CHAIRMAN SOULES: Does anyone have anything new on this?

MR. RAGLAND: I have one.

CHAIRMAN SOULES: All right. Tom.

MR. RAGLAND: Just a question. If the rule is adopted substantially as worded here where it says that "the damages be assessed to the

appellee," how is this going to be apportioned in the event of multiple appellees?

MR. SPIVEY: That's a frivolous statement. Let's penalize him.

CHAIRMAN SOULES: All right. I'm going to break this down in order to give Bill some guidance. How many feel that the percent limitation of the present rule should be retained at 10 percent? Hold your hands up.

MR. McCONNICO: Liquidated cases --

CHAIRMAN SOULES: On liquidated cases. Of course, it doesn't apply to anything else.

MR. McCONNICO: Yeah.

CHAIRMAN SOULES: Seven. How many feel that just damages should be written into the rule as opposed to a percentage limitation? Five. I guess -- how many feel that there should be some percentage other than 10? One.

All right. How many feel that a multiple of costs is an appropriate remedy for a case where there is not a liquidated judgment? Ten. How many feel that some other way to handle that would be a better way?

MR. LOW: I do, but I don't know what it is.

CHAIRMAN SOULES: And if so, what is your way. Here's Harry.

Finally --

MR. McMAINS: Luke, if I may add something on that. If you're really talking about costs, what you're really talking about are the attorney's fees. No, what --

CHAIRMAN SOULES: Are they talking about costs from the trial court and on appeal and so forth?

MR. McMAINS: No, no, I mean -- what I'm saying is, if you're really talking about trying to do or undo the wrong of the frivolous appeal that Harry is talking about, then -- you know, rather than the -- if you don't have any money damages to do it, shouldn't it be some form of a fee schedule. Isn't that really what the damage is?

JUSTICE WALLACE: But aren't you getting into an entirely new fact finding duty on the part of the court of appeals to determine what reasonable attorney's fees would be?

MR. McMAINS: The question is whether or not you want to -- at the Motion for New Trial stage you should know whether or not the guy has a reasonable basis for complaint, and you could prove

up the attorney's fees at that time.

MR. REASONER: Or you could remand it for finding of attorney's fees.

PROFESSOR DORSANEO: That would be nice if we rewrite that. Why don't you move that? Make them pay the appellee's attorney's fees.

MR. REASONER: Well, I would permit a multiple of them.

PROFESSOR DORSANEO: At some rates you wouldn't need to do that.

MR. REASONER: No, I guarantee you, if it's a matter that's worth appealing, they'll sit and calculate "Well, hell, we'll just throw in the other side's attorney's fees." I mean to achieve delay.

CHAIRMAN SOULES: How many feel that the -- some arrangements should be written into the rule for the court to either assess or remand for assessment of the prevailing party's attorney's fees in a frivolous appeal?

MR. BECK: What do you do about a contingent fee, Harry? These guys make a lot of money.

MR. REASONER: That's a good point, but Rusty has tricked me again.

MR. ADAMS: Not with frivolous appeals you don't.

MR. BECK: You would be the appellee.

CHAIRMAN SOULES: Or limited to fees on appeal.

MR. McMAINS: No, but you're really talking about limited to a situation where there wasn't liquidated damage. I mean, you've already, as I understand the vote, has already kept the 10 percent ceiling.

CHAIRMAN SOULES: Well, not necessarily.

MR. BECK: I think it's broader than that, Rusty.

MR. BEARD: As I understand you go from a third to 40 percent you get a big judgment. Lay about seven percent on that other party, that would be some penalty from a big judgment.

MR. McMAINS: Well, you can go 10 percent now for frivolous appeal against an appellee under the current rule.

MR. SPARKS: So, you get 20 percent, at least, on a judgment, plus a possible multiple cost if we go into it. That's not a bad deal.

MR. McMAINS: My suggestion was to cover only the problem of what -- when you don't have a

liquidated damage. I mean, my understanding of where the committee was and the context in which I made the proposal was if you've got a damage number which is affirmed -- and obviously I think you would require an affirmance before you could penalize the other the side for having taken an appeal, which corrected or modified, anyway it wouldn't be appropriate.

HONORABLE WOOD: Of course, also you've got a number of cases where you'll have some liquidated damages and some recovery of specific property, like a trespass to try title case sometimes.

MR. McMAINS: Right.

HONORABLE WOOD: I beg your pardon?

MR. McMAINS: Right. Of course, assuming that there was a supersedeas bond filed, and you know, what that -- there's been an assessment of some kind.

MR. SPIVEY: You know, I'm concerned that we don't consider the unwritten portion of the rule and the effect of it. I really think this is a basic philosophical argument and it's something that we're -- it seems to me that we're -- if we've got a specific problem, let's address the specific

problem. And it seems to me that there ought to be some fact finding, not just the amount of the damages, but there should be a standard in the rule that the court has got to find were violated before they oppose a sanction.

CHAIRMAN SOULES: Well, it's in there. It's in 358.

MR. SPIVEY: It seems to me that no sufficient cause is just like that's a pretty girl or handsome man.

CHAIRMAN SOULES: No, we've already voted not to use that. Well, as I understand it, we voted to -- well, we haven't really, I'm sorry. I'm in error. Are we going to maintain the standard in the present rule that -- for "delay only" and "frivolous"? How many feel that those standards should be retained?

MR. BECK: Wait a minute. I thought -- the present rule talks about delay and not sufficient cause.

CHAIRMAN SOULES: Okay. "Delay and not sufficient cause." How many feel that that dual standard should be retained? Nine. All right. How many feel that the proposed Rule 84 standard should be used instead? That's four. The

consensus seems to be to keep the old rule. We've got one problem with it and that is that it doesn't speak to cases where there's an unliquidated award.

Steve.

MR. McCONNICO: Luke, I propose we keep the old rule and then with "unliquidated rewards" we just say "just damages for the penalty." And I'm going to support that by saying -- you know, we've kind of crossed this barrier on sanctions and we're sure not giving our trial courts any guidance on pretrial discovery sanctions, just whatever the court feels is appropriate, and I don't see that that's been abused. We've had some cases that have come up on it now, and I don't think it's been abused by any trial courts and I don't think it's going to be abused by the appellate courts.

CHAIRMAN SOULES: What's the consensus on that? How many feel that what Steve proposes would be appropriate?

MR. REASONER: I guess I would wonder, Steve, what you had in mind for the mechanics. Are you going to remand it for the assessment of just damages or are you going to have the court of appeals get into making a finding like that one?

MR. McCONNICO: I think let the court of

appeals make the finding of just damages.

CHAIRMAN SOULES: Okay. I'm going to take a vote on three things. Just damages, multiple of cost or something else. That's the only way I know to handle it. How many feel that --

MR. ADAMS: When you say "just damages," are you talking about the federal rule?

MR. McCONNICO: Only unliquidated.

CHAIRMAN SOULES: This is on unliquidated judgments. Judgments for something other than a liquidated sum is the only thing we're talking about.

MR. McMAINS: Which would include a take nothing judgment or a judgment for something that isn't money.

CHAIRMAN SOULES: That's right. And I guess if it's mixed, the court would be able to decide that 10 percent of the award and then -- that's liquidated could be appropriate in addition to that something more because part of it's not liquidated.

PROFESSOR DORSANEO: Who's going to draft -- tell me the difference between liquidated and unliquidated? I do not know the difference. I know how to spell the words differently, but I do not

know in hard cases when it's unliquidated or whether it's --

MR. McMAINS: No, what he means is there is not a money damage award.

MR. McCONNICO: Not a sum certain.

MR. McMAINS: He's talking about when you're appealing a judgment without a money damage award.

CHAIRMAN SOULES: That's what I'm trying to describe.

MR. McMAINS: That's what he's talking about. You're not talking about unliquidated and liquidated claim.

CHAIRMAN SOULES: Okay. I'll call it money damage, then. Is that term acceptable, Bill? Do you understand what I'm talking about?

PROFESSOR DORSANEO: Yeah.

MR. McMAINS: In other words, the problem is that 10 percent of nothing is still nothing.

CHAIRMAN SOULES: Okay. In a -- where the award that's been addressed by the appellate court is not a money damage award, and we're using the standard that we talked about regarding -- said we were going to maintain, that is the former standard, how many feel that the court should be

permitted to just assess just damages whatever that may mean?

MR. McCONNICO: In unliquidated?

CHAIRMAN SOULES: Yes, in non-money damages. Six. How many feel that the answer is "some multiple of costs," that that should be the approach? Nine. And how many feel that another answer is appropriate and have something to propose?

Broadus, what do you propose?

MR. SPIVEY: I sincerely propose -- because it seems to me that what we're talking about is a variety of contemptious conduct against the court. And if there is a meretricious appeal or a bad faith appeal, the lawyer had to have some role in it. Now, I ain't for sticking lawyers, but if you're going to put some teeth in this thing, let's put the teeth -- or let the teeth bite who the violator is, and that's -- that got to be the lawyer.

CHAIRMAN SOULES: All right. How many feel that bite the lawyer is the answer? Broadus is the only vote on that. All right. So --

All right. Now that there's -- there's a consensus nine to seven that the percentage -- that

a multiple of cost is the answer. What multiple do we use? Ten, 20? Somebody make a bid.

MR. WELLS: You've already tied the appellate court to a multiple, and we can't imagine what various factors are coming up in a case.

MR. McMAINS: How about not to exceed ten times the cost?

MR. WELLS: The most would be sometimes 10 or even 50 times, could be.

CHAIRMAN SOULES: Multiple not to exceed what? Because if you -- if it -- if there's -- what?

MR. BECK: Not to exceed ten times cost.

CHAIRMAN SOULES: All right. How many feel that a multiple not to exceed ten is the answer?

MR. REASONER: Well now, wait. We're talking about a few thousand dollars.

MR. WELLS: Yeah, you're not talking about anything.

PROFESSOR DORSANEO: Well, what's "costs"? Statement of facts' costs?

MR. McMAINS: Yeah, I think you should probably say --

PROFESSOR DORSANEO: But, of course, if

you're really taking it for a delay, you're not going to get a statement of facts.

CHAIRMAN SOULES: Well, all costs, trial court costs, Bill, are we --

Are we including in costs all the costs in a trial court as well as all the costs on appeal? Is that what we're -- how many understand that we're talking about all the costs of the case and all taxable costs, hold your hands up so that we can indicate. Okay.

Everybody believes what we're talking about, Bill, are all the costs in the trial in an appellate court.

Ned, what I'm concerned about and what I think the -- I feel the others are concerned about if you say "any multiple of cost," then you're back to just damages, which we voted out. That's

MR. WELLS: At least you've tied them to something, though.

JUSTICE WALLACE: Rusty, there isn't any cost bill in your transcript, is there? Ordinarily you don't find the cost bill in the transcript, do you?

MR. McMAINS: Supposed to. But a lot of times they don't put them in there. They put the

cost, of course, of the transcript. And the statement of facts is supposed to show the cost on it.

CHAIRMAN SOULES: How many feel ten times the multiple? How many feel ten times multiple is the appropriate multiple?

MR. SPARKS: Not to exceed --

CHAIRMAN SOULES: Not to exceed ten percent -- Ten times, I'm sorry. There are ten votes for that. And how many feel some other multiple would be appropriate? I know Ned feels that there probably should not be a ceiling on a multiple. How many feel that there should be no ceiling on the multiple? One. Does anyone want to suggest another multiple?

Okay. 10 percent seems to be the consensus on that, Bill.

MR. McMAINS: Ten times.

CHAIRMAN SOULES: Now, do we have anything else that we need to address on this in order to give you guidance, Bill, on how to --

PROFESSOR DORSANEO: No, except we need to take a vote on this last sentence.

CHAIRMAN SOULES: Oh, yeah, the last sentence. At the present time in order for a judge

to make a determination that the appeal is for delay only and that there is no sufficient cause, he has to review the entire record and go into things that have not even been raised on appeal.

MR. McCONNICO: Luke, I don't see that in the present rule. Is that 483?

CHAIRMAN SOULES: That's just the way it works.

PROFESSOR DORSANEO: That was a lawyer by the name of Michael Remme wrote a letter and said that he wanted to tag somebody for taking an appeal when all of the points raised in the appellant's brief had not been preserved below or hadn't been raised on appeal --

HONORABLE TUNKS: By point of error.

PROFESSOR DORSANEO: -- by point of error, you know, to begin with. And he said that he was afraid to -- I didn't exactly completely understand, but he was afraid to try to get the damages for delay because he thought that would open up the entire case and that there would be a reversal.

MR. REASONER: I didn't understand that.

MR. McMAINS: Bill, if I could explain? The case law -- and it's case law, it's an

interpretation of the rule which requires that the appeal be frivolous and for delay only. In interpreting that, the courts say, "Therefore the time that you make that determination is at the conclusion of the trial." You don't talk about whether he screwed up on a motion for new trial or how he briefed it. The time is when the judgment -- when the appeal is -- actually it used to be when the appeal was perfected, which was by notice of appeal, which is actually where those cases came from.

So at that time the question was, was there a reasonable basis for the appeal, and that was the focal point that you were supposed to look at. Then the court went one step further and said when an appellee raises that issue, which was the way it always has been addressed by the appellate courts, then it opens up the entire record for inspection. And if the court finds reversable error, whether preserved or not appropriate, subsequently, they have the jurisdiction to reverse. So that in order to assert the point of a non-meritorious appeal, you were opening yourself up to a scrutiny of the entire record and may suffer reversal on that basis because you, by the appellee's assertion of this

affirmative claim, have waived all of the predicates that were otherwise necessary for appellate complaint.

CHAIRMAN SOULES: And the addition of this last sentence would remove that problem or is designed to remove the problem that Rusty has just addressed.

MR. BECK: The appellate court doesn't have to do that, though.

MR. McMAINS: Doesn't have to, but you open yourself -- I mean, the problem you're seeing here is suppose he's got a golden point which he has waived at the motion for new trial status and all of a sudden you, being greedy and asking for the assessment of the frivolous appeal costs because his brief stinks and the court says, "Aha, we're going to reverse that because you have assented now to our inspection of the entire record," and --

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS: I move that that determination be made on the basis of the appellant's brief.

MR. LOW: Couldn't we do that by saying, "not have the effect of requiring the appellate

court to consider," and then they don't have to do it? You don't say they don't have to consider it. Instead of putting the effect of authorizing it, if that's what we're trying to get to.

CHAIRMAN SOULES: That doesn't really solve your problem, does it, Rusty? Because the court still could do it.

MR. McMAINS: Well, you're talking about a chilling effect, and the problem is that it's a chilling effect on claiming a non-meritorious appeal.

MR. SPIVEY: I've never alleged that and I guess that's why. I'm so myopic and don't see a problem with it.

CHAIRMAN SOULES: How many feel if we kept the last sentence in the rule at it's proposed, that the word "authorizing" should be changed to "requiring"? Let's see hands on that. Five. How many feel that --

PROFESSOR DORSANEO: I'm going to vote for that, too.

CHAIRMAN SOULES: Six. How many feel that "authorizing" should be left in here as it is proposed? Three. Okay.

MR. REASONER: Well, if you change it to

"not requiring," it doesn't really change the law, does it?

MR. McMAINS: It's still a risk.

MR. O'QUINN: It doesn't change.

CHAIRMAN SOULES: You still have the same -- the problem that Rusty is talking about if you change it to "requiring," that does not --

MR. LOW: Well, what Rusty is saying is that the court feels that they are required to do that. This doesn't tie the court's hands and say that they can't do it, but it doesn't clear the air that they're not required to do that.

CHAIRMAN SOULES: But it does not remove the risk to the lawyer.

MR. LOW: It does not remove the risk that that's --

CHAIRMAN SOULES: -- who asked for damages because of delay and no merit.

MR. LOW: Yeah, that's absolutely true.

MR. RAGLAND: It seemed like a pretty strong penaly if you're limiting the penalty at 10 percent on money damages for frivolous appeal. On the other side, if he raises the frivolous appeal point and is reversed, it gets wiped out completely. That doesn't seem like to be in

balance to me.

MR. REASONER: I agree with that.

PROFESSOR DORSANEO: It's not in balance, but it does have kind of a backyard fairness to it. If it's not the client's fault that the appeal has turned out to be frivolous because the lawyer messed up, then why should the client have to pay any amount as a penalty?

MR. RAGLAND: But on the other hand, if it is reversed, it's the client's judgment that's reversed.

MR. REASONER: Well, let me say that now that Rusty has explained the law to me, I'm never going to challenge anybody for having filed a frivolous appeal.

HONORABLE WOOD: What about this language, "shall not have the effect of" -- I had it, now I've gone and lost it. "Permitting the appellate court to consider allegations of error that have not been preserved"?

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: Now we're back to authorizing.

CHAIRMAN SOULES: That's pretty much the same as --

MR. McMAINS: What if we say -- I don't care if the court considers it for purposes of determining the merits of the decision to appeal, what I'm concerned about is that you ought not to have waived all of the appellate predicates under those circumstances. What you ought to say, in my judgment, is "that it shall not have the" -- "shall not authorize the appellate court to reverse on allegations of error."

CHAIRMAN SOULES: All right. Let's see a show of hands on that approach.

MR. McMAINS: "Reverse the judgment on the allegations of error not preserved for appellate review."

CHAIRMAN SOULES: Let see a show of hands on that approach and then Rusty will have to do some drafting with Bill. How many feel that what Rusty has proposed is the proper approach?

PROFESSOR DORSANEO: I do.

CHAIRMAN SOULES: Okay. How many feel differently? How many are opposed to that? One. So it's about 14 to one in favor of what Rusty has proposed. Do we have any more matters on this rule?

MR. REASONER: As I understand the way

Rusty is going to draft it, it will also make clear that the appellate court is not required to do it.

CHAIRMAN SOULES: As I understand what Rusty has said, he's going to write the rule so that the judge can consider error, whether assigned or unassigned, in determining whether the appeal was frivolous.

MR. REASONER: If he wants to.

CHAIRMAN SOULES: If he wants to. But he cannot -- the judge, other than for that consideration, cannot give consideration to unassigned error in reaching his judgment.

PROFESSOR DORSANEO: I think that takes care of Justice Wallace's point, too, doesn't it, that approach?

CHAIRMAN SOULES: All right. Any changes of votes after that explanation? Okay. The vote then stands at 14 to three.

PROFESSOR DORSANEO: Okay. Shall I say how I understand it or do we not dare to try to recapitulate?

CHAIRMAN SOULES: Go ahead and say it.

PROFESSOR DORSANEO: What you want me to do is to go back and take a look at current Rule 438 and add back into the introductory language

"taken for delay." To add -- to build back in the 10 percent on the amount in dispute as damages in a damage case --

CHAIRMAN SOULES: Money judgment.

PROFESSOR DORSANEO: -- and to add to that -- how much was it?

CHAIRMAN SOULES: Multiple of cost not to exceed ten.

PROFESSOR DORSANEO: For other cases.

CHAIRMAN SOULES: That's right.

PROFESSOR DORSANEO: And to modify that last sentence in the matter that we just discussed.

MR. REASONER: And "cost" is to be defined to include trial court costs?

CHAIRMAN SOULES: Yes.

PROFESSOR DORSANEO: Trial court costs only?

CHAIRMAN SOULES: Oh, no, sir, trial and appellate courts.

MR. McMAINS: All taxable costs.

CHAIRMAN SOULES: All taxable costs.

MR. LOW: All taxable costs in the lawsuit.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: All right. Now, let's

take a vote. Do we have a -- how many now are in favor of the rule being redrafted and adopted by the Supreme Court as Bill has just described it? Let's take a vote on that. 11. And how many oppose that? One opposed. All right.

MR. REASONER: Broadus, I want you to note that I voted with the majority on that.

MR. SPIVEY: All right.

PROFESSOR DORSANEO: I want to thank you for all that, Broadus. That was very helpful. I think we can go briefly over the remittitur business. This was taken up yesterday.

The proposal was made by Justice -- well, I'm not going to go and reiterate what Rusty said yesterday. I think the part we didn't really talk about -- did we take a vote on this yesterday, on any of it?

MR. McMAINS: We took a vote on the philosophy.

Which page is it on?

PROFESSOR DORSANEO: All right. You can look at either page 3 of the memoranda or --

MR. McCONNICO: 118.

PROFESSOR DORSANEO: 118. Page 118?

MR. McCONNICO: Yep.

PROFESSOR DORSANEO: All right. This Rule 85 is a combination of current rules. Paragraph (b) is, I guess --

MR. McMAINS: It's the only change.

PROFESSOR DORSANEO: Rule 440, currently, and the change is underlined in the little memoranda on page three. The current thing says, "In civil cases appealed to a Court of Appeals, if such court is of the opinion the verdict and judgment of the trial court is excessive." Rather than our suggestion "if such court is of the opinion that the trial court abused its discretion in refusing to suggest a remittitur." Just change -- what Rusty said yesterday, replaces one standard with another. I move the adoption of that suggested change to current Rule 440 and proposed Rule 85(b).

CHAIRMAN SOULES: Second?

MR. McMAINS: I second.

CHAIRMAN SOULES: Discussion?

MR. WELLS: Isn't that what we voted on yesterday?

CHAIRMAN SOULES: We had a consensus to go ahead and go this way, but as far as getting the specifics, we didn't really get into the specifics.

MR. McMAINS: What happened to the voluntary remittitur language which is supposed to be in here?

PROFESSOR DORSANEO: It's in there, Rusty. It's --

MR. SPIVEY: Page 3.

PROFESSOR DORSANEO: Isn't it? Where is it?

MR. McMAINS: It's not in the book that I have. That's why I asked.

MR. SPIVEY: It's listed on page 3 of number (d). But it sure is not on page 119.

MR. McMAINS: It's in the memo, but it's not in the book.

PROFESSOR DORSANEO: It got lost. All right. We'll add it in.

MR. McMAINS: With that exception. I mean --

PROFESSOR DORSANEO: We may need to talk about that, too. Judge Tunks raised a bit of a problem with the language yesterday.

CHAIRMAN SOULES: With the language on page 3 that's under (d), "voluntary remittitur," did Judge Tunks have something on that?

PROFESSOR DORSANEO: Well, he pointed out

to me yesterday that the language in the first sentence is a bit clumsy.

CHAIRMAN SOULES: Are you going to do some rewrite on that?

PROFESSOR DORSANEO: Well, I can talk -- we're going to talk about it. Are we going to vote on the first part or have we already voted?

CHAIRMAN SOULES: David.

We haven't voted.

MR. BECK: I have a question. I want to make sure I'm clear on what I'm voting on. By replacing the current standard with the abuse of discretion standard, does that mean that that issue can then go up to the Supreme Court?

MR. McMAINS: We debated about that yesterday. An argument can be made, I suppose, that it could be an issue in the Supreme Court. Either way.

MR. BECK: Because you're dealing primarily with the law.

MR. McMAINS: That's right.

MR. BECK: So, one effect this may have is allowing that issue to be appealed further to the Texas Supreme Court, where arguably you can't take it up now.

MR. McMAINS: No, but you can take it up now anyway. I mean, on the same issue, no. On the same issue --

MR. BECK: Not on the factual -- not on the evidentiary determination.

MR. McMAINS: But you can still take the position of abuse of discretion in an application if the remittitur occurs in the court of appeals, the other side goes up. I mean, it hasn't really changed any of that procedure. There are express procedures for going all the way up.

MR. BECK: Well, I -- then I ask the same question Harry asked yesterday, why do we need to change it if the effect is no change?

MR. McMAINS: Well, it's not that there -- it is not -- in my judgment it is a change. Judge Guittard said he didn't think it would change what the courts do.

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS: Is the current rule that the court of appeals can make its own factual determination on the record on remittitur a rule or is that --

PROFESSOR DORSANEO: It's Flannigan versus Carswell.

MR. McMAINS: No, what it -- it is the rule.

MR. SPARKS: Is it a constitutional base?

MR. McMAINS: No, that Flannigan is interpreting the court's power under the rule.

PROFESSOR DORSANEO: All right. I don't know, that's different.

MR. SPARKS: Is the factual determination, though, based on the Constitution or is it by rule?

MR. McMAINS: Remittitur has always been a rule or a statute prior to the rule.

MR. McCONNICO: No, remittitur started in Texas with common law. It didn't start in the Constitution. It's not found within the Constitution.

JUSTICE WALLACE: Well, isn't the one issue we need to decide is whether or not if it comes to the Supreme Court, the Supreme Court looks at the abuse of discretion by the trial judge as opposed to abuse of discretion by the court of appeals in reviewing the trial judge's discretion. Because if we're looking at abuse of discretion and only abuse of discretion, then you might as well not pay any attention to it. That's impossible.

MR. McMAINS: I think that the -- my personal view is that the question of whether the trial court abused its discretion is a law question. And that is the question that is reviewable.

JUSTICE WALLACE: That goes to the Supreme Court.

MR. McMAINS: If there is a question that's reviewable right now.

JUSTICE WALLACE: I didn't get that from the rule and that's -- that maybe should be clarified. How, I'm not sure.

MR. BEARD: If we're going to vote, we need to state this again. I came in right at sort of the middle, I guess, and y'all have got me lost. Is the court of appeals not -- if it finds abuse of discretion, it cannot make a suggested remittitur?

MR. McMAINS: Yes. If it finds an abuse of discretion by the trial court in refusing to remit it, then suggest remittitur itself.

MR. BEARD: And then when it goes to the Supreme Court, it's only whether the trial court abused, not --

MR. McMAINS: That's right. It's whether the court of appeals was correct in concluding that

the trial court abused its discretion. Because that -- that is a legal standard applied by the court of appeals in regards to the trial court's judgment.

JUSTICE WALLACE: So, in effect, what you're doing is saying if the Supreme Court wants to substitute its review for the trial -- for the CA review --

MR. LOW: Yeah, because otherwise you have presumption -- you add discretion -- on violation of discretion and you -- just couldn't never be any such thing.

MR. McMAINS: Well, in addition to which I think that's -- the other situation, of course, is you're remitting. I mean, if -- you aren't in the position unless you refuse to remit. And you don't get to go up unless you have remitted, and the other side goes up anyway. So, from that standpoint, it's not something that's just going to be routinely done, I don't think.

MR. REASONER: I take it the purpose of this change is to limit the power of the court of appeals to order remittitur.

MR. McMAINS: Yes, in my judgment. Judge Guittard, as I say, says that he doesn't think

that's going to make any difference. It's limit in the sense that the trial courts are the one that sits there as -- throughout all of the evidence and the question is, is an appellate court the appropriate body to threshold review against that decision or should it be looking at the trial court's action, whether it abused its discretion, which is really the federal standard, if you will, on excessiveness and on remittitur. That's whether the trial court has messed up in not cutting the damages.

CHAIRMAN SOULES: Bill, why don't you restate where we are and let's see if we're ready to take a vote.

PROFESSOR DORSANEO: Well, under the current rule according -- the court of appeals decides the remittitur issue itself and is not deciding whether the trial court did the right thing or the wrong thing. That's extraordinary -- an extraordinary thing for a court of appeals to do. And the proposal is made to have this thing be like every other thing.

MR. McMAINS: Right.

PROFESSOR DORSANEO: And Judge Guittard says that it doesn't make any difference, that he

will find it's an abuse of discretion if he has to.

MR. McMAINS: That's right.

MR. McCONNICO: Can I just add something?

CHAIRMAN SOULES: Steve.

MR. McCONNICO: I don't agree with Judge Guittard on that. I was at the subcommittee meeting. And right now, as I read the rule --

PROFESSOR DORSANEO: Is it fair to characterize his position, actually? Maybe we shouldn't.

MR. McCONNICO: Yeah. It's just -- all the court of appeals does is decide if the trial court judgment is excessive. That's the only decision they make. If they decide it's excessive, you can have remittitur. Under the proposal they now have to review the trial court judgment to see if it was an abuse of discretion for the trial court not to give a remittitur. That's as simple as I can make it.

CHAIRMAN SOULES: Okay. The change would be to go to an abuse of discretion standard. How many feel that that change should be made?

MR. McMAINS: We already voted on that yesterday.

CHAIRMAN SOULES: I know. Eight. How

many feel it should not be made? Four. Well, that's the same -- essentially, the same consensus we had yesterday, that it should be made.

MR. McCONNICO: I will add one thing to that because I looked at this a little bit and I had a briefing attorney at our firm to look and see how other states handle this before I went up to the subcommittee meeting. We looked at Illinois, Massachusetts, New York, California. We didn't look at all the states. I think we looked at the five most populous states. And it's not clear in most of the states how they handle the review. But from the states that we did see, it is an abuse of discretion review like in all other appellate reviews of trial courts where it's stated.

CHAIRMAN SOULES: Like we've just voted for.

PROFESSOR DORSANEO: In my teaching, too, in the torts area you get into this question. There usually is some sort of standard, too, that involves the highest amount that you could imagine or something like that.

CHAIRMAN SOULES: Well, do we have any more business on Rule 85 as proposed?

MR. McMAINS: May I make one comment,

please?

CHAIRMAN SOULES: Yes.

MR. McMAINS: The other thrust of this -- remember we changed Rule 324 last time to require a motion for new trial, whereas the remittitur point is waived, which is already controlled. The court -- I mean, you've already -- requires presentment to the trial court anyway as a prerequisite for appellate review. And all this is is just putting it back.

PROFESSOR DORSANEO: And to that extent, Rule -- current Rule 440 is misleading because it suggests that you don't have to do anything in the trial court to raise the excessiveness complaint in the court of appeals.

CHAIRMAN SOULES: Is that cured by your current verbage?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Do we have any more business, now, Bill or anyone else, on proposed Rule 85?

PROFESSOR DORSANEO: Yes, we have this voluntary remittitur. Pardon us for not putting (d) in the back. I have a question that --

Rusty, I think you drafted this language,

didn't you?

MR. McMAINS: Rather hurriedly, I'm afraid.

PROFESSOR DORSANEO: I know. But would it be okay to change this first sentence to say "effects only part of the judgment"? Do we have to say "effects only part of the damages or judgment," or are we talking about the judgment only anyway? The idea here is to let somebody voluntarily remit in order to avoid a reversal.

MR. McMAINS: But -- yes. The problem, I suppose, is that the reason that I put "damages or judgment" in there, you might have a situation in which the argument is made that -- let's suppose you submit items of damages listed as elements, but you come out with a bottom line number, but -- and there is -- but the evidence, arguments, everything else shows that the damages for that element for "X" and the error that you're talking about affects only that amount.

The question is, can you remit -- can you tender a remittitur as to that portion of the damages which is the max that it would affect or do you have to suffer reversal because of the fact that you only have one answer line?

PROFESSOR DORSANEO: Okay. You're reading "judgment" to say judgment, this piece of paper, as opposed to the judgment including everything that is in that number?

MR. McMAINS: Yes.

CHAIRMAN SOULES: Judge Tunks, did you have something, some concerns about this?

HONORABLE TUNKS: What? I didn't understand it at first. But what Rusty says clears it up for me.

MR. REASONER: What if you have punitive?

MR. McMAINS: What do you mean? Well, I think you've -- I think if you've got something that affects the punative damage recovery, then your choice is to tender remittitur all the punitive damages. You can affect part of the punitive. What I'm trying to deal with is a situation where supposedly there's error in admitting a piece of evidence that affects only one aspect of the claim, but you don't have a separate answer line for it.

I really think the case law would support the fact that you could remit. The court could order a remittitur now in order to cure that error of the maximum amount that the jury could have included

under the evidence or that number, but shouldn't have because of the evidentiary problem.

JUSTICE WALLACE: That's done quite often now, isn't it?

MR. McMAINS: Uh-huh.

JUSTICE WALLACE: If you're talking about medical expense, just reduce it by the amount of medical expense.

MR. McMAINS: Right.

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS: I just want to ask a question. Pat raises a good point back here. It doesn't affect the court of appeals on finding that the damage findings are against the greater weight?

MR. McMAINS: Don't know.

MR. SPARKS: Thanks.

MR. McMAINS: No, no. I'm just telling you I don't know under the current case law. There are -- my view of the case law is that there is a difference between making a factual sufficiency or against the great weight point as to amount, which in my judgment is an excessiveness complaint as opposed to --

PROFESSOR DORSANEO: Any.

MR. McMAINS: As to the existence of

damage.

PROFESSOR DORSANEO: Right, that's great weight. Any number.

MR. McMAINS: Really and truly, excessiveness is an amount issue, and that's not something that is appropriate for an independent factual sufficiency review, in my judgment.

MR. BEARD: You say the law is certain in that respect?

MR. McMAINS: No, that's why I said it was my view. I'm not sure the courts are in total agreement, because it's basically, you know, you're talking about courts of appeals who may say a number of things about it.

MR. BEARD: So the issue still is floating?

MR. McMAINS: Oh, I think the defendant will probably try and take positions that it's -- that the evidence is insufficient, period, and then try and avoid arguing the abuse of discretion. And that may be something that ultimately that has to be resolved, but that's a different issue.

PROFESSOR DORSANEO: Should we go to the next one?

CHAIRMAN SOULES: Does the writing on

this subparagraph (d) now satisfy you if we are going to have a voluntary remittitur paragraph? All right. How many are in favor of including a voluntary remittitur paragraph? Ten. And how many are opposed? None.

MR. BECK: Just out of curiosity, have any of the members of the claims bar ever made a voluntary remittitur?

MR. MCMAINS: Well, is the question is whether you get to keep --

CHAIRMAN SOULES: Do we have any more business on Rule -- proposed Rule 85?

PROFESSOR DORSANEO: All right. I'm going to slide over Rule 452 in the interest of not spending the rest of the year on this matter and go to Judge Casseb's suggestion, to Rule 458. This particular suggestion which has been drafted into proposed paragraph (f) of proposed Rule 100 is that a time be imposed upon the courts of appeals for ruling on motions for rehearing. The language in this paragraph (f) which appears on page 4 of the little memo and which I hope appears in the text of Rule 100 -- what page?

MR. LOW: 131.

PROFESSOR DORSANEO: Yeah, 131. You've

got me gun-shy here now. Speaks for itself. "In the event a motion or second motion for rehearing is not determined by written order made within sixty days after the same is filed, it shall be overruled by operation of law on the expiration of that period." There is no time period within which the motion is overruled by operation of law at the present time. And Judge Casseb -- what was the problem with that? It had to do with appealing further, I suppose, to the Supreme Court, just stuck on stop.

CHAIRMAN SOULES: Any discussion on proposed paragraph (f)?

Judge Tunks.

HONORABLE TUNKS: There are some instances, not many, in which it isn't necessary for the -- or advisable for an appellate court to hold a motion for rehearing for more than sixty days. For instance, if a similar case has been decided by another court and the Writ of Error has been granted in that case, the courts of appeals are inclined to hold the case in which it will be controlled by what the Supreme Court does in that Writ of Error, therefore, that they ought to hold a motion for rehearing in their own court until the

Supreme Court has passed on that case in which it has granted the Writ of Error. I wanted you to be aware of that before you decide on it whether to be included or not.

PROFESSOR DORSANEO: Well, what would that -- would that mean we should lengthen the time? I mean, it could be the case that the Supreme Court takes a long time, too.

HONORABLE TUNKS: The Supreme Court is not limited to six months deciding a case.

MR. McMAINS: Judge Guittard also made the observation that this was -- if the court of appeals wanted to sit on it, all they had to do was withdraw their opinion. And then they can issue a new opinion later. I mean, if the court wants to delay it, there is nothing you can do about it as long as they're within their jurisdiction. So I'm not sure that it really accomplishes anything if the court is hell bent and determined to delay something.

The function of it, as I understood it, however, from Sol's letter was that one of the problems you have is that you kind of feel like a motion may get lost up there, you don't know what's happening. And there are examples that have

occurred within the last three years where the court of appeals has inadvertently not notified the parties of the overruling of a motion for rehearing which has created considerably havoc later on. And --

JUSTICE WALLACE: I think the real impetus behind this was Judge Casseb's own court down there that got so far behind, they were sitting on a motion for rehearing sometimes two years for no reason really. And that was the impetus behind this. And I think Judge Tunks is absolutely right. There needs to be some escape valve in for the situation he mentioned.

CHAIRMAN SOULES: Harry.

I'm sorry, Judge.

JUSTICE WALLACE: Some notation, perhaps, by the court of appeals as to why it's being held longer than sixty days. We had an instance or two in Houston where some people say for -- because one particular justice is up for reelection, he wouldn't decide a controversial case until after November, that sort of stuff.

CHAIRMAN SOULES: Harry.

MR. REASONER: Well, I guess, you know, while -- what Justice Wallace points out is a very troubling thing. It seems to me that this does

kind of demean the rehearing process. Certainly my experience with federal agencies, for example, where you have automatic overruling, that's what is resulted is that there just is no more rehearing process. Everything is just -- you know, they ignore it and it's all treated as automatically overruled. And my impression is that the way some of our courts of civil appeals operate --

MR. McMAINS: They may just decide not to rule on anything.

MR. REASONER: Well, or -- I think that they do take -- that their first opinion is one that they do feel compelled to take a hard look at. And if it's a hard case, sixty days is not a lot of time for the appellate court to act.

CHAIRMAN SOULES: Anything else on this rule before we vote on whether to have automatic overruling of a motion for rehearing in the court of appeals? Okay. Whether it's sixty days or otherwise is not really the issue on the table right now. It's whether we have it or don't have it. So let's vote to see how many feel that there should be some overruling by a passage of time with regard to motion for rehearing in court of appeals. How many feel there should be such an overruling by

passage of time? One. How many feel there should not be such an overruling? Nine. There are nine. That's nine to one against having an automatic overruling by passage of time. So that would be the consensus of the committee.

MR. REASONER: I think that we should refer the problem of such courts that are delaying for two years to the task force on Administration of Justice and let them --

PROFESSOR DORSANEO: Okay. So we're going to take that out.

CHAIRMAN SOULES: Paragraph (f) is -- the committee is against that by a vote of nine to one.

PROFESSOR DORSANEO: All right. Let me move on. That concludes all of the proposals for change to the current rules that were made over the past several years that we tried to build into this proposed package. Please take a look at the plan which is on page 1 of Arabic No. 1 of this packet, which is about page 6 after the table of contents. And I'll go over briefly with you the structure of these proposed appellate rules and in the process of doing that explain kind of what we did.

"Applicability of Rules." There is nothing particularly important about that. It's just a

general statement as to what courts these rules -- proposed rules would be applicable.

The "General Provisions," Section Two is an important section. It includes a large number of things including such things as communication with courts, filing, service, notice, amicus briefs, duties of clerks of courts of appeals, duties of court reporters. Much of what is now in the "General Provisions" has been sprinkled in the current rules throughout the rules of procedure. And in addition to that, there has been a lot of redundancy and inconsistency. For example, many of the rules repeat that information about the number of copies and about sending one of those copies to opposing counsel. There is no need to have so much prolixity in the rules and have the same thing repeated over and over again when one general provision is -- can accomplish the same thing.

So, one of the things that we have, the "General Provisions" eliminated the need for a lot of language in the rules, a lot of redundancy and basically simplify for that reason.

Section Three doesn't have a great many modifications in it from the current rules and it basically deals with how you take an appeal, how it

is perfected or filed, how the record is gotten to the court of appeals.

Section Four, "Motions, Briefs and Submission" more or less speaks for itself.

Five, that speaks for itself.

Section Six. Now, in the original draft developed by the committee appointed by the Supreme Court, the Court of Criminal Appeals and the Legislature, we had two -- we had one section called "Original Proceedings in Courts of Appeals," because at that stage of the game the Supreme Court Rules were not in this package. At our last meeting in May when we were asked to add in the Supreme Court Rules, we did that by adding a separate section for Original Proceedings in the Supreme Court. I think that that is the draft that was used in making recommendations to the Court of Criminal Appeals, if I'm not mistaken.

Since that time we decided that it would make a great deal of sense to have one section called "Original Proceedings in Appellate Courts," because, quite frankly, the rules of procedure for courts of appeals and the Supreme Court in the current rule book are virtually identical. So it was a simple matter of collapsing, basically, four

rules into two with some modification in wording. And so that was done.

With the certified questions, in our current rule book some of the certified question material is in the court of appeals' part of the rule book and some of it is in the Supreme Court part, depending upon where the action is to take place, whether it's the certification part or the response part. That's all collapsed into one place, in "Certified Questions."

Basically after that Eight, Nine, Ten, Eleven, Twelve and Thirteen more or less, and virtually always more, track the language of the current rules in the Supreme Court of Texas part of the rule book. There are some modifications there, but I would characterize them as more or less minor things.

So that's -- you know, that's the overall plan and that's the road map that we have followed from -- as modified in terms of this plan from a very early stage in this process of trying to draft combined rules.

Now, with respect to rules that are of particular importance or ones that you may want to look at carefully, I'm going to try to go through

those quickly. Rule 4 -- I think you would find nothing remarkable about either Rules 1, 2 or 3. Rule 4 is one of those rules that's picked up from various places throughout the rule book and it's meant to be a general purpose rule dealing with the "Signing, Filing and Service" of everything that's signed, filed and served in the appellate courts. It is taken from a variety of places throughout the rule book, but the point is that all of the information is now located in this one Rule 4, whether you're talking about a brief filed in the Court of Appeals, a motion or any other paper required by these rules to be filed.

An appellate court, again is defined broadly in the rules of procedure definitional section, which is Rule 3, to include all the appellate courts. Let's see, "'Appellate court' includes the Court of Appeals, the Supreme Court and the Court of Criminal Appeals." Now, this rule replaces a lot of things here hither and yon. You look in Rule 414 you'll see a number of copies for briefs. You look in whatever, there's probably a number of copies. There is probably something that says this is meant to be served in accordance with Rule 21(a). We think that this is an improvement more

or less modeled along the way the federal rules have done things.

Now Rule 5 --

MR. REASONER: Can I ask one question? Do the rules make clear what happens if something is received more than ten days tardily? I take it it says if I mail it and that the court doesn't get it? What happens then, if I can proof I mailed it, but he didn't get it for 12 days?

PROFESSOR DORSANEO: If you can prove you mailed it one day beforehand, but he didn't get it --

MR. REASONER: Yeah.

PROFESSOR DORSANEO: -- within the ten days?

MR. REASONER: Yeah.

PROFESSOR DORSANEO: Well then, you didn't file it. Right?

MR. REASONER: Well, given the state of U.S. mails, I --

MR. McMAINS: No, there are cases and that's the reason that we amended the rule to authorize as well a certificate of mailing in addition to the instrument itself bearing a legible postmark. The procedure that you follow now and that has been recognized -- basically it's all case

law because there really isn't a rule provision for what happens if it don't get there -- is that you then file -- you do need to check to find out, and if it doesn't, in fact, get there, then you file your extension motion. Because if it isn't there within ten days, then -- you have 15 days to extend anything in the appellate court. And so, then basically you extend or file a motion for extension along with your proof that you mailed it. And the Supreme Court has even said that an affidavit that it was, in fact, mailed is sufficient to justify, you know, the granting of the extension of time. Now, what happens after the 15 day period I don't know.

MR. REASONER: So what you comtemplate is that everybody is going to call the clerk and see if it got there?

MR. McMAINS: Well, you're supposed to get notice by the clerk, of course, that it did get there. If you don't get such notice within ten days, you ought to be looking.

CHAIRMAN SOULES: That's right.

MR. McMAINS: That's a hiatus in the existing rules. None of these are changes.

MR. REASONER: I understand that. I

mean, one approach is to say that mailing is filing, but this requires actual physical receipt.

MR. McMAINS: Yes.

PROFESSOR DORSANEO: Where did we make that improvement, Rusty?

MR. McMAINS: Well, it's in the rule itself on service by mailing.

MR. WELLS: On page 5 and 6.

MR. McMAINS: It says, "Service may be personal or by mail." That's on the bottom of page 6. "Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing." You see, so we do have the provision that it's complete on mailing. And then you've got the proof of service problem.

MR. REASONER: Well now, that means service is complete.

MR. McMAINS: That's the reason that --

MR. REASONER: That's service on counsel. That's not filing.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: That's right.

MR. McMAINS: "Papers presented for filing shall contain an knowledgement" and so on.

It says "Proof of service may appear" --

MR. WELLS: Back on 5 is where we should be.

MR. McMAINS: Where is the rule? I'm sorry, it's on page 5. "If received by the clerk not more than ten days...shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the U.S. Postal Service" -- which is something you get when you mail it. It cost you the cost of a postage stamp -- "or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing," which in turn is proof of service.

MR. REASONER: But not filing.

MR. McCONNICO: Well, see, that -- are we varying 21(a) in any of these?

MR. McMAINS: Only with that. Only by the certificate of mailing provision.

MR. McCONNICO: Because I like 21(a) as it's written. I probably should have picked this up before because as 21(a) is written, it says, "service by mail shall be complete upon deposit of the paper enclosed in a post-paid properly addressed wrapper at a post office or official

depository under the care and custody of United States Postal Service."

PROFESSOR DORSANEO: But that's not filing.

MR. WELLS: That's service.

MR. McCONNICO: That's service.

MR. McMAINS: Yeah, but we're not talking about that. He's talking about filing.

MR. McCONNICO: I know. Why can't we do this with filing?

MR. REASONER: Well, I guess that's really my question.

CHAIRMAN SOULES: Well, that's never been done. There are no rules in Texas that make deposit in the mail the same as filing.

MR. McMAINS: The rule on filing has always been what is now 4(b).

CHAIRMAN SOULES: Filing means stamped by the clerk. It can be deemed filed at some other time once it becomes filed by the clerk, by the rules here if it's received ten days -- if it's deposited in the mail one day before it's due and received sometime in the next ten days. When it is filed, it's filed the same day it's received, but deemed filed earlier, by operation of the rules.

But we don't have any rules that say that deposit in the mail constitutes filing. The clerk has to actually do something before something is filed under all the rules that we have in Texas.

PROFESSOR DORSANEO: Now, maybe this ten days is no longer -- what you're saying, Harry, is that ten days isn't good enough time any more. I think in the old days ten days was probably thought of as a long time. If not received more than 20 days?

CHAIRMAN SOULES: Well, there are ways to handle that. I mean, it's risky business to file by mail. We've known that for some time.

MR. REASONER: I'm afraid that's true. I guess I don't --

CHAIRMAN SOULES: So we have to call and find out if they got it, is what I think cautious lawyers do. And the failure to receive means that you start a different avenue of getting it filed and hopefully the mails will accommodate you, but if they don't, then you've got -- you're going to be out some inconvenience.

MR. McMAINS: The problem with changing the times to go much more than ten days is that it dovetails right now with our 15 days extension

times. I mean, if you mail it a day ahead of time, then you've got actually 16 days in which to file a Motion For Extension. So --

PROFESSOR DORSANEO: So why don't we not --

MR. McMAINS: Huh?

PROFESSOR DORSANEO: We did improve it on the legible -- on the certificate from the Postal Service as opposed to you not being able to prove -- you can't prove when you mail it because you can't show a legible postmark because it's illegible. So now you can get a certificate.

MR. REASONER: That's the purpose of the proviso?

CHAIRMAN SOULES: But you get a certificate at the time you mail it. And the Supreme Court has held that an affidavit that it was mailed is sufficient.

MR. McMAINS: That's right.

CHAIRMAN SOULES: Well, why don't we put that in the rule? That seems to me to be critically important.

MR. McCONNICO: I'm sorry, Luke, I didn't hear the last comment.

CHAIRMAN SOULES: Is it ending with that? The Supreme Court has held that a legible postmark

is not required, even though the rule says it is. And we're saying -- and that an affidavit that the thing was mailed is enough.

MR. McMAINS: Let me -- what is -- the situation is this.

CHAIRMAN SOULES: Okay.

MR. McMAINS: We were trying not to encourage people who let the times go by and are just prepared to send an affidavit and say "By the way, I mailed it."

CHAIRMAN SOULES: I understand.

MR. McMAINS: Well, let me get along. This rule merely says that this is prima facie proof that this is sufficient. They've got to accept it if you've done any one of these things. Now, anything else that you do is basically provable, as our rules provide, by an affidavit in the court of appeals, okay? And the court of appeals determines what's been done factually from a standpoint of its jurisdiction by rule which is how the Supreme Court and the courts of appeals have handled the problem when you have something that's been misfiled either by the clerk or by the Postal Service or something else that has gone beyond this, and frankly has not really proved to

be a problem.

CHAIRMAN SOULES: Well, we -- of course, litigants are losing their rights under CLICK and even with the 15 day extension. It seems to me like the risk of a false affidavit in ten days may be used. I mean, maybe there are going to be a lot of those. But why shouldn't we accommodate the --

MR. REASONER: One thing about the present statement, Luke, is I think any prudent lawyer who reads this will get a certificate. If you put "or affidavit," I don't know that they will.

CHAIRMAN SOULES: Well, it's -- but why -- I guess what I'm saying is why do you have to go to the extra trouble of getting a certificate? Why don't we just say an affidavit is enough if you're in ten days? Why can't we just depend on lawyers as officers of the court to say, "I mailed it and I'm within ten days." What's ten days? You know, big deal. Why do we have to go through extra paperwork at the post office, whatever the cost may be, more paper to keep in the files?

MR. McMAINS: The basic problem is how long are you going to give them. I mean, there must be a time limit.

CHAIRMAN SOULES: Ten days.

MR. McMAINS: No, you -- you're not giving them ten days. You're saying an affidavit. You haven't put any time limits, we have no mechanism -- I mean, basically two months later they find out. "Hey, we haven't got a brief. We're getting ready to dismiss your appeal." And you say, "Hey I mailed it." And they just come in, you know, two months later.

CHAIRMAN SOULES: Maybe it's a bad idea. Sam Sparks.

MR. SPARKS: Luke, I'm sure this is all interesting. I've got two or three rules that I would like -- we're losing members quickly that are really ready to come out of the discovery -- that I sure would like to discuss before we're going to break, and it's already 11:10, or 11:15.

MR. REASONER: I thought you would be interested in this discussion, Sam.

CHAIRMAN SOULES: My principal remark to that is that on May the 31st we called a two day meeting to last until 4:30 this afternoon, and I -- Bill has done as much work as anybody else has and we need to get these rules -- we need to get them all out, and I hope that people will stay and

attend and participate.

PROFESSOR DORSANEO: I'll try to go quickly. Maybe -- you know, some of this we're talking about what the old -- I'm really just going to point out the changes from current law, now. All right?

CHAIRMAN SOULES: Okay. Let's quickly go through the changes from current law and --

PROFESSOR DORSANEO: Okay. The "Computation of Time Rule" is basically the same as the current rule with the exception of the last sentence of paragraph (a), and I'm going to let Rusty explain the problem. It's a tricky little problem and it has to do with the situation where something was due to be filed on a --

What is it, a Monday, Rusty?

MR. McMAINS: Yeah.

PROFESSOR DORSANEO: And Monday is a legal holiday.

MR. McMAINS: All right. Let me start.

PROFESSOR DORSANEO: I'll let him explain.

MR. McMAINS: There are, interestingly enough, on these little sophisticated problems a split in the two courts of appeals. Unfortunately,

I think one of them is no writ and one of them is NRE. The question -- the rules provide that when you dovetail all the computation and extension rules, that if you mail something a day before its due, then that's good enough for all of the things connected with the appeal.

On the other hand, there is also the rule that says that when you -- when something is to be filed or you're supposed to do something and the day that you're supposed to do it is a Saturday or a Sunday or a legal holiday, then you get till the next business day, okay, that is not a Saturday, Sunday or legal holiday. The thing that arises all the time is if your motion or whatever is due on Saturday, Sunday or a legal holiday, then you are supposed to, under the rule, mail it the day before. Well, if it's Sunday the day before is Saturday, that's also a Saturday. Therefore, the question is, can you mail it on Monday or must you mail it on Friday, which is actually two days before it's due.

And surprisingly enough the courts have applied those rules differently. One has said filing it on -- serving it, that is, mailing it on Monday is good enough even though it's due on

Monday and even though you're actually sending it the day it's due. The day you were supposed to mail it is Sunday and you can't mail it on Sunday, so you mail it on Monday and that's good enough. The court recently -- I believe it was Corpus --

CHAIRMAN SOULES: How is this written?

MR. McMAINS: This is written to give you the Monday.

CHAIRMAN SOULES: How many favor that? Show of hands.

MR. McMAINS: It gives you the extra time.

CHAIRMAN SOULES: All right. How many opposed? Okay. That's fine.

PROFESSOR DORSANEO: Okay. Look at -- I'll just point out that the Rule 19, "Motions in the Appellate Courts" -- this is another tricky area. The current rules of appellate procedure for the courts of appeals have or contain no one rule about motions. There are rules about these motions, those motions. There is no general rule saying even what a motion is or what it should contain, what it should look like. This contains -- this has that, copied basically from the federal rules. There are other provisions that are taken

from the current rules incorporated in here, such as "Docketing Motions," "Notice of Motions," "Evidence on Motions," "Determination," et cetera.

Perversely, paragraph (g) of this rule, "Number of Copies" should have been crossed out because, of course, that's now covered by the general rule on "Signing, filing," et cetera. So that's just an oversight on my part, a clerical error, if you like. So (g) should go.

Secondly, the rules about motion practice in the Supreme Court are even really more obscure. There's a rule that says that the rules of procedure applicable in the courts of appeals apply in the Supreme Court when there isn't any guidance in the rules for the Supreme Court. And I presume that means that rules on motions apply in the Supreme Court, but I don't -- for example, I don't know what the motion practice is in the Supreme Court, what its requirements are, et cetera. This rule would take care of that as well.

MR. McCONNICO: What rule are we talking about, Bill?

PROFESSOR DORSANEO: Proposed Rule 19.

CHAIRMAN SOULES: It's on page 33 of the materials.

PROFESSOR DORSANEO: Page 33. Well, as far as the court is concerned, what we now have is a rule about motion practice in the appellate courts. It's an all purpose rule that is pretty much a procedural thing rather than having obscure references to motion practices without knowing much about it.

Now, there are specific rules about specific motions later. This Rule 19 at the beginning says, "Unless another form is elsewhere prescribed by these rules," and there are other circumstances -- situations where there are other rules.

Now, I can go quickly through the other changes because there really aren't that many. We've talked about most of them. One of them is in ordinary appeal, how -- when perfected, okay? We have a provision now in the rules of procedure or we have basically several ways to perfect an appeal, bond, cash deposit, notice of appeal when you don't have to post security affidavits. The current rules kind of inadvertently do not give you a 15 day extension --

MR. McMAINS: On notice of appeal.

PROFESSOR DORSANEO: -- when you are the kind of appellant who appeals by giving notice of

appeal. That, undoubtedly, was an oversight, and that's been built in to treat that type of appellant the same as all other appellants, giving this 15 day period to cure screwups.

We've already talked about the change in the accelerated appeal rule. We've talked about the supersedeas thing. We've talked about preservation of appellate complaints.

Please take a brief look at Rule 63. This is more or less again in the nature of reporting. We have no rule in the rules of procedure now dealing with the important subject of the form and content of motions for extension of time. There are many courts of appeals that have local rules requiring a motion to fulfill certain prescribed requirements. We thought that there ought to be a rule in the big rule book that explains that because it is so important and this Rule 63 does it. It is patterned on the Dallas local rule which is a representative local rule in this problem area. There is a companion rule in the Supreme Court part of the rule book which deals with the form and content of a motion for extension of time in the Supreme Court and that it is the same kind of idea.

CHAIRMAN SOULES: And criminal appeals.

It was also patterned on something that's in the Court of Criminal Appeals.

PROFESSOR DORSANEO: Yeah, that's right. That's right. And we also borrowed again, as we have in many instances, from good provisions. And I'm going to talk about another one of those that are currently applicable criminal cases, but we don't have anything like that in the civil area. Another one of those is Rule 69, "Panel and En Banc Submission" on page 108.

As far as the civil rules are concerned, there is no rule in the big rule book about panel and en banc submission.

On my goodness. Make a note to check whether 1812(b) of the revised civil statute -- that that's still right. There may be a change this session. I doubt it. It's probably still --

CHAIRMAN SOULES: We're now on page 108 of the materials.

PROFESSOR DORSANEO: Page 108. And basically now we have a rule about a panel and en banc submission that was worked out by the appellate -- principally the appellate judges on our committees, and that's been added in. It is modeled on criminal appellate Rule 206.

Yes, Your Honor?

HONORABLE CLINTON: Let me answer your question. It's no longer 1812(b), it's Government Code Section 22.223.

PROFESSOR DORSANEO: Thank you, Your Honor. I thought it might be sneaking around there.

HONORABLE CLINTON: You'll find that in a couple of places in the rules. You need to change it to the government code.

PROFESSOR DORSANEO: I think we did it in the other -- in 1738. I caught that, but I didn't -- 1728 -- but I didn't catch it on this one. Thanks.

CHAIRMAN SOULES: Thank you, Judge.

PROFESSOR DORSANEO: Really -- I think I'm really about through. I'm sure that there is a lot more that could be said about this overall package from top to bottom, but I think those are the important changes. I'll probably think of something else of importance, and I would ask any of the committee members to -- or anyone else to raise something.

MR. WELLS: Where have you got anything about mandamus proceedings?

MR. McMAINS: It's in here.

PROFESSOR DORSANEO: It would be Original Proceedings in Appellate Courts.

MR. McMAINS: Basically modeled after the existing rule.

PROFESSOR DORSANEO: Rule 121, "Mandamus, Prohibition and Injunction in Civil Cases" on page 141.

MR. WELLS: When you tie that in -- does that tie into your Rule 42 motion? Can a single judge decide those things?

MR. McCONNICO: That's a good question.

PROFESSOR DORSANEO: No, I wouldn't think that that's motions.

MR. McMAINS: It's not a motion. That's an original -- application for original proceedings then.

CHAIRMAN SOULES: You file a motion for leave to file.

MR. McCONNICO: You do file a motion for leave to file. So, why couldn't a single judge hear --

PROFESSOR DORSANEO: That's a good question.

CHAIRMAN SOULES: Can y'all straighten that out? I'm sure the consensus is that one judge

should not be able to decide a mandamus.

MR. McMAINS: You want to put an exception in the motion thing that says except --

MR. McCONNICO: Motions for leave to file mandamus.

MR. McMAINS: Leave to file original proceedings.

CHAIRMAN SOULES: Original proceedings.

PROFESSOR DORSANEO: Yeah, that motion thing does -- did have a large exception on deciding -- well, deciding cases, didn't it, for rehearings?

JUSTICE WALLACE: You're talking about granting motion to file the petition as opposed to granting the mandamus. Now, that's --

MR. McMAINS: Right. It's clear that they can't grant a mandamus for --

CHAIRMAN SOULES: How many judges act on motion for leave to file?

JUSTICE WALLACE: We require three.

CHAIRMAN SOULES: That's what I thought.

PROFESSOR DORSANEO: Yeah, that needs to be put in there.

JUSTICE WALLACE: Those things have a bad habit of coming in at 5:00 o'clock on Friday. And

everybody who's there -- we require at least three. If not, hold it over till Monday.

CHAIRMAN SOULES: I guess it would be "except in conjunction with motion for leave to file original proceedings."

Harry, did you have something on that?

MR. REASONER: Was there consideration given to limiting the length of briefs unless changed by motion?

PROFESSOR DORSANEO: Justice Hill raised that yesterday. There was consideration given to it and -- at all committee levels. I think Judge Clinton mentioned that that was not a problem on the criminal side any more since one of the judges on the current quota was elective or something like that. But we basically decided not to add in a 50 page limitation.

MR. McMAINS: We essentially, I think, decided to defer to the courts of appeals if they wanted to impose their own. I assume subject to review of their local practice.

PROFESSOR DORSANEO: It was considered and this was decided not to do it.

MR. McCONNICO: Have any of the courts done it?

MR. McMAINS: Yeah.

MR. McCONNICO: Who?

MR. McMAINS: Houston and Corpus.

CHAIRMAN SOULES: Anything further, Bill?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Judge Clinton, I would like to invite you now to make any remarks you have about this work product and what you've heard today and whatever considerations you've given us before. If you have any remarks to make, we would be pleased to hear them.

HONORABLE CLINTON: The only thing I have to say -- I understand you kind of plowed this ground yesterday -- the only thing I want to say about the court and its rules -- our court and its rules -- I need to emphasize to you that the Legislature has put us under a bind. And if we're going to have to act by January 1 to adopt rules, what the Legislature calls a comprehensive body of rules of procedure and post-trial appellate and review at the same time we have the authority to adopt rules of evidence in criminal cases, we're under the same time constraints.

So we're going to get out -- and the importance of that is if we don't do it by January

1, we lose the authority to do it, number 1. And number 2, there are certain articles in the code of criminal procedure that are repealable under that act by virtue of adopting the rule. So if we don't adopt a rule that covers the provision in the Code of Criminal Procedures, it's not repealed. We want to do that.

Substantially the same situation exists on rules of evidence. What I'm getting ready to say is because of those things, we're going to turn out a product. And when you look at it, you may not like it. I'm sorry. But we just don't have the time to go through all of this again. We've been through it once, what we had. We don't have the time to go through it again between now and January 1. And I'm sorry if you don't like it, but we're under that -- we feel -- obligation to do it for very good sound policy and practical reasons. That is for us to get that authority and keep it and run with it.

So the point is even though you don't like what we turn out, and we may not like it either, we're going to put an effective date -- we're not under any limitation on when they become effective. We'll put an effective date down the road and then

with patience and care and tender loving kindness we will go through all of this and other things and eventually come up, as I've told Justice Wallace, with that great desired one book.

And unless somebody has some questions about any of this, well, that's all I have to say. And I think that's about all that needs to be said on the subject.

CHAIRMAN SOULES: I know this committee certainly understands your time constraints and appreciates them. And furthermore, we also very much appreciate your willingness after that January 1 deadline, very important deadline, to work with us, conference committees or what have you, between the court, whose committee this is, and your committee and your court and us, to get a work product out finally that is harmonious. As you said, the one great book. And we'll work, Judge, with you at your convenience and at your direction as well.

Rusty.

MR. McMAINS: I just want to make one addition to the stuff that we really didn't -- there is one other change of significance, that is the extension of time that was put into the rules

in 306(a) as to the trial courts, has been added to the appellate courts which means, basically, that if you don't get notice of a motion for rehearing as required by the rules, then you get an extension by proving by affidavit or whatever or petitioning the appellate court, saying that you didn't get the notice and you didn't acquire actual notice. Now, there's an outer parameter there, just like the other rule, 306(a), of nintey days.

So if you have not gotten, for instance, the notice of overruling or motion for rehearing, but it was, in fact, done, you got, in essence, a ninety day grace period in which to -- your times for filing a motion for extension doesn't run until that motion is granted. So --

CHAIRMAN SOULES: Okay. Let's see if we can wrap this up.

MR. McMAINS: That's in Rule 5, I believe, isn't it?

PROFESSOR DORSANEO: Yes, it would be in paragraph (e) of Rule 5 on pages 10 and 11.

CHAIRMAN SOULES: Okay. Let's see if we can wrap this up.

First of all, I know that the committee is very appreciative, Rusty, of your work, and, Bill,

of your work in getting this report to us in the shape it is in and with the relatively few number of changes, I think, that have been suggested here yesterday and today. You must feel substantial feelings of accomplishment that you've got this work product where it is. I know I certainly do feel so.

I would like to get now a consensus from the committee if you're now prepared to, with the change that we've suggested over the last two days in session, to recommend to the Supreme Court -- this is for Bill's guidance in putting out a final product that we will act on in March, as we did these evidence rules yesterday. They were, in essence, passed on on May the 31st and then brought up yesterday just in a clear text, final text. And that's essentially what I, as chair, expect us to do on these appellate rules next time, is a very final approach to recommending to the Supreme Court the adoption of these rules without a major combing through them again. We'll be looking at other major problems next time. This will be just a small part of our agenda.

Well, now that you understand how I perceive this, I want to ask that the committee, in that

same vein is prepared to, with the changes we have suggested, recommend to the Supreme Court of Texas that this report be adopted and be prepared to finalize that on -- in our March 7th meeting. How many so feel?

HONORABLE WOOD: I hate to say a thing in the world, but I had, on page 10, noticed this subparagraph (d) before.

Is Mr. Tindall here?

Well, he had a problem, I guess, is the word for (d) there. And I'm on the subcommittee, and I think I know what it is. He points out that, looking at paragraph (d), you take a judgment in a case where you have published service. Then the rule says that you have two years to file a motion for a new trial. All right. You file that motion, say, in a year and a half or something of that sort. Then he says if it's been filed more than 30 days, the motion, it shall be presumed then that the judgment was signed 30 days before that motion was filed. Now, the motion is filed, say, a year and a half, more than 30 days. The rule then says -- and it may be changed in here. Y'all can tell me -- the rule then says that you shall serve the parties affected by it with service. You shall serve them

the citation. And they shall then come in -- and the motion will be right for hearing, the motion for rehearing. Okay. Now what it is is a motion for new trial. And when you file it, why then your 30 days has already run. Okay. You get service by citation to serve these people, why you're looking at 20 odd additional days. That's, say, 50 something. It's got to be ruled on within 45.

MR. McMAINS: It's actually -- you actually have 105 from the date of judgment --

HONORABLE WOOD: All right. So --

MR. McMAINS: -- within whatever jurisdiction it arises. So you're -- actually you've got 75 days from the date you file your motion if you're -- given the way this rule reads.

HONORABLE WOOD: All right. Now, Tindall points out, then, that you've got 30 days plus time to get service, that's 50, maybe, maybe 55 --

MR. McMAINS: Maybe longer.

HONORABLE WOOD: -- maybe longer than that. And you're cutting it pretty fine then to get a hearing on your motion under those circumstances. Now, I think I told somebody that some people have achieved -- some people are born great, some have it -- achieve it, some have it

thrust upon them. As a -- I myself, in looking at his problem, drafted something. And if --

Russell, if it's not handled in what you've got here, I will be glad to read what I wrote. Short, of course.

CHAIRMAN SOULES: Why don't we hear what you've written there, Judge.

HONORABLE WOOD: I sent this around to a few people, but not to the entire committee -- I mean not to the lawyers committee, because I assumed that somebody -- one of our chairman would be here.

MR. McMAINS: Can I ask you this question? Would it solve his problem, at least give you an initial 30 days, if it says that it's deemed -- the judgment is deemed signed the date that the motion is filed? Because that gives you the extra 30 days that we just took away from you.

HONORABLE WOOD: I would think that would be all right, because that would have him then -- he could get his --

MR. McMAINS: Why don't we do that?

Do we have a real good reason for not doing that, Bill?

PROFESSOR DORSANEO: No, and quite

frankly --

MR. McMAINS: In fact, there probably should be -- in fact, there is a good reason to do it, because you don't know -- you may have left something out or something that you might get special exceptions on, and you don't have the -- outside the 30 days you don't have the power to amend it.

CHAIRMAN SOULES: Let's look at --

PROFESSOR DORSANEO: This problem here that is now embodied in this proposed Rule 5 is a -- basically a Rule 306(c) problem, and that rule is a problem, current rule. I mean, that's part -- what you're pointing out, Your Honor, is really just already there in paragraph 7 of 306(a) -- pardon me, current Rule 306(a). And that rule could be -- could take up a whole two days, in and of itself, and I think did a couple of years ago and still could.

MR. McMAINS: He's talking about (d). He's not talking about (e). He's talking about in the situation where you got process served by publication.

PROFESSOR DORSANEO: Yes, right. Well, I'm saying that particular language is verbatim out

of current Rule 306(a).

HONORABLE WOOD: Well, that's what he was complaining about, current Rule 306.

MR. McMAINS: What I'm saying is you -- but if you just change -- his particular problem is just the time. We've taken 30 days off his -- off the trial court's disciplinary power, even though they have various and sundry obligations to do service and stuff that are not typical of a motion for new trial.

CHAIRMAN SOULES: Well, are you going to just strike "30 days before" out of the text?

MR. McMAINS: As if the judgment were signed on the date of filing of the motion.

CHAIRMAN SOULES: Okay. So you just strike out "30 days before," those three words and leave it otherwise intact?

MR. McMAINS: Except you put "on" -- strike out "30 days before" and put "on the date of filing the motion."

CHAIRMAN SOULES: All right. How many feel that should be done? Opposed? All right.

PROFESSOR DORSANEO: I don't know why Clarence put -- I don't know why he put that in there, so I have no way of knowing what in the

world it's about.

CHAIRMAN SOULES: Well, if it -- will you please check with him and if it is something important, give it some consideration -- some additional consideration?

HONORABLE WOOD: I think we know why he put it in. If you key it into the rules about the steps going from the judgment, I don't see that that would do violence to it, but it might.

CHAIRMAN SOULES: With that additional change, then, how many feel that -- and subject, of course, to conference committees with the Court of Criminal Appeals, how many feel that these rules, when they incorporate these changes, will be ready for recommendation to the Supreme Court of Texas for adoption, please raise your hands. And how many opposed? That's unanimous.

All right. Sam, sorry we don't have a bigger audience for you, but --

MR. SPARKS: An audience is an unimportant quality or perserverance, one of the two.

I think I'll just try to bring the ones that have given most of the lawyers concerns. If you turn first to page -- well, I don't have them

numbered, but rule -- we stopped at Rule 101. Rule 101, it's been suggested, removed the "Monday next after twenty days" and make it "twenty days." Most everybody that I have talked to are not in favor of that. They like the seldom call from New York or California to explain to those lawyers what it means. But, the part of the rule that has been suggested reads "The citation shall include a simple statement to the defendant to inform the defendant that he has been sued, has the right to employ an attorney, and that, if a written answer is not filed with the appropriate court within twenty days after service of citation and petition, a default judgment may be taken against the defendant." And we think that's a good inclusion in this particular rule because all of us have run across that poor fellow who was served and was walking from court to court on a Monday trying to find out where he's supposed to appear. But not a major significance on Rule 101, so that seems, to me, an easy one to decide what you want to do there.

There are two changes in it, to make it "twenty days" and to have the citation read as indicated.

CHAIRMAN SOULES: Okay. How many feel that the awkwardness of the "Monday next" language should be removed from the rule and should be a specific number of days after service, raise your hands please? One. How many feel that the rule --

I'm sorry, Ned, excuse me. My apologies to you. Two.

How many feel otherwise that we ought to just leave it like it is? Six. And that --

We don't need to change that, Sam. If you'll leave that part of it as is.

How many feel that we should have a plain English statement, such as the other suggestion that advises a party served with citation, as this does advise them? How many feel that? How many feel otherwise? Okay. That's unanimous. So the language in that advisory should incorporate "Monday next after 20 days," which we're going to maintain that awkwardness. But the rest of it, I guess, will be in plain language.

MR. McMAINS: I have one question, though. If the wording is exactly, it says, "you have a right to retain an attorney."

MR. SPARKS: And it says, "has to inform him that he has been sued and has the right to

employ an attorney."

MR. McMAINS: I'm only concerned in this day and age of civil rights if they think that they've got a right for somebody to pay for a lawyer. I mean, I don't know whether that language is ambiguous in that regard, but there are, of course, cases pending in the Supreme Court on whether or not -- in the United States Supreme Court, the circuits on the rights of indigents to counsel in civil cases.

MR. BEARD: Well, I don't see language about an attorney in any other states. And telling them that a default judgment will be taken against them is sort of routine on citations out of other states. But I have never seen the language which says you have the right to an attorney.

MR. McMAINS: All I'm saying is do you want to say, "his right to retain an attorney" or say, "may wish to contact an attorney" or "may wish to hire an attorney" or something? Something that would suggest that we aren't -- the county is not suggesting we're going to pick up the tab, is all I'm saying.

CHAIRMAN SOULES: How many feel that there should be any information in this advisory

concerning an attorney?

MR. McCONNICO: Say that again, Luke. I'm sorry.

CHAIRMAN SOULES: What I'm saying is should we just limit it to, "You've been sued and a default judgment is going to be taken," and omit any reference to an attorney? How many feel we should omit a reference to an attorney? That's four. How many feel that there should be a reference in the advisory to an attorney? Six. Okay. We should have a reference -- is this the one we want to use? Does anyone have a --

MR. SPARKS: I'll go ahead and draft another one that just simply says "you may" or something along those lines.

MR. McMAINS: Yeah, "you may hire an attorney" or "you may consult an attorney." I just --

CHAIRMAN SOULES: "You may employ an attorney," something along those lines. Okay.

MR. SPARKS: Yeah, I've got to redo it anyway, so I'll redo it that way.

MR. RAGLAND: Let me ask a question here.

CHAIRMAN SOULES: Yes, sir.

MR. RAGLAND: What is the anticipated effective date of this rule?

CHAIRMAN SOULES: We don't have any control over that, really. The Supreme Court really promulgates these rules, sets an effective date. What is the concern?

MR. RAGLAND: Well, the concern is you've got 254 counties that have to buy these printed citations up and they may need more lead time on something of a change of this magnitude, than otherwise, because I'm sure that some of them got a years supply already and want to use them up. But the logistics of getting them printed and in hand probably ought to be considered.

MR. McMAINS: We might consider modifying in some way the citations rule that would authorize the use of a stamp.

CHAIRMAN SOULES: What about saying, "the citation shall include or be accompanied by" a simple statement?

MR. McMAINS: Yeah.

MR. SPARKS: Okay.

CHAIRMAN SOULES: Or something. That may be an awkward way of saying it, but you could staple an advisory on the citations that they're already using, if we did it that way. We want to be able to accommodate a clerk just stapling or

somehow attaching the advisory to a current form, Sam.

MR. SPARKS: Okay. I'll do that.

CHAIRMAN SOULES: Okay. If we do that, then -- as I understand it, the committee is unanimous that such an advisory should be afforded a party to serve the citation.

MR. McMAINS: I personally think you have less problems if, in fact, you stamp it. It will cost a whole lot less for a rubber stamp. You're going to otherwise have the problem of what happens if that notice -- if they deny that they got that notice. I mean, you know, if you're stapling and putting separate documents and --

MR. BEARD: It's not going to affect what happens, at all, if it's left off, is that it?

MR. McMAINS: Well, I'm not sure that's true, though, with the strictness of compliance with the citiation rule in order to sustain a default.

MR. SPARKS: The next rule is 103, and we had a lot of input on that. It changes that if the lawyer wants the clerk to mail a registered certified mail, the rule would change to where the clerk must do it. And apparently this has been a

problem everywhere. I know it has been in our part of the world. The clerk just won't do it. You have to go down and try to find a deputy sheriff, and sometimes they're not too reliable. The constables are less reliable sometimes. This looks like a good rule and I certainly recommend it. It changes the world "may" to "shall if requested."

MR. McMAINS: Second.

CHAIRMAN SOULES: Discussion? In favor? Hold up your hands. Opposed? It's unanimous for the change.

MR. SPARKS: Rule 106 is the next one and this is to make service more easy. And it changes -- adding a "good cause therefor," but allows the court more latitude in using, I assume, professional process servers. I had several letters on this. Apparently it's a good rule or a good recommendation.

CHAIRMAN SOULES: What it does is permits any interested adult or disinterested adult to serve a citation, but only on order of the court permitting substitute service, is that right?

MR. SPARKS: That's right.

CHAIRMAN SOULES: So, you've got to have a court order permitting substitute service. Now --

MR. SPARKS: But you can do it by motion rather than -- you know, technically you're supposed to go down and try it one time and then -- apparently in the divorce area this has been requested a lot, so that you don't have to go through the getting an affidavit from the deputy that they've tried it and that type of thing. It appears to be a good rule.

CHAIRMAN SOULES: Well, it's the first step to -- prior to this you had to go attempt service before you could go to the court and ask for substitute service. This just eliminates the necessity for attempted service prior to asking for substitute service, is that correct?

MR. SPARKS: Yeah, and it's my understanding and I've sure seen it in El Paso. People are doing this anyway, they're just going and getting a court order on a motion on doing service that way. I don't know if it's been challenged or not, but I think it's one that we ought to accept.

CHAIRMAN SOULES: How many favor the suggested change, please show it by hands? Those opposed? Again, that's -- the committee is unanimously for the change.

MR. SPARKS: The next one is Rule 162. What we have tried to do in 162 is we had a couple of letters from district judges who had questions as to whether or not they had to sign an order of dismissal on non-suits. Then we had several letters from lawyers -- and I'll have to admit, I didn't know that you could go down there and just file a notice of dismissal under the existing rules, but you can. I think the problem is that most of us who practice don't realize we could.

What we've tried to do in 162 is combine a lot of suggestions allowing a dismissal and preserve the same precautions that a dismissal has no effect on any pending motion for sanctions and that it's suppose to be accompanied by the payment of the court costs. But it allows it from any time up and through introduction of all the evidence other than rebuttal evidence. But this is a change, and we're combining a couple of rules.

MR. McMAINS: Sam, the only question I have is in the second part of the underlying it says, "any dismissal...shall not prejudice the right of an adverse party to be heard on a claim for affirmative relief." What I'm wondering is shouldn't there be some kind of requirement that

that claim has been pending at the time? I mean, that would appear to say that if the other party comes in and says, "Hey, I've got a claim here. I just haven't had a chance to file it yet."

MR. SPARKS: After it's dismissed?

MR. McMAINS: Yeah.

CHAIRMAN SOULES: Start a new lawsuit.

MR. McMAINS: Well, I understand that, but it may be -- I mean, what you're really talking about are venue situations a lot of times, choices or -- maybe pending service someplace.

PROFESSOR BLAKELY: Put the word "pending" in there. "Heard on a pending claim."

MR. McMAINS: "Be heard on a pending claim." How about that?

MR. SPARKS: That's fine.

PROFESSOR BLAKELY: That's what you've got in the next sentence anyway.

MR. McMAINS: Right. And I think that it says -- it says, "or the payment of all costs taxed by the clerk." I personally think that if it's effective on the notice filing, that they ought to be taxed with the cost. I mean, if you're going to non-suit, you get taxed by the cost by order anyway. Why --

MR. SPARKS: A lot of the orders, they neglect to do that. And, of course, there's not -- they're just filing a notice. Now, it would be just --

MR. McMAINS: Why -- I understand that -- but when I say -- what I'm saying is shouldn't the rule provide that upon filing of the notice, dismissal is effective and costs shall be taxed against the dismissing party?

MR. SPARKS: Yeah, I think that's a good point.

JUSTICE WALLACE: As I recall, the last case or two we've looked, the only thing they questioned was when that dismissal was effective.

MR. McMAINS: That's right.

MR. McCONNICO: That's exactly what, I think, Rusty is saying.

MR. McMAINS: That's what I'm trying to do is let's find out when -- yeah, if it's going to be effective immediately, let's go ahead and tell the clerk that upon the filing of the notice, that they get to go get the money from them.

MR. McCONNICO: Yeah, but it's still --

MR. McMAINS: That's the final judgment, then, from that standpoint, or at least terminated

that litigation.

CHAIRMAN SOULES: Are you suggesting that the last sentence be deleted or changed then?

MR. McMAINS: No.

CHAIRMAN SOULES: Well, is the dismissal effective if the costs are not paid cash money?

JUSTICE WALLACE: According to the decision it is.

MR. McMAINS: It's effective, it just is -- the problem is that if you don't have an order taxing costs, then the clerk has got to figure out how it is that it's entitled to get it.

MR. SPARKS: Well, how about changing the last sentence to read "any dismissal pursuant to this rule shall be accompanied by the payment of court costs as taxed by the clerk to be effective"? Too simple?

CHAIRMAN SOULES: That's, in effect, what it says.

JUSTICE WALLACE: I think that's a pretty radical change to say that the case cannot be -- if the case is not dismissed until the cost is paid, is that what you were -- is that the intent of --

MR. McCONNICO: That's not what I want, no.

CHAIRMAN SOULES: That's what's written here, though, see.

MR. McCONNICO: That's what -- I agree.

CHAIRMAN SOULES: What we ought to be doing is saying that as soon as it's dismissed, the clerk taxes cost. "The clerk taxes cost and execution" -- "shall issue" or something like that rather than -- because the way this reads, it's all -- you could say it's a condition of a dismissal that the costs be paid.

MR. SPARKS: That's true and that's part of one of the suggestions.

CHAIRMAN SOULES: That is a suggestion? How many feel that that -- that a condition of dismissal or non-suit should be the actual payment of costs? No one. All right. There -- the committee is opposed to that unanimously. How many feel that the clerk should be directed by a rule to automatically tax costs against the dismissing party at the time of the dismissal? Those opposed? Okay. The committee is unanimously in favor of taxing the costs automatically against the dismissing party at the time of the dismissal.

JUSTICE WALLACE: Now, are you talking about all costs incurred, period?

CHAIRMAN SOULES: That's the way I understand it.

JUSTICE WALLACE: In other words, we're not attempting to change the -- listing of costs by this rule, are we?

CHAIRMAN SOULES: I understand that we are.

MR. McMAINS: What do you mean?

CHAIRMAN SOULES: That all costs would be taxed against the dismissing party?

MR. McMAINS: That's what I'm trying to get.

MR. SPARKS: That's the way it is now.

JUSTICE WALLACE: Is that it?

MR. McMAINS: Yeah. I mean basically now if you want to non-suit, you've got --

MR. McCONNICO: Pay everything.

MR. McMAINS: You've got to pay all the costs.

MR. RAGLAND: Well, that's up to the judge.

MR. McMAINS: Except that the judge could, I suppose, if there is something done by the other -- there is some discretion. We have a cost rule is, I guess, the problem. It gives the court

the power not to tax costs.

JUSTICE WALLACE: And my point is are we changing the cost rule here? That's the only reason for the question.

CHAIRMAN SOULES: Why don't we say, "unless otherwise ordered by the court, the clerk needs to automatically" -- then that would recognize that the court still has discretion to order those costs. And "the dismissal may be made in open court and requests that costs be assessed against the non-dismissing party," for whatever reason. There may be some reasons, maybe abuse of discovery.

MR. SPARKS: We could say "any dismissal in accordance with this rule shall authorize the clerk to tax costs against the dismissing party unless otherwise ordered by the court."

MR. McMAINS: That's fine.

CHAIRMAN SOULES: Dorsaneo.

PROFESSOR DORSANEO: I think that there has been an inconsistency or at least some puzzlement in these rules, 162, 3 and 4. But we are changing 164 -- this proposal of changes, as I understand it, 164 which authorizes the taking of a non-suit, without telling you how you do that, to

indicate that, in effect, you take a non-suit by filing a notice of dismissal, and that's the only way you do it, right?

MR. McMAINS: Yes. That's authorized now is the problem.

PROFESSOR DORSANEO: Right. Now you take non-suits, not only as to whole cases, but as to parts of cases, that is to say as to -- take a non-suit as to one defendant by amending your pleadings and not including that defendant in the petition. Right?

MR. McMAINS: I see what you're saying. You're saying what about a partial dismissal?

PROFESSOR DORSANEO: What about a partial case?

MR. SPARKS: It does not address that. That's a good point.

PROFESSOR DORSANEO: I mean two issues. Do we want a partial case -- a partial non-suit to require a notice of dismissal? And secondly, do we want something about the costs?

MR. McMAINS: Yes, I think the notice of -- my position is notice of dismissal should be accomplished -- should accomplish it. But secondly what you should probably do is to assess all costs

paid by the dismissed party or otherwise taxable to the dismissed party. Those are the costs you really want to pay at that time. You shouldn't have to pay all the costs accrued. You should have to pay -- if you have not dismissed the whole case, you should have to pay the costs that the dismissed party has incurred.

CHAIRMAN SOULES: Sam, can we just defer that back to you for handling that problem and we'll look at the language next time in March?

(Short break.)

CHAIRMAN SOULES: Sam, could we maybe skip over to that 207(1)(b) or do you want to take up something else first? That was the thing that we --

MR. SPARKS: Let me take up 166c and 204.

CHAIRMAN SOULES: All right.

MR. SPARKS: Because we got -- we have received more letters, complaints than anything on those particular rules. The two requests probably are best exemplified by Mr. Haworth's recommendation on 166c. They want depositions to be taken before any person, at any time or place, upon any notice, and in any manner. And what really the recommendation is is to go back to allow

the attorneys to stipulate that a deposition can be taken without waiving the form of the question and nonresponsiveness of the answer.

There are two proposals. One would go back to the old practice and two would continue, unless there is an agreement of the parties, the form of the question and the nonresponsiveness of the answer to still be as they are today. And so, I think we need to --

Luke, we need to decide, one, do we want to allow the lawyers to make agreements and change the rule, and if so, then do we want to continue the existing rule as to objections to the form of the question and nonresponsiveness of the answer if there is no agreement. I think those are the two factors we need to decide, and then we can draft the rule pretty easily. And, of course, that goes to both 166c and 204.

PROFESSOR DORSANEO: I move the adoption of proposed Rule 166c as drafted.

CHAIRMAN SOULES: Okay. But --

MR. WELLS: That's the one that begins "Unless the court orders otherwise..."?

MR. SPARKS: Yes, sir.

CHAIRMAN SOULES: It says unless the

court orders otherwise, a party can make agreements in writing.

MR. McMAINS: You say may be taken before any person, you mean can you use the secretary, is that what you're saying?

MR. McCONNICO: That's what they're saying.

MR. McMAINS: You don't need a shorthand reporter or --

MR. McCONNICO: Tape recorder or anything?

MR. McMAINS: -- anybody else?

MR. MORRIS: They're against that.

MR. SPARKS: That's being done now, though.

MR. MORRIS: Well, let me ask you, what -- maybe I've just got it too easy down here, but we haven't had any problems, and I practice a good bit around the state. What's the problem that creates this need?

CHAIRMAN SOULES: Well, Lefty, the problem that gave rise to the interest that's demonstrated here was much narrower than what's written here. And that was a statement in a speech given by Justice, now Dean, Barrow, shortly after

the adoption of 166 -- well, whatever the rule is that says that you -- 204, that you can't waive objections to form -- I mean, that you must make objections to form and responsiveness at the time of the deposition, when that new rule came in. Actually it wasn't new law. That's what the law was, but it was written into the rules.

Justice, now Dean, Barrow, in making a speech, early after the adoption of those rules, stated in his speech that that could not be waived by agreement of the parties. And that view prevails in some areas and in the minds of some judges, that you cannot waive the necessity at the time of the deposition to make objections to the form of the questions and the responsiveness of the answers. Now, that was never discussed at the COAJ. It was never discussed in the Advisory Committee and it was never the intent of that addition to that rule that that be non-waivable by agreement. But since -- and I think maybe judge -- that part of -- that that part of Justice Barrow's speech eventually got published in a law review or advanced civil trial court or something. So some people believe that.

MR. McMAINS: Are you saying it is

non-waivable even by agreement?

CHAIRMAN SOULES: That's right.

MR. McMAINS: That's what his position is?

CHAIRMAN SOULES: That's what Judge Barrow's position is, and it prevails, in some areas, some people's thinking.

PROFESSOR DORSANEO: It's an "F" in my course.

CHAIRMAN SOULES: Everybody here say -- I mean, everybody believes -- I've never heard anyone dissent from the proposition that we now need to make it clear that that's waivable. If the parties want to waive objections to form and responsiveness, they can. They better say when they waive them to, do they waive them to the day before trial, is that still a part of the form of the deposition, which was the whole problem to begin with? Or do you waive them until the time of trial, which means that you don't know until you offer the testimony whether or not the other side is going to say you led the witness and now you're calling him as your own and you're out of -- you're out of luck, you can't use those questions.

But anyway, it's a serious proposition to

waive it. You really need to know what you're doing, but everybody believes that I talk to that it should be waivable. Now, that's where this all began, and then whenever they started talking about -- well, if the parties can agree to waive that, why don't we say they can agree to do anything unless they're precluded by order of the court. And that was how this 166c came into being.

But the problem that really needs to be addressed is to state that objections to form and responsiveness can be waived. How much beyond that we go --

MR. SPARKS: But that's handled in 204. Well, let me -- Lefty, I don't know why, but California lawyers and Arizona lawyers that we depose out in our part of the country, every question that's asked, they simply say, "object to the form of the question." I mean, it's just that that's their practice. And -- "object to the nonresponsiveness of the answer." I mean, "what's your name?" "Object." You know, and depositions get to be 400 pages. Well, it's remarkably true.

But, in any event, we recommend Rule 166c that -- did we approve that or is that before the --

CHAIRMAN SOULES: A motion has been made

to approve.

MR. SPARKS: I second it.

CHAIRMAN SOULES: And seconded.

MR. McMAINS: I have one question.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Yeah, the only problem I have is that if your intent is to, in essence, convince the judges that these are effective, when you say, "unless the court orders otherwise," is that a little broad? I mean, suppose the court -- you do it, you do the agreement and then the court decides later on that they're not going to enforce the agreement, then what do you do? There's no procedure for the court ordering otherwise. I'm not sure --

PROFESSOR DORSANEO: The language itself was taken verbatim from existing Federal Rule 29. It begins that way, and I don't know why it begins that way.

MR. SPARKS: We could start it "The parties may." I think you're right. I don't know why in the world it's there.

MR. McMAINS: I mean, frankly, if the parties agree to it, what business is it of the court?

MR. SPARKS: Well, when you tie it into 204, the court becomes involved. But, sure, we could eliminate that phrase. It's just a carryover from the federal rule.

CHAIRMAN SOULES: You're including waiving the oath, too?

MR. SPARKS: The way this is written, I think you could do almost anything.

CHAIRMAN SOULES: A deposition is a deposition. Q and A -- transcript of the Q and A without an oath, is that a deposition?

Tom.

MR. RAGLAND: I agree with the concept of proposed Rule 166c. My question is why not include it under Rule 11 which is referred to as stipulations and not lend it just to depositions or discovery matters here, but anything that the parties are wanting to agree to, with the exception of conferring jurisdiction on the court, which they couldn't do.

MR. McMAINS: Well, there is another rule on stipulations, I think, is there not?

MR. RAGLAND: Rule 11, yeah.

MR. McMAINS: No, there's another rule in here, proposed, on stipulations.

CHAIRMAN SOULES: There was some talking about the -- quite a bit of talk about the placement of this rule. And because it deals so directly with discovery, they wanted to put it right behind 166b, which is the discovery scope rule.

PROFESSOR DORSANEO: In fact, I might want to put it in 166b, which is the discovery general provision.

CHAIRMAN SOULES: There was talk about putting it in 166b, as a part of 166b, which is the general discovery provisions, as Bill has said.

PROFESSOR DORSANEO: But it's not in Federal Rule 26.

CHAIRMAN SOULES: But that was the reason for the placement of it.

MR. BEARD: I move the question.

CHAIRMAN SOULES: All if favor, say aye. Oppose? That's unanimously for.

MR. SPARKS: Then if we go -- switch over to 204. 204 preserves the right on non-waiver unless it's by agreement. And we just added the phrase "unless otherwise agreed between the parties or attorneys by agreements recorded by the officer" taking the deposition of course. So, if you don't

agree and you're not waiving the -- you know, you said it's a statement by Judge Barrow, but this rule says that, Luke, in my judgment.

MR. McCONNICO: In defense of Judge Barrow he said that in a lawyer review article -- he said he sees that the rule could be interpreted to say that. He didn't say that felt that -- he says he feels that, you know, the rule could be interpreted to say that.

MR. SPARKS: But in all the state bar seminars everybody has been instructed that they are not -- that, you know, you can't waive them. So we need to --

CHAIRMAN SOULES: Not in all of them, because I speak at some of them. And I believe that's wrong.

MR. SPARKS: But anyway, we recommend that modification to Rule 204.

PROFESSOR DORSANEO: Which one is it, though, Sam, that you're -- the language? Is it the -- I have a couple of them in here, Rule 204.

MR. SPARKS: Yeah, you're right. Haworth's was accompanying the one we did, Judge Barrow and Luke's. I don't see any difference in either of them.

CHAIRMAN SOULES: Let me see. Where is Haworth's?

MR. WELLS: It's just one ahead of yours.

MR. SPARKS: They're back by --

MR. McMAINS: The second one looks better to me. I just -- the 204(4).

MR. SPARKS: Yeah, it's more traced on the older Rule 204. I don't think it makes any difference.

MR. McMAINS: Well, one thing is that it talks about recorded by the officer, which I'm not sure what -- the first one talks about an agreement to waive anything almost.

MR. BEARD: But he starts off "The officer taking an oral deposition." I think it's clearer.

MR. McMAINS: So does the next one. Should we change that to "officer" or "person"? Should we change it to "person"?

MR. SPARKS: Well, I'm not -- we can do anything we want to, but the -- we didn't change that part of the rule. That's the existing rule.

PROFESSOR DORSANEO: I have one question about this second one. All right. We clearly want to say that parties or their counsel -- that

lawyers can agree that objections to the form of questions or nonresponsiveness of answers can be made for the first time at trial. We want to permit that agreement. Do we want to let lawyers agree at a deposition that all objections must be made at the deposition?

CHAIRMAN SOULES: Well, you've got that from the one we just passed.

MR. McCONNICO: Yes, 166c.

PROFESSOR DORSANEO: Well, look at this. "The court shall not otherwise be confined to objections made at the taking of the testimony."

MR. SPARKS: Well, but that's in the rule now.

PROFESSOR DORSANEO: I know. But -- I mean, I'm trying to get this concept down. Do we want to let them have -- make an agreement upside, downside, every way?

MR. McMAINS: What he's saying is should you put in "absent agreement the court shall not otherwise."

MR. RAGLAND: I think this third alternative, is better; just take out that phrase altogether. And we got this new 166b that allows them to stipulate to anything they can agree to.

MR. SPARKS: That goes back to the original. That's the original rule that we changed two years ago.

CHAIRMAN SOULES: The problem with that, Tom, is that the law is that these objections, they're formal, so a party can come in prior to the time the trial starts, object to the form of the questions and the responsiveness of the answers and destroy that deposition for use in court unless there is an expressed waiver made to all the requirement of objecting to form of questions and responsiveness of answers. And that's what's written into the rule. That just lets all the bar know what the law really is, the court of appeal cases that hold those.

MR. RAGLAND: I don't really have any problem with that. I think if someone goes to take a deposition, if he's not smart enough to know the form of his questions, that they're not going to be admissible, he ought not to be there.

CHAIRMAN SOULES: But see Harris wants to take that back out and just leave it in ambush. That's why the --

MR. RAGLAND: My point being we've already tentatively approved 166c which allows the

lawyers to agree to practically anything in the taking of a deposition. And if objections to the form of the question and responsiveness of answers is something that is important to the people taking the deposition, let them stipulate and agree to it.

CHAIRMAN SOULES: That's right. And that's what the 2044 that we've got -- now what -- my proposal, if you want to call it that, the Barrow, Soules and Hyde Proposal, omits -- it's important -- and this has come up in the COAJ which is present in the Haworth suggestion is that the stipulation be recorded in the deposition. That's usually where it's made. It's not really -- you don't -- what you don't want to do is fall into the trap of Rule 11 that you've got to have a signed agreement or one made in open court in order for it to be enforceable. Now, what this --

MR. McMAINS: Of course, if it's in a deposition and filed, it probably complies with Rule 11 anyway.

CHAIRMAN SOULES: What's that? How so?

MR. McMAINS: Because the deposition is filed.

MR. McCONNICO: It's not a written agreement.

CHAIRMAN SOULES: Not signed by the parties.

MR. McMAINS: But it's not signed by the attorney.

CHAIRMAN SOULES: Not signed. It doesn't really meet it.

MR. McMAINS: But I'm not sure that it's not -- but, that doesn't make it in open court either.

CHAIRMAN SOULES: Well, a lot of argument. I mean, we can go around about that. But if we said "absent express agreement recorded in the deposition" and inserted those words to the contrary in the Barrow, Soules and Hyde, it would meet that omission. It would give the parties the clear right to waive those objections, but it would put parties on notice who are not waiving them that they need to make them.

So it really hits all three of the issues that I see, Tom. You may see some more.

MR. RAGLAND: No, I have a question. You're proposal here then requires that an agreement be made that objections must be made at the time of the deposition?

CHAIRMAN SOULES: No, the rule requires

the objections to be made at the time of the deposition.

MR. RAGLAND: Well, see, I'm talking about your proposed amendment here.

CHAIRMAN SOULES: Would still require that unless waived.

MR. SPARKS: The important thing here is that on 204 when you're going to present deposition testimony, the rule says that the -- you're not bound by the only objections made in the record except to -- you make additional objections except to the form of the question, nonresponsiveness of the answer unless it has been waived.

MR. RAGLAND: That's the part I don't like.

MR. SPARKS: Well, that's the way it has always been.

CHAIRMAN SOULES: That's the law, whether we like it or not. The courts held.

MR. SPARKS: I move that -- in deference to Luke, I'll move that we accept 204(4) recommended by Dean Barrow, Luke and Hyde with that insert "absent express agreement recorded in the deposition."

I don't know if I like that or not.

CHAIRMAN SOULES: Well, that's where you make the stipulation.

MR. SPARKS: Yeah, I know. I mean I just don't like the -- I kind of like Haworth's. It says "unless otherwise agreed between the parties or attorneys by agreement recorded by the officer." I kind of like the wording on that.

MR. BEARD: I do to.

MR. SPARKS: I move we adopt the first 204 presented by Mr. Haworth.

MR. MORRIS: Second.

MR. McMAINS: Except that that still doesn't solve Bill's problem. I mean, 166c appears to say you can agree to waive all objections, and this rule doesn't.

CHAIRMAN SOULES: Well, I don't see any difference in Haworth's and mine except the way the words are set in order. And, you know, I -- if his English is better than mine, that's fine. Are you seeing a substantive difference, though, in Haworth's and mine?

MR. McMAINS: The substantive problem is the same in both.

PROFESSOR DORSANEO: That is that, you know, lawyers could make an agreement that --

"Okay. Let's have all bar objections now. This is now trial."

MR. McMAINS: Well, like, for instance, you got a party on a deathbed, any objection you want to make, substance, anything, got to be made now or it's waived.

PROFESSOR DORSANEO: They should be entitled -- they should be allowed to make that agreement and make it stick. Under both of these drafts that question is uncertain as to whether they can make such an agreement. Now, it would be rare when they would make it, but why not let them.

CHAIRMAN SOULES: How do we solve it?

PROFESSOR DORSANEO: Well, you would have to have "unless otherwise agreed" applied to both parts of that sentence.

MR. McMAINS: Right. You can do it easier, it seems to me, in your proposal, Luke, by using the "absent express agreement" preface to the last sentence.

PROFESSOR DORSANEO: Or by doing "absent express agreement" and then one, objections to the form of questions, blah, blah, blah and two.

CHAIRMAN SOULES: Yeah, that's exactly what I was doing there. If you pick up after the

word "counsel" in the underscored, put "one" and then after the word "deposition" coma "and two" and change the cap "T" to a small "T."

MR. RAGLAND: Which one are you on?

CHAIRMAN SOULES: On the Barrow, Soules and Hyde. And, you know, it's not any pride of authorship, it's just that it starts out with the condition "absent express agreement," and we're using that to modify both the objections to the form. And then "the court shall not otherwise be confined." So you can leave it -- you're making it clear that you could agree on both of those.

MR. McMAINS: I have one other question. I have one other problem. This rule also contemplates, it would appear, that in order for that to be effective, it requires all counsel, whether they're in attendance or not. Now, can you defeat the rule by just staying away? And suppose one of the parties doesn't come.

MR. SPARKS: I think that's right.

MR. McMAINS: You defeat the rule then. I mean, as to everybody.

MR. SPARKS: You have to have the agreement, that's right.

MR. BEARD: Well, you ought to be able --

the parties that are present ought to be able to agree.

CHAIRMAN SOULES: By all parties with notice of the deposition or their counsel.

MR. McCONNICO: Well, why don't we just say like it says up above "engaged in taking the testimony" or "engaged in the deposition"? In the first sentence.

MR. McMAINS: It's one thing if you haven't given anybody any notice or something else, but --

PROFESSOR DORSANEO: Well, why should I be bound by an agreement, whether I got notice or not, that I didn't make?

MR. McMAINS: I'm not even suggesting that you should. I'm saying but isn't there a policy question there. A, do you bind non-parties to the agreement in the deposition. And B, should parties to the agreement be able to escape it by the absence of other parties. The latter, it seems to me, clearly should not be the case. A party who agrees to it should not have the right to go back on the agreement because of the absence of a party.

MR. RAGLAND: A different party.

MR. McMAINS: A different party.

MR. BEARD: It's just binding on the parties who agree. The other parties can't object. That's the way the rule ought to be.

MR. McCONNICO: I think the way it's written now, that's the way it is.

MR. McMAINS: What?

MR. McCONNICO: That it binds the parties that are at the deposition that agree, but the parties that are not present at the deposition they can still say, "I'm not bound by the agreement."

MR. McMAINS: That's not what it says. It says, "absent expressed agreement to the contrary by all parties."

MR. McCONNICO: No.

CHAIRMAN SOULES: How about changing "all" to "the parties"?

MR. SPARKS: Well, you know, we're talking about more than has been suggested, of course, but -- which is a fatal error of thinkness. But I don't think it's been proposed by anybody, short of now. It's only the parties -- generally you're taking a deposition, you want to take a quicker deposition and have all of the garbage in there. And it seems to me that we're worrying about something that's -- you know, if you're not

present, you ought to be able to make any objection you want.

PROFESSOR DORSANEO: Why don't we just say "unless otherwise agreed" and leave out -- let the normal rule apply, and that is, that you who agreed to is bound by it and nobody else is? What's wrong with that?

MR. McMAINS: I don't have a problem with it. You know, if there's everybody there and -- if you got 17 lawyers there and 16 of them were willing to enter into the agreement, why shouldn't they be entitled to do that?

MR. SPARKS: Because the 17th lawyer is going to object to every question.

MR. McMAINS: Well, but that's fine. That's better than 17 lawyers having to sit there and adopt it. In the face of this rule, we can say that that's the only way it becomes effective.

MR. SPARKS: Let me ask you a practical question. Do you think that anybody is ever going to agree on a death-bed witness or an expert witness not -- to waive their right to make an additional objection later on? I mean, I can't imagine me doing it.

PROFESSOR DORSANEO: I had somebody ask

me to do that one time.

MR. SPARKS: Did you do it?

PROFESSOR DORSANEO: Not on a deathbed. No, I never agree to anything.

CHAIRMAN SOULES: Okay. Let's see if this -- if we take out "by all parties or their counsel" and just say "absent express agreement recorded in the deposition to the contrary," then somebody who doesn't agree can say, "I never agreed." You know, take out everything after -- "absent express agreement recorded in the deposition to the contrary. One, objections to the form of the questions are waived." And then it's whoever agrees, agrees; and whoever doesn't agree, doesn't have any agreement.

MR. McMAINS: You could -- if you want to clarify it, you could say "by such agreeing parties," I suppose.

MR. McCONNICO: I think it reads well the way Luke has it. It simplifies it.

PROFESSOR DORSANEO: I think that would work. I don't think we need to add any more.

CHAIRMAN SOULES: What is that?

PROFESSOR DORSANEO: I think, Luke, you did fine, it seems to me.

CHAIRMAN SOULES: "Absent express agreement recorded in the deposition to the contrary. One, objections to the form of the questions or the nonresponsiveness of the answers are waived if not made at the taking of an oral deposition, and, two, the court shall not otherwise be confined to objections made at the taking of the testimony." How many --

Is that your motion that those changes be made, Bill?

PROFESSOR DORSANEO: So move.

CHAIRMAN SOULES: Is there a second.

MR. WELLS: Second.

CHAIRMAN SOULES: All in favor, say aye. Opposed. It's unanimously recommended.

MR. SPARKS: Let me be the devil's advocate. Because we may be just doing something that we are not thinking out. It could be construed that you're going to have to make an agreement not to waive -- well, to reserve nonresponsiveness form of question and that you can't make other objections later, is the way that's written.

PROFESSOR DORSANEO: Do you think so?

MR. SPARKS: Or maybe it's just late in

the day for me.

CHAIRMAN SOULES: Well, if so, will you handle that by drafting clarification, if you feel that that's a problem, Sam?

MR. SPARKS: Okay. I would rather just write adopted, okay? All right. So we'll adopt that one as done and we'll "X" those. Okay.

Now, the other thing that I wanted to bring up right there is the proposed new rule. And it's back in the packet, unfortunately. It should be there. And it's a proposed new rule, again by Haworth, on stipulations. And says, "Stipulations Regarding Discovery Proceedings, if you can find that.

MR. McMAINS: Where is it? What rule?

MR. SPARKS: Well, it's -- we didn't put a number on it.

MR. McMAINS: Oh, okay. It's after Rule 188a.

MR. SPARKS: Okay.

MR. McMAINS: That's the one we did, isn't it? Or that's similar to the 166c, isn't it?

MR. SPARKS: I don't know that it adds anything. But what I was going to suggest is we reject that one because I think 166c covers it.

MR. BEARD: I'll second that motion.

CHAIRMAN SOULES: I'm lost in the report. I'm sorry, I didn't follow you. Which one?

MR. RAGLAND: After proposed new Rule 188a.

MR. McMAINS: The next rule is called "New Proposed Rule." Is the only difference that he's suggesting that you can modify any discovery procedure?

MR. SPARKS: Well, that may have been his intent, but that's not what it says.

MR. McMAINS: I think that was his intent.

MR. SPARKS: Yeah, but it doesn't say, and I just carried on his exact proposal.

MR. McMAINS: It says, "and modify the procedures provided by these rules for other methods of discovery."

MR. McCONNICO: I say stick with what we've got.

PROFESSOR DORSANEO: Well, so does the other one say that? The only difference between 166c and this one is the last sentence. "An agreement effecting a deposition is enforceable if the agreement is recorded in the transcript."

CHAIRMAN SOULES: Now where are we?

MR. SPARKS: And we've already provided for that.

PROFESSOR DORSANEO: We've already done that. We didn't have to do it now.

MR. SPARKS: That's right. So I move we reject it.

MR. BEARD: I second.

MR. SPARKS: I can get it off the docket.

MR. McMAINS: Okay. I got one other observation. We already passed 166c, but it says, "the parties may by written agreement." Do we want to say "the counsel"?

CHAIRMAN SOULES: I think Rule 11 takes care of that. No, it doesn't either.

MR. McCONNICO: This is different.

PROFESSOR DORSANEO: I think the law of agency takes care of it.

MR. SPARKS: Well, but we have used the term in 204 "the parties or their counsel," didn't we?

PROFESSOR DORSANEO: I always wondered why put in these rules -- we always say that, "the parties or their counsel." "If represented by counsel." I always wondered why we keep on saying

that.

MR. McCONNICO: Let's leave it the way it is.

MR. MORRIS: "Counsel" would apply if you don't have a lawyer.

MR. McMAINS: I'm saying the parties or their counsel is the way that the federal court goes.

MR. McCONNICO: Well, what Bill is saying, by saying "the parties," it necessarily includes their counsel under agency, just under the pure laws of agency.

MR. McMAINS: Well, under the rules.

MR. McCONNICO: Yeah, under the rules, too.

MR. McMAINS: Rule 12 or whatever.

MR. McCONNICO: Let's leave it is my suggestion.

MR. SPARKS: I would like to get rid of proposed Rule 200(2)(a), concerning a number of days.

CHAIRMAN SOULES: I'm not sure -- what rule were we just talking about? I know we were talking about 166c. Have we talked about 166b and d or did we skip through those?

MR. SPARKS: No, I'm just bringing it up, I think, the ones that are the most sensitive because of the time. So I've skipped --

CHAIRMAN SOULES: Okay. May I prevail on you, Sam, to look at 166-A because Judge Hittner is anxious about this one.

MR. SPARKS: Certainly.

PROFESSOR DORSANEO: He's got it in here twice.

MR. SPARKS: This comes from when you're preparing on October the 6th the September 30th report.

CHAIRMAN SOULES: Is there any controversy, really, over this change in 166-A?

MR. SPARKS: No, I don't think so, and I think it ought to be adopted. I move that we adopt it.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Well, I would like to quote judge -- a remark made to me some years ago -- Judge Fred Red Harris in Dallas. And he said "If it's good enough for summary judgment, it's good enough for trial." And I want to vote against this. It's a suggestion by Judge Hittner.

CHAIRMAN SOULES: Why is that?

PROFESSOR DORSANEO: I think the Clearcreek (Phon.) case is good enough. And I do not perceive this to be a loophole.

CHAIRMAN SOULES: Okay. What's the consensus of the committee? Those in favor of Judge Hittner's proposal on 166-A please indicate by showing hands. Those opposed?

The vote is to reject.

MR. SPARKS: Okay. I think we can move, really, to 166b, really. The suggestion was there's a court of appeals that holds that photograph is non-discoverable as a work product. If it is, I'm guilty of a lot of malpractice. And I would like to recommend that we include in 166b the phrase, "photographs and other discoverable documents."

CHAIRMAN SOULES: Those in favor, say aye. Opposed? Unanimously approved.

MR. SPARKS: Okay. And the next one --

MR. McMAINS: The court held the photograph is communication.

MR. McCONNICO: Well, there's a mandamus --

PROFESSOR DORSANEO: Wasn't that argued this week, Your Honor?

MR. McCONNICO: Yeah, here, Wednesday.

CHAIRMAN SOULES: If the court straightens that out, we don't need a rule change -- how is that? If the court straightens that out, we don't need a change.

Okay. Sam, now where do you want to go?

MR. SPARKS: We certainly don't want to prejudge that case.

CHIEF JUSTICE WALLACE: How did y'all tell me to vote?

CHAIRMAN SOULES: Is suspect if it were there wouldn't be a writ granted, but I don't know.

MR. SPARKS: Rule 200(2)(a), an attorney wants to have a number of days as presumed reasonable, as I told our committee, on a notice to take the deposition. The smallest number of days that we wanted to put in there was 200.

CHAIRMAN SOULES: Isn't this in the category if it ain't broke don't fix it? Isn't this working right now?

MR. SPARKS: We move to reject it.

MR. MORRIS: Second.

CHAIRMAN SOULES: The motion has been made to reject a fixed number of days to be deemed reasonable for a deposition. Those who favor rejection -- those who want this rejected, please

say aye. Anyone who wants this in, say aye. Okay. It's rejected.

MR. SPARKS: And I would like to go to 215. This was primarily motivated by Judge Kilgarlin's paper "What To Do With The Unidentified Expert," but several lawyers have written along this. And basically what it says is if you haven't notified within 30 days of your expert and you try to bring in an expert, and the court allows it, the court must state in the record what good cause was, so that it will be before any appellate court.

MR. McMAINS: We don't have it. It's not in the book. Is it in one of the letters?

CHAIRMAN SOULES: It's in 215. It's in the book. It's about two-thirds of the way back, styled "215, Failure To Make Supplementation Of Discovery Response In Compliance With Rule 166b."

MR. McCONNICO: I like that because the court of appeals cases are all screwed up right now on what's good cause.

PROFESSOR DORSANEO: It doesn't appear to be in all the books.

MR. SPARKS: Well, I'm sorry. Let me read it to you. 215(a).

CHAIRMAN SOULES: Start with the 204 that

I gave you -- that we passed, and turn pages with me. Start with the 204. If you can find the 204 that we passed, it will be the ninth page behind that, if it's in your book. It's just in front of 306a(3). All right. It's omitted from some of the books. My apologies.

MR. SPARKS: Let's me read it. It's an additional paragraph to Rule 215(a), which is "The Failure To Make Supplementation Of Discovery Response In Compliance With Rule 166b." In the sentence to be added in at the end of that rule it says, "The burden of establishing good cause is upon the offeror of the evidence. If the trial court finds that good cause sufficient to require admission exists, it must succinctly state the reasons for the determination of good cause on the record prior to admitting any such evidence." And I think it's a good amendment. I move that we adopt it.

MR. MORRIS: I second it.

CHAIRMAN SOULES: Will you accept an amendment to delete "succinctly" and just state --

MR. SPARKS: Yeah, when I'm quoting from a judge, I will -- just as long as it goes on the record it was yours, I will certainly do that.

PROFESSOR DORSANEO: I don't --

CHAIRMAN SOULES: That was Dorsaneo talking. I want the record to reflect that.

What, Bill?

PROFESSOR DORSANEO: Well, what happens if the trial judge doesn't do that? The trial judge says, "Oh, there's no big deal about this. You weren't surprised. Good cause" -- "there's good cause sufficient to require admission." Doesn't -- states the reasons on the record, then admits the evidence, then there is a judgment for "X" then what happens? Reversed because the judge didn't say something on the record before admitting the evidence?

MR. BEARD: I agree with that I don't think the trial courts should have that. They offer the reasons, the trial court let's it in, and if -- you know, it's not enough reason, appellate court reviews it.

MR. RAGLAND: Furthermore, this constitutes a finding of fact by the trial judge right in the middle of the trial and it tinkers with the presumption, as I understand the law, that the trial judge rules for all the right reasons. And I just don't think it ought to be --

MR. McMAINS: What if there is good cause and he states the wrong reason?

MR. WELLS: I move we reject it.

CHAIRMAN SOULES: Was there a motion to accept it?

MR. MORRIS: Yeah, there's already been a motion to --

MR. McCONNICO: And a second.

MR. MORRIS: -- accept it.

CHAIRMAN SOULES: And a second.

MR. MORRIS: And it has been seconded.

MR. McCONNICO: I'll speak in favor of the rule. I think that -- well, at least the suggestion, because I've just now read it. But the way the system is working now, it's not working, because if you get a surprise expert, you have first got to say, "I don't want him," and give your reasons and then you've got to make a Motion for Continuance. Your Motion for Continuance has to be denied. And then they've got to put them in.

And there are court of appeals cases to that effect. There is one out of Beaumont and I think there's one out of Corpus. Well, that puts you in a bad situation as the party that's surprised, because all of a sudden the case is going okay for

you, the other party doesn't like the way it's going, so he puts you in a situation where you're either going to get the cause continued or you're going to get a surprise expert. And that's the reality of the practice today. And I think this will avoid that reality.

PROFESSOR DORSANEO: Well, I think that the case out of Beaumont -- I think that there was a procureum opinion from -- isn't that the one where there's a procureum opinion from the Supreme Court where they seemed to validate this other way of -- this burden? They seemed to validate putting the burden on the one opposing the offer.

MR. McCONNICO: No, I think the first Duncan (Phon.) opinion, out of -- well, when it was in the Austin Court of Appeals, took care of all of this.

PROFESSOR DORSANEO: But then Duncan itself -- the second Duncan opinion goes the other way.

MR. McCONNICO: Yeah, Smithson (Phon.). That's right, it was Smithson.

PROFESSOR DORSANEO: Smithson goes the other way. And then this Garza case, which, I think, is the one out of Beaumont, seems to say

that the Smithson way is the right way, which I personally don't like. But we're swimming too far up stream at this point it seems.

MR. McCONNICO: I don't read it that way. I don't like it like that. Basically, the system today in what we've got with surprised experts is not working. Because what happens is the trial judge will say, "Well, you better move for a continuance under some existing case law." Well, why should I have to move for a continuance, because I've been diligent, I've given the name of my experts, I've taken the depositions of the experts they've named and the trial is going good for me. All of a sudden they bring in a sleeper that can turn everything around and I'm the party that's got to move for the continuance.

And I like this in that it will have a chilling effect upon that happening. I'm still saying it might still happen, but at least now a trial judge has to give his reasons for why he's letting this expert in.

PROFESSOR DORSANEO: Well, let me go back and talk about -- I don't disagree with anything you say, Steve. And let me go back and try to refresh my recollection on this Garza case. I

think in Garza what happened is this, that the trial judge allowed a supplementation of a discovery response concerning a doctor in a comp case.

MR. McCONNICO: That's the Beaumont case.

PROFESSOR DORSANEO: Right. Within 14 days prior to the date of trial, which was the time frame under the preexisting Rule 168 paragraph 7, supplementation, the Beaumont court held two things. One is that there wasn't any need to show good cause because of the fact that the trial judge allowed the supplementation within the 14 day period, hence the supplementation was timely because it was allowed. All right.

Now the Supreme Court bounced that part of the opinion, saying "No, that's not what timely means. Timely means within the time prescribed by the rules and not within some other time." But the Supreme Court did affirm that case and they did appear to validate the rest of the Beaumont opinion, which concluded that there was good cause for allowing the testimony to come in because the opposing party had a lot of other things that it could do, okay? And I think that's a different issue than the good cause issue -- related issue.

So --

MR. McCONNICO: I don't. See, I think what Judge Kilgarlin is suggesting here would take care of that because then the trial court can state all the findings that the Supreme Court made later, where the Supreme Court said, "Well" -- or the Beaumont Court of Appeals, they said, "Well, you had 14 days, you could have taken the deposition, you could have done all of this, so they're good reasons to allow the expert."

But, you know, we have the other case out of Madisonville (Phon.) where they brought in the doctor -- and I've forgotten which court of appeals it went to, I'm sure it went probably to Waco, I would guess. But anyway, that case states that where they brought in a doctor that nobody even knew about and they said, "Well, you didn't find a motion for continuance because you didn't have any -- you didn't ask for a motion for continuance. If you would have gotten the continuance, you could have repaired your damage."

MR. BEARD: Well, I don't think that the trial court should have a greater burden than saying granted or denied.

MR. SPARKS: Well, but the problem is

that the requirement of good cause is in the rule. And then you just say -- and that's what happens, you call in an expert and you say, "Your Honor, I" -- you know, "I just found out about him" or whatnot, and they allow it in there. I don't see how it could possibly be anything but a better system of justice to have the person who wants to put on the expert show a reason and have the court state what he thinks is good cause, so it's reviewable rather than nothing -- nothing in the record.

MR. McCONNICO: Which is where we are.

PROFESSOR DORSANEO: Well, the first sentence of the suggestion I like. But this little -- this technical way of handling it I don't like. I mean to say -- you know, the burden ought to be on the one who has broken the rules. That makes sense to me. But then to say that if he convinces the judge that there is an additional thing that has to happen, the judge has to state succinctly or otherwise, on the record, exactly why he was convinced. Why? Why do that? I mean it's either good cause or isn't good cause.

CHAIRMAN SOULES: Anything new, Lefty?

MR. MORRIS: Well, only, Luke, that I think the rule as it presently exists is being

abused and this will stop it from being so dang subjective. It ought to be something that trial lawyers and parties can rely upon. And the current state of the way it's handled, it's not.

CHAIRMAN SOULES: Okay. Let's take them one sentence at a time. How many feel the first sentence of the suggestion should be incorporated into the rule? Say Aye. Opposed? Okay. The first sentence is unanimously recommended.

Now, with regard to the second sentence that deals with the good cause to be stated in the record, I'll ask for a show of hands on that. Those in favor of adding that language to the rule, please raise your hands. Three. Now those opposed? Five. In order, perhaps, to give Sam some guidance, let me just ask for a show of hands. How many feel like the rules should require that the good cause appear of record, whether the judge states what it is or not, that there be a record of it? Okay. Those -- to put a good cause shown on the record, in sentence number 1, in effect. How many favor that part of it?

MR. RAGLAND: Well, let me ask you a question.

CHAIRMAN SOULES: A lawyer has got to get

it on the record, he's got to put it in the court reporter's transcript, file a motion. There's got to be good cause appearing of record. If we're not going to require the judge to state what his reasons are, make the lawyers, at least, have their reasons of record for review.

PROFESSOR DORSANEO: Yeah, make the lawyer be a lawyer. That's fine.

MR. RAGLAND: Well, the burden is on someone to establish that, and if it's not in the record, he hasn't established it.

CHAIRMAN SOULES: Well, he may go back in the court's chambers and there may not be a record made of it. And then there -- you can't -- it's hard to review. And at least this way there's something there for Judge Wallace to look at.

How many feel that we should make the good cause that the lawyer shows appear of record? Say Aye. Opposed?

Okay. That way we can draw it that way, Sam. Thank you.

MR. SPARKS: Let me go to Rule 208 because I think it's easy. Judge Barrow has pointed out that we do not have the sentence on deposition on written questions as we have on

deposition on oral -- for oral depositions, to require a leave of court with or without notice obtained before an appearance date.

PROFESSOR DORSANEO: Where is that?

MR. SPARKS: This is Rule 208. It should be on the page right in front of that.

MR. McMAINS: It's missing from all of those that the other one is missing from.

MR. SPARKS: Well, this makes -- what this does, Rusty, is requires leave of court if you don't take a deposition by written questions before appearance date as you have the requirement in the oral deposition.

MR. McMAINS: Okay.

MR. SPARKS: And I move that we adopt that.

CHAIRMAN SOULES: Well, I think -- isn't this the only written discovery device that's available prior to answer date?

MR. SPARKS: Without leave of court.

CHAIRMAN SOULES: Without leave of court.

MR. SPARKS: I think that's right.

CHAIRMAN SOULES: I think it's important for the collection lawyers to have some way to get their proof when they serve a citation. You can't

-- I think request to admits except -- of course, they're such loaded guns. But there ought to be some way to get discovery served. There is just one service on a deadbeat. If you can find him one time, serve him with citation. And if you want to, even serve him with a discovery request, so that at least you've got motions for sanctions or whatever you need to do to try to get your proof going.

MR. RAGLAND: Luke, can you do that throughout your deposition, making the answers returnable, say, in sixty days after service?

CHAIRMAN SOULES: You can't even start discovery prior to answer date except through this means or by leave of court.

MR. McMAINS: I mean, if you -- why can't -- what's the problem with getting leave of court, though?

CHAIRMAN SOULES: Getting leave of court. Why have to go through the process. Anyway, that's my view. I'm not sure that we should be precluded from making --

MR. McMAINS: I would be concerned about the problem if you simultaneous serve a citation and then a deposition on written questions and -- you know, when he sends -- when the ordinary

defendant sends the papers up, maybe he sends one of them and doesn't send the other one, or you're sitting there and you've already got these things, they're already defaulted. And you've already got sanctions, potential and all kinds of things if you don't have leave of court.

PROFESSOR DORSANEO: I'll tell what I think about it. I think that if we're going to give somebody a safety value, we give them the interrogatories and not give them this one. And the reason why the leave of court is not in there now, at least from my perspective, is that when this rule 208 was drafted, it was copied from the federal rule, and leave of court isn't in the federal rule. When I wrote it down, I didn't think about it.

MR. McMAINS: Another drafting error.

PROFESSOR DORSANEO: So, I don't know about the Supreme Court. They probably noticed it, but I never noticed it.

CHAIRMAN SOULES: Those in favor of the change, please signify by saying aye. Opposed? Okay. Let me see a show of hands, then. Those in favor of the change show hands please. Five. Opposed. One.

MR. SPARKS: Okay. I've kind of hurried through that. I think we're back to 207 and what we wanted to do on that one from yesterday. And if we have any more time, I've got one or two little ones, but that mainly gets us through, I think, most of the things that --

CHAIRMAN SOULES: Let me touch on Tom's big project here.

Tom, if --

MR. SPARKS: One thing I would like to mention that we have not drafted but we have received a lot of comment on and suggestions, is to eliminate filing of a lot of documents, interrogatories, depositions, like the federal court and other things, because of storage problems or whatnot, and we'll bring that up at the next meeting.

CHAIRMAN SOULES: That's exactly what -- because this last very substantial piece of work is a good work product from Joe Johnson, Waco, McLennan County District Clerk in conjunction with Tom Ragland. This is a problem that we're going to have to deal with, the cost of storing papers. You know, we're just getting complaints from every quarter.

And Tom --

MR. RAGLAND: I don't want to discuss these rules. I just want to say that those proposals are just something to generate some discussion at a later time. But the significance of the problem, I think, is emphasized by the fact that the district clerks went to the Legislature the last time and actually got a bill introduced mandating about how filing and discovery stuff has been done.

Now, I don't know if they have the authority to do that, if that conflicts with the Supreme Court's authority to make rules, but I perceive that probably the court would like to avoid that Legislative jurisdictional conflict and it's something that ought to be addressed at some point.

CHAIRMAN SOULES: The only thing that I would like to add to that is that I would ask, Sam, that we have a good full report ready for committee action at the March meeting on reducing the filing of discovery materials. If you and Tom can address that in your committee together because we're already beginning to get agitation from the Commissioners Courts and the district clerks as to cost of space.

With that then we can go to 207. And as far as I know that's the end of our current business, but I will ask for indications about that.

Go ahead, then, on 207, what, (1)(b) or (2), new (2)?

Harry was going to do some drafting on that, Newell, and I think you and he did work on that together and you're carrying his -- yours and his report at this time, right?

PROFESSOR BLAKELY: Yes.

Yesterday we talked about 207 in connection with a couple of changes in Evidence Rules 801 and 804. And you recall that one -- new, as we got it proposed here, new (1)(b) was amended. And those were -- there were a number of changes in there, and those were approved.

Now, in (1)(a), "Use of Depositions in Same Proceeding" and new (2), in different proceedings, Harry was able to see that we were talking about the application of the rules of evidence. We were -- to depositions, that there is a considerable ambiguity in the wording, because you've got the problem is the deposition admissible, generally, so far as the rules of evidence are concerned. And then you've got the question of the application --

assume it is admissible, the application of the rules of evidence to each question and answer as the deposition is being put in.

And to clarify that, I suggest -- and Harry approved that we set up a separate sentence both in (1)(a) and new (2) referring to the application of the rules of evidence at the trial itself. And I'll read the sentence -- the new sentence, so you can see that and then I'll indicate where I would put it in. It would -- the separate sentence would read "Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying."

All right. Now, this would be done down in (2), and I'll just start reading (2) as it would read with this amendment. This new (2). "At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding, insofar as admissible under the rules of evidence." Period right there "insofar as admissible under the rules of evidence." Then would come this new sentence. See, in the first sentence you would have dealt with admissibility generally. New sentence "Further, the rules of evidence shall be applied to

each question and answer as though the witness were then present and testifying." And strike everything else.

Then you would go back up into (1)(a) that now we're dealing with this same problem in where the deposition was taken in the same proceeding, and it would read "At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the rules of evidence," strike "applied as though the witness were then present and testifying." Pick up "may be used by any party for any purpose against any party who was present or represented at the taking of the deposition or who have reasonable notice thereof." Then you would pick up this new sentence, which you've already got down in new (2), "Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying." Then the ending sentence "Unavailability of deponent is not a requirement for admissibility."

CHAIRMAN SOULES: Okay. You're reading from "Alternative No. 1" in your Evidence Subcommittee's report, are you?

PROFESSOR BLAKELY: That's right.

CHAIRMAN SOULES: And I was -- And I got sidetracked because I was looking at the 207 that's in Sam's. So if you could --

PROFESSOR BLAKELY: It's all right. I think we're -- it's exactly --

CHAIRMAN SOULES: Are they the same?

PROFESSOR BLAKELY: Yeah.

CHAIRMAN SOULES: All right. Could you then, if you will, just start with (1)(a), for my benefit and perhaps for the benefit of the record, although I'm sure you've got it pretty straight already, and go through it straight through for me?

PROFESSOR BLAKELY: All right.

CHAIRMAN SOULES: Where the changes would come and where they would be.

PROFESSOR BLAKELY: One, "Use of Depositions in Same Proceeding, (a) Availability of Deponent as a Witness does not Preclude Admissibility of a Deposition Taken and Used in the Same Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the rules of evidence" -- begin to strike -- strike "applied

as though the witness were then present and testifying." Strike that. "May be used by any party for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." Right there insert a new sentence.

CHAIRMAN SOULES: Okay. And go slowly, if you will, there, so I can write it down.

PROFESSOR BLAKELY: "Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying." End of new sentence. Then finish up "Unavailability of deponent is not a requirement for admissibility remembering that (b) was already amended yesterday. And now you've got those. We would come on down to (2), New (2), "Use of Depositions Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding, insofar as admissible under the rules of evidence." I've got a period, but that's not a sentence, is it?

CHAIRMAN SOULES: No. Not yet.

PROFESSOR BLAKELY: "Any part or all of a deposition taken in a different proceeding, shall

be admissible."

PROFESSOR DORSANEO: Just "is." "Is admissible."

PROFESSOR BLAKELY: "Insofar as admissible under the rules of evidence."

MR. McMAINS: "In accordance with the rules."

PROFESSOR BLAKELY: A little bit awkward there. "Shall be admissible insofar as admissible under the rules of evidence." Now the new sentence. "Further, the evidence rules" -- and this will be the same as the one up there, Luke.

CHAIRMAN SOULES: Okay.

PROFESSOR BLAKELY: "Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying." And that does it.

CHAIRMAN SOULES: And then we strike "applied as though..." and the balance of that number (2)?

PROFESSOR BLAKELY: Yeah, you don't need it. Yeah.

CHAIRMAN SOULES: So then we would strike "applied as though the witness were then present and testifying, may be used subject to the

provisions and requirements of rules...Texas Rules of Evidence." That all comes out.

PROFESSOR BLAKELY: Yeah, all comes out.

CHAIRMAN SOULES: All right. We had a consensus on this, but now that we've got the language and maybe subject to working a little bit on the awkwardness there of that last thing that you've recognized, Newell, what --

Is there a motion, then, to adopt these changes now as written?

PROFESSOR DORSANEO: I move.

CHAIRMAN SOULES: Second?

MR. MORRIS: Second.

CHAIRMAN SOULES: All in favor, please say aye. Opposed? That's a unanimous recommendation.

So that the record is clear now, I want to append to the court reporter's transcript minutes of the last meeting that were approved. There was one deletion on page 4, which I have marked on the official copy, as well as a copy of the "Report on Standing Subcommittee on Rules of Evidence, Professor Newell Blakely, Chairman." And the "Joint Report on Standing Subcommittee on Court of Civil Appeals Rules 342-472 & Supreme Court Rules

474-515, Bill Dorsaneo and Russell McMains, Chairmen." And a "Report of Standing Subcommittee on Trial Rules 216-314, Franklin Jones, Jr., Chairman." And the "Report on Standing Subcommittee on Pretrial and Discovery Rules 15-215A, Sam Sparks, Chairman."

These are the reports and the documents that we've worked off of for the last two days and the transcript of the proceedings of -- the references to page numbers and other locators will be references to those reports and documents.

Is there any further business?

Rusty.

MR. McMAINS: Luke, may I -- I assume we're talking about acting on most of these rules on March 31 -- March 7th, whatever. What is -- I wanted to raise a question. It was just from Dean Blakely's reading of Rule 207 now. I perceive that maybe we have a problem. I'm not sure, but -- about the use of depositions against subsequently joined parties. Maybe it's just there already and we haven't done anything about it. But we seem to be very specific now, the rules of evidence refer to depositions taken in accordance with the rules and rules refer to the rules of evidence. But now

we have limited it to people who were at the deposition or who had notice of it.

PROFESSOR DORSANEO: Right.

MR. McMAINS: And the problem I have is what if you've got a subsequently joined party who's had access to the deposition, has no complaint about anything. You read the evidence in the record and then after trial all of a sudden they say, "That ain't" -- "you don't use that against me." And they make a hearsay objection at some point or --

PROFESSOR DORSANEO: It is hearsay.

MR. McMAINS: And it is hearsay at that point because it's not admissible under the rules.

PROFESSOR BLAKELY: It wouldn't be admissible as a deposition taken in the same proceedings.

MR. McMAINS: Right.

PROFESSOR BLAKELY: Now, he would then have to slip over to Evidence Rule 804(b)(1), former testimony, which will include depositions taken in a different proceeding. Yeah, that's not going to let it in either.

PROFESSOR DORSANEO: Did you change that from "same or different" to "different"?

PROFESSOR BLAKELY: Yes.

PROFESSOR DORSANEO: Oh, that -- shouldn't have done that. That's what it was about. It was about subsequently joined persons.

PROFESSOR BLAKELY: If you leave "the same proceeding" in there, then you, in essence, got that same proceeding dealt with in two different places.

PROFESSOR DORSANEO: I know, but it's the same proceeding -- but it finally occurred to me that "the same proceeding" part of that had to do with this subsequently joined person. And as to that person, even though it's the same proceeding, they weren't part of the deposition process. And the unavailability rules ought to be the same for whether it's an earlier case or an earlier time in the same case and I wasn't there. So, yeah, you're right, we do have to still work on this some more.

MR. McMAINS: We might be able to fix it in the -- included within the meaning of "same proceeding." We kind of sort of start to talk about it, but we don't really talk about it.

MR. BEARD: Are we saying that --

MR. McMAINS: Because you're talking about substitution of parties under the rule.

PROFESSOR DORSANEO: That wouldn't be this. This is a different --

MR. McMAINS: No, but I'm just saying, but I think you can deal with it, maybe, in that rule.

MR. BEARD: If you weren't a party or had reasonable notice and all, you're going to be able to offer this testimony in another trial where you're a newly joined party? We're not saying that, are we?

PROFESSOR DORSANEO: No, we're talking about a simple thing.

MR. BEARD: That's hearsay, is it not? I mean, as far as the new party is concerned it's not admissible against him.

PROFESSOR DORSANEO: A good argument could be made that a new party whose interests were protected, even though he's not technically the same party. So, a new party whose interests were the same and his interests were protected --

MR. BEARD: Part of a class or something. That would be different.

PROFESSOR DORSANEO: -- ought not to be able to claim a hearsay objection. Isn't that --

PROFESSOR BLAKELY: Yes. And ironically,

if it were taken in a different proceeding --

MR. McMAINS: It would be.

PROFESSOR BLAKELY: -- it would be asmissible under 804(b)(1), because 804(b)(1) --

MR. McMAINS: Former testimony. Doesn't require unavailability.

PROFESSOR BLAKELY: -- does require unavailability. 804(b)(1) --

MR. McMAINS: Oh, okay.

PROFESSOR BLAKELY: -- requires unavailability. But who is it admissible against? It's admissible against, under that rule, this later joined person. Well, let's see, I've got it right here. "If the party against whom the testimony is now offered or a person with a similar interest..."

MR. McMAINS: Right.

PROFESSOR BLAKELY: And that -- "had an opportunity and similar motive to develop the testimony" or something. And that was put in way back in the liaison committee to take care of that -- here, multi-parties, 15 on each side, asbestosis, experts have been deposed extensively and everybody had jumped on him and then way late somebody else is added. Should he have had an

opportunity to jump on this deponent? The thought was goodness, no, that deponent has been thoroughly examined from both sides and those interests of the new party are well -- has been well represented and you shouldn't have to go back and depose again, you see.

So that's taken care of over there if it were a different proceeding. Now, do you want to -- if you put back in 804(b)(1) -- we've just struck "the same or," you see. If you put that back in, "taken in the course of the same or another proceeding," you've taken care of that later joined party.

PROFESSOR DORSANEO: I want to make it clear. I would say "the same as to subsequently joined parties" or something like that.

PROFESSOR BLAKELY: Well, you see, that language was in there and we just struck it, "the same or."

PROFESSOR DORSANEO: "The same" caused confusion.

PROFESSOR BLAKELY: What's wrong with that? Well, because the plan was to take out of the Hearsay Rule, 801(e)(3), to take out from under hearsay definition "depositions taken in the same proceeding."

MR. McMAINS: Right.

PROFESSOR BLAKELY: But we've restricted admissibility there by 207 saying that it's admissible against --

MR. McMAINS: Only parties who had -- that were there.

PROFESSOR BLAKELY: "May be used against any party" -- "for any purpose against any party who was present or represented." Now, do you want the word "represented" -- do you want to say "or person with a similar interest"? Do you want to go to that problem in 207?

MR. McMAINS: I think what I would do, I would amend in some way (b), because it says "included within the meaning of same proceeding." And I would put in a sentence specifically dealing with "subsequently joined parties."

PROFESSOR DORSANEO: Well, the issue is do we want to have an unavailability requirement at all as to this person with a similar interest who has joined later. I say "no."

MR. McMAINS: I don't think so.

PROFESSOR BLAKELY: Well then do -- are you willing in (1)(a) --

MR. McMAINS: Because you've got

available discovery. If you want to rediscover him, I think you could do that.

PROFESSOR BLAKELY: Is (1)(a) -- Rusty, what you would want to do would be to amend (1)(a). We're talking about against whom is it admissible. Who -- "the person who was present or represented" it now says. Do you want to broaden that to "or a person with a similar interest who was present or represented at the taking of the deposition." "Or a person with a similar interest" -- "party with a similar interest."

MR. BEARD: If you sue the poor one, go through all that, he can't really defend, and then you join the rich one and somebody died, that shouldn't --

MR. McMAINS: Well, if he has died, it's admissible anyway. You have unavailability.

PROFESSOR BLAKELY: You're really objecting to what we've gotten now over in the unavailability list.

MR. McMAINS: We've already got that.

MR. BEARD: I wasn't here yesterday, so I can't complain.

PROFESSOR DORSANEO: Well, why don't we work on that one some more.

CHAIRMAN SOULES: Why don't we entrust that back to you for handling of that problem.

PROFESSOR BLAKELY: Well, can you decide? It's a policy question and there it is.

MR. McMAINS: I think we ought to vote on it.

CHAIRMAN SOULES: All right. Those in favor of having a deposition used in trial regardless of unavailability as evidence against a party whose interest is the same or similar to a party who was present at the deposition, say aye. Opposed?

MR. BEARD: I say "no" without further qualification.

HONORABLE WOOD: I would, too.

MR. BEARD: I mean, somebody has got to vigorously defend it for that to work.

HONORABLE WOOD: That's it. Where you look at that deposition and the interrogation of the witness --

CHAIRMAN SOULES: But, Judge, you can -- if that deposition is not good enough, that subsequently joined party can redepose.

MR. BEARD: If they're alive.

CHAIRMAN SOULES: If they're alive. But

if they're not alive, then you're under a different rule which makes it admissible anyway.

MR. McMAINS: That's what I'm saying. It's already admissible if you want to go ahead --

CHAIRMAN SOULES: Redepose him if you're not satisfied. You can depose him during trial if you're not satisfied.

MR. McMAINS: The problem I'm talking about is sandbagging. I mean, when you -- you don't have any complaint about what's in the deposition -- or the party wouldn't have any complaint about what's in the deposition. They let it in at trial, maybe with some kind of b.s. objection which you don't understand at the time. You go on and it turns out maybe you hit only that party. Well, that -- you may not have any evidence against him under these rules.

PROFESSOR BLAKELY: Now, this -- if would be -- if you've got (1)(a) before you, it would read "may be used by any party for any purpose against any party who was present or represented at the taking of the deposition, who had reasonable notice thereof, or a person with a similar interest" --

CHARIMAN SOULES: "Party."

PROFESSOR BLAKELY: "Party with a similar interest."

MR. BEARD: I would just say that he really ought to be adequately represented by his class or whatever. That's all I'm saying.

MR. McCONNICO: How do the federal courts handle that?

PROFESSOR DORSANEO: Well, I guess it's a tricky thing because they have a whole different way of looking at availability, unavailability to begin with.

PROFESSOR BLAKELY: They're not that broad. They're not that liberal. Jim Kronzer dictated that.

CHAIRMAN SOULES: All right. We'll leave that, Rusty, to you and Bill and Newell. And if you think you've got it solved, why -- without much controversy, fine. If not, let's get it with full committee next time again.

PROFESSOR BLAKELY: In other words, we're saying 207 has not been approved by the committee?

CHAIRMAN SOULES: I would say that the reservations that have been shown here at the end of the meeting would be reservations that should be addressed and not just accept the committee's

earlier vote. I think we've engendered a new look at that.

PROFESSOR BLAKELY: All right. I was going to prepare the evidence rules. I think I could go ahead and do that -- well, no, wait a minute. 804(b) is pulled into this little whirlpool, too, isn't it? See, it says -- we're striking "same" -- the word "same proceeding" from 804(b)(1).

CHAIRMAN SOULES: We may need to look at this again next time, afraid so.

We stand adjourned until 10:00 a.m. on March the 7th of 1986, subject to call by the court for any sort of an interim meeting.

And thank you very much everyone. We'll have full reports from all of the committees, again, at that time on the remaining matters.

(Proceeding closed.)

STATE OF TEXAS)

)

COUNTY OF TRAVIS)

I, Mary Ann Vorwerk, Certified Shorthand Reporter in and for the County of Travis, State of Texas, do hereby certify that the foregoing typewritten pages contain a true and correct transcription of my shorthand notes of the proceedings taken upon the occasion set forth in the caption hereof, as reduced to typewriting by computer-aided transcription under my direction.

I further certify that the cost of the preparation of this transcript is _____.

WITNESS MY HAND this the 23rd day of December, 1985.

Mary Ann Vorwerk

MARY ANN VORWERK
Certified Shorthand Reporter
CSR #2176, Expires 12/31/86

805 W. 10th, Suite 301
Austin, Texas 78701
(512) 478-2752