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Report on Rule changes addressed
by Standing Subcommittee on
Pretrial and Discovery

SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
Austin, Texas 78701
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CHAIRMAN SOULES: It's 8:45 on the 16th. Meeting will come to order. Just a few preliminary matters: One of the Courts of Appeal has now found that our distress warrant rules are constitutional and the Extraordinary Writ Committee worked on those, as you know, sometime back, worked on garnishment, sequestration, attachment, distress warrant, child right of property and revised all those in view of plaintiffs and progeny (phonetic) from the Supreme Court of the United States. And so apparently we did a good enough job to satisfy one Court of Appeals, and to my knowledge, none of those rules have been declared unconstitutional. And they now, at least, with all the same scheme, have been held constitutional.

MR. BEARD: I got a district court that declared a garnishment statute unconstitutional on the final judgment.

CHAIRMAN SOULES: Well, you got that done to you, or got it accomplished?

MR. BEARD: I got it accomplished.

CHAIRMAN SOULES: Actually, was there anything presented to the court about the rules or was it just the statute?

MR. BEARD: Well, it was just on the question of exempt property in the cashing and buying and garnisheeing without notice. There is a Pennsylvania case that raises the question.

CHAIRMAN SOULES: Well, there's a Texas case that holds that the garnishment statutes are unconstitutional. Now, they have been re-enacted by the legislature, so I don't know what that's going to do to it.

MR. BEARD: All I'm saying is, we probably ought to -- and I should do this by committee -- is provide for notice provisions when you garnishee with the final judgment. We don't have any provision for notice.

CHAIRMAN SOULES: That was deliberate. That was deliberately omitted.

MR. BEARD: Well, I know it was, but we have a lot of cash that is exempt by law. So you don't give notice before you go garnishee, but you give notice of whether they have a hearing and all that other stuff. But we don't have that on the final judgment.

CHAIRMAN SOULES: Well, fine. And the reason that we don't have it is because this committee, at least, concluded that we didn't need

to under those, because the party had notice of the suit. They had notice of the judgment under the rules. And they should anticipate that there would be execution or other means to enforce the judgment. So the notice was deemed to the party, you know, about taking their property and they could take it without it. Now, that's why we didn't do it. I don't know; maybe we need to do it now.

MR. BEARD: I think we really should because you have cash that is exempt, homestead, workmen's comp.

CHAIRMAN SOULES: That may be right. Maybe we need to look at that. One thing that's left, too, is the ex parte receivership, and we may not even need that. You might think about that before your report, Pat, is whether we even need to have ex parte receivership in the rules anymore. We either need to take it out or make it comply. That's one last ex parte seizure scheme that we haven't addressed.

JUDGE WOOD: Mr. Chairman, those of us who were here when those rules were amended, brought up to date, conformed to the constitution, are aware that you were the leading spirit in

revising all of those rules. I'm sure you had other people working with you, but it is my understanding that you had the laboring all the way through. And those of us who were here at that time know that and appreciate it.

CHAIRMAN SOULES: Thank you, Judge. That was by way of getting into the other overhauls that we're doing here. We spent a good long day yesterday on Administrative Rules and those that were present at the end of the day voted nine to one to recommend that the Court not adopt those rules. But nonetheless, we spent the entire day scrubbing those rules for problems with the Rules of Civil Procedure and for procedural omissions in those rules to make them workable and practical. And however they come down, I think, whether they are adopted or not, our work is going to be beneficial to the Bar.

It was stated this morning that it was surprising that someone, at least, didn't make a motion that the rules be made applicable for one year only to Harris County, and then if they worked there, we wouldn't need them anywhere else or there anymore. The motion wasn't made so we won't have to bring that up again.

MR. TINDALL: Can we amend that and exclude Harris County?

CHAIRMAN SOULES: That large piece of work has been done. Here's another piece of work, and these are the Appellate Rules. Now, these have now been promulgated by the Supreme Court of Texas after approximately two years of work that began with some effort in the legislature that got the Court of Appeals rule-making power. The principal problem was that the Courts of Appeals were working under two appellate systems, and there really wasn't any need for two. But they had a scheme under the criminal system and a scheme under the civil system. We got a charge to harmonize Appellate Rules of Texas, and it was done by Rusty McMains, largely by Rusty and Bill Dorsaneo for this committee, although, we've spent a lot of time in session dealing with them as a committee as a whole.

MR. MCMAINS: Judge Tunks and Judge Guittard were also very active.

CHAIRMAN SOULES: I said in this committee, and in the previous committee -- Rusty, thank you for that reminder. Of course,

Judge Guittard shared the joint committee between the Court of Appeals and the Supreme Court with Judge Clinton as a representative of the Court of Appeals and a broad section of both civil and criminal practitioners that got it here.

In the interim between our last meeting when this committee approved the rules, subject to a conference participated in as our representative by Rusty and then Bill Dorsaneo with the Court of Criminal Appeals representatives to resolve differences, they met; they resolved all the differences. We now have promulgated by both courts a single set of appellate rules. That's not to say that the rules are exactly the same in criminal cases as they are in civil cases. There are differences at certain points because of the due process problems that arise are different in the civil scheme and criminal scheme at some points. But it has to be done on appeal and what can be done on appeal. Those have all been recognized, but there are very few departures from consistency.

MR. TINDALL: Have they adopted the identical set?

CHAIRMAN SOULES: Yes. There has been a joint set of rules.

MR. MCMAINS: It's the ones that are just being published now, I think, that the Court of Criminal Appeals are actually going to be amending.

CHAIRMAN SOULES: The Court of Criminal Appeals rules are going to be -- let me back up, so that I make that clear. Now, I understand the basis of your question, Harry. The Court of Criminal Appeals had to adopt rules by a certain deadline. They did so. There was no prohibition on them thereafter amending them anytime they wanted to. So they adopted rules which haven't become effective yet, which have been amended already. Because in order for them to meet their deadline they couldn't get our input. So now they have gotten our input. We've had a conference. Is that right, Rusty?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: We've resolved all the differences and the Court of Criminal Appeals and the Supreme Court of Texas have now adopted exactly the same set of Appellate Rules; is that

right?

MR. MCMAINS: You would have to ask Judge Wallace. I know that's true with the Supreme Court. I assume the Court of Criminal Appeals followed suit.

CHAIRMAN SOULES: Is that right, Judge?

JUSTICE WALLACE: I wasn't paying attention.

CHAIRMAN SOULES: If it hasn't been done, it will. We were talking about that the Court of Criminal Appeals has now agreed to and has amended their first set of rules to conform to the single set.

JUSTICE WALLACE: Appellate rules?

CHAIRMAN SOULES: Yes, sir.

JUDGE WALLACE: They have been promulgated, signed on by both courts, and are in effect. Will be as soon as --

MR. MCMAINS: When do they become effective?

JUSTICE WALLACE: September 1.

PROFESSOR EDGAR: Could we get a copy of these?

CHAIRMAN SOULES: If you haven't, I'll

get them to you; I thought they had been sent to everybody. But that is a huge effort, and it's now been accomplished. And there are few changes which Rusty is going to cover. Bill wrote us a letter and it has got a couple of little flyspecks that they want us to pass on, but I'm sure that won't be a problem.

In the last major round of changes we have completely overhauled, with Dorsaneo's help and everybody here that was involved, the rules of discovery in the state. And all of this -- of course, that was another two-year effort that many people said could not be done, that you couldn't get scope in one rule and you couldn't get sanctions in one rule; it just could not be done. But it was done, and at least those rules are much more understandable and much easier for inexperienced practitioners to follow.

And I guess this is all by way of patting you-all on the back for two things: One, the effort that goes into the rules, the effort of this committee as a whole. And two, that we are receptive to change. And I guess to our boss's credit, to the Court's credit, they too are receptive to change that's needed.

And unlike the practice in the federal courts where the Supreme Court of the United States rules have to go through Congress, when we're through and our Court is through, they make rules, and they become effective.

And Texas has not been slow to respond to the needs of administration of justice, as is demonstrated by these huge efforts, all of which have occurred in the last ten years, most of which have occurred in the last five years. So, I thank you and the Court thanks you, and I'm sure you-all feel that way about each other for the effort that's been put into the rules.

Now, we're into a lot of housekeeping and other substantive matters that have come to us. And I guess all that was by way of laying a predicate to the fact that we have 661 pages of materials in this book that, in spite of all those efforts, this committee has still not addressed. There may be certain matters in here that are duplicate that I just haven't pulled out of here yet. But for the most part we still have that to do.

So, our lawyers and our judges and even some members of the public are not bashful about asking

for change that they feel is needed. And I think that speaks very well for our Court and very well for this committee and the COAJ of the Bar that we get these requests.

Our practice now, and I'm not sure what it was in the past, is that whenever one of these requests has been acted on, up or down, a letter is written to the requesting individual stating what the action of this committee was and sending that individual a copy of the transcript of the debate of this committee on his suggestion so that they become informed about what we did. So we have a responsibility, but there's not any question that we're meeting it. And I certainly do appreciate your participation in that.

With that, Sam, are you ready to start on your big group of rules?

MR. SPARKS (EL PASO): Now that I know that the copy of the debates is sent to the people who request them, I am going to do less editorializing.

CHAIRMAN SOULES: Well, don't that that because they need to know.

MR. SPARKS (EL PASO): I thought it

apropos that the Court of Criminal Appeals adopted their rules by a technicality. One thing to echo what Luke says is, the rules come to us now from two real sources, proposed rules. They still come from that lawyer who gets mad at the courthouse and goes home and dictates a letter and sends it in. But I'd say more than half of them now come out of sections of the Bar or groups of lawyers in speciality practice or groups of judges in specialty practice. And for the most part, they are not as romancing as they used to be.

There are two rules that we are going to start off that are in the printed materials. Generally, we're going to start on Page 123 of the printed materials. For some reason, the first page is on 195. So, if you'll turn to 195 with your hand on 123, I can tell you what this proposal is.

The motion to recuse or disqualify a judge in some parts of the state has become, apparently, an automatic continuance. In El Paso, as far as I know, we haven't had too much problem with it, except, I had in one case where a lawyer from Luke's town came in and filed a motion to recuse on the grounds that I entertained this judge

royally every night at the country club and that he was in my pocket. And, fortunately, I had never even been out with this particular judge, but it did cause for a continuance, and this was Monday following a Wednesday where his continuance had been denied. So I've had that one personal experience, but that was all. But, apparently, in different parts of the state there is this problem.

Now Rule 18-A, as proposed by an attorney named Bruce Pauley of Mesquite, by the way our subcommittee read this rule, indicated that you were entitled to one frivolous, bad faith motion. So we took the liberty of submitting to the committee for its consideration the proposed Rule 18(h) which is on 123. And the intent of that was to -- if the judge who is deciding the motion on recusal or disqualification finds that a motion is frivolous and brought in bad faith or for delay only, then they can impose, if they wish, any sanction under 215-2(b).

So that's really the proposal from Mr. Pauley, and actually several lawyers. We gave him the credit for the specific proposal. So Rule 18-A(h) on 123 is the proposal.

CHAIRMAN SOULES: Okay. Comments?

MR. MCMAINS: Yes, two questions. First, not having the current rules in front of me, which sanctions are in the 215-2(b)? Is that all of the sanctions that we have? That's why I was asking. I know all the sanctions are in 215. I mean, are you going to dismiss a lawsuit?

PROFESSOR EDGAR: Yes. It's the whole gamut.

MR. SPARKS (EL PASO): They're all in one thing.

MR. MCMAINS: Okay. I didn't remember if they were all one subdivision. The second question: By "presiding judge," are you talking about the presiding judge of the region or of the administrative district?

MR. SPARKS (EL PASO): Whoever is assigned by the administrative judge would be the presiding judge in that case to determine --

MR. MCMAINS: Is that the language we use in 18-A?

MR. BEARD: That was my question.

MR. MCMAINS: Because I don't think --

MR. BEARD: Presiding judge of the

administrative district is used in D.

MR. MCMAINS: Yes. The judge of the administrative district, once he assigns it, doesn't do anything more with it.

MR. SPARKS (EL PASO): That may be. Our presiding judges generally comes and hears them. But I understand that that's not always the case.

MR. MCMAINS: Because it's not required.

MR. SPARKS (EL PASO): That's correct.

MR. MCMAINS: All he's got to do is assign somebody.

PROFESSOR EDGAR: Under Rule 18-A Subdivision D, "The presiding judge of the district shall immediately set a hearing before himself or some other judge designated by him."

MR. MCMAINS: Right.

CHAIRMAN SOULES: So we could say "the presiding judge or the judge designated by him."

PROFESSOR EDGAR: Yes. Would that be more complete?

CHAIRMAN SOULES: Sure.

MR. MCCONNICO: Luke, just one very minor matter: That next to the last line should

say "The presiding judge may impose any sanction as authorized by Rule 215."

MR. MCMAINS: You don't even need the "as" actually.

MR. BRANSON: Luke, I have some trouble imposing all of the sanctions. It is an awfully harsh penalty to the client to have his lawsuit dismissed or the answer stricken, if it's a defendant. Can't we merely impose sanctions on the attorney if the Court determines the attorney has been acting in bad faith as opposed to punishing the client?

CHAIRMAN SOULES: I guess I use these words too many times. But what if we said, "The presiding judge or the judge designated by him may, in the interest of justice, impose any sanctions"? Because it may be that it's the party who has given the instruction to the lawyer. That's just a reply.

MR. BRANSON: That's certainly possible; it's not probable. I don't really see many lawsuits where the parties direct that type of conduct.

CHAIRMAN SOULES: Well, the only time I've been in a motion to recuse where it went to a

full-blown hearing was on the instructions of my client to file a motion to recuse. And, of course, we were successful, but I guess if it's successful it's not frivolous. But what if the party comes in and says, "I don't want that judge and here's why," you know, "I know he knows the other party and here's a long string of relationship." You say, "Yes, but I think he's going to be fair."

MR. BRANSON: Well, but that shouldn't be the basis for sanctions, if the party believes that. That's the thing that bothers me about the penalty provision. I don't really like -- for the same reason that we don't tax the attorney's fees of the winning party against the losing party, I am concerned that by sanctions that strong, you virtually discourage the litigants from expressing what may be legitimate concerns. And certainly you could have an instance in which a trial judge, who was friendly with the presiding judge, could get angry at an attorney because the motion was filed, and justice would not be served in that instance. And I think as long as we give the Court some sanctions, but limit them to the attorneys, you've got a protection built into the

system.

CHAIRMAN SOULES: Okay, Rusty, I'll get to you in just a minute.

Let me just raise one thing. We talked long and hard about sanctions in this rule to begin with. And Bruce's point about sanctions for the second shot is a different problem than we've ever addressed before in this committee. But Sam's point on sanctions for the first shot is not a new problem before the committee. And it was felt that -- and this is just giving you some history not that it controls anything that we do today.

But just the fear of what might happen if you lose that recusal, if you bring a frivolous point, if the presiding judge or whoever hears it rules against you, and then you're looking at that judge back up on the bench, that that was sanction enough for the first round. And some of us may still feel that way.

Now, the second time, though, we really hadn't talked about the straying of motions for recusal just to -- that lawyers not as fearful, maybe, of their next court appearance or that one would bring -- or parties forcing it would bring just to avoid judgment day.

MR. BRANSON: Well, the problem with that, though, Luke, is if you've got a presiding judge or if you've got a sitting judge who, in fact, is not acting in good faith in asking someone to step in, you could have a lawyer who legitimately needed more than one of those, and that's why it's in the rule.

And to begin at the second level to impose them and, to my knowledge, I don't think I've ever filed one because I try to go back to most courts. But by the same token, a man ought to have the right to do that. And I saw early in my practice some instances where this rule would have been very, very helpful. And I really hate to take that away from the trial lawyers.

CHAIRMAN SOULES: We're not talking about taking away; we're talking about whether you impose sanctions on the second part or the first part, second tier of filings. And I guess that's really -- maybe we could --

MR. BRANSON: All right. What are you using as a criteria for bad faith, I guess, is my problem? It's awfully broad.

CHAIRMAN SOULES: Of course we have a lot of --

MR. BRANSON: Is it automatically bad faith if the judge rules against you?

CHAIRMAN SOULES: Well, that's a standard that's been construed by the appellate courts, but it has a lot of discretion in it. It's not unbridled discretion just because the judge is angry.

MR. MORRIS: Luke, I guess I'd like to get away from the concept of if the motion is brought in bad faith, that somebody should be sanctioned just because that that is just such a nebulous term and it's so subject to interpretation.

If the evil that we're trying to cure is the delay, then I would say that a motion to recuse for purpose of delay only, then might result in something. But this wide-open thing of if it's brought in bad faith, I mean, that is sure -- judges don't like it, that's bad faith to them when you file one.

CHAIRMAN SOULES: Amen.

MR. MCMAINS: Yes. I was going to make the same point. We don't have a reference in

the rule anywhere, in any of the rules, to either frivolous or bad faith, basically, you know, where there is any definitive standard or litigation establishing any precedent. And since you're talking about rather broad discretionary powers, but for purposes of delay only, I think it's something that's fairly definitive, you know, kind of -- that's akin, at least, to the meritless appeal rule that I think is more appropriate. But I tend to agree that we should not be dismissing lawsuits because somebody feels like they're about to get gunned down.

JUDGE THOMAS: I tend to agree. I see the problem as being the delay. And I'm not surprised, for instance, that the complaint comes from Mesquite because about a month ago in Dallas County, as soon as Judge Gibbs overruled a motion for continuance, the next motion that happened to be filed was the motion to recuse him.

And the same thing happened to me on the second floor and, fortunately, in Dallas County, Gibbs could hear mine and I could hear his.

If we hadn't had that ability -- and both of them came, you know, immediately following our

overruling of the motion for continuance. So, I see the problem as the delay, and I'm bothered by the bad faith clause, also.

MR. SPARKS (EL PASO): I do want to confirm exactly what's being said. We have not received any correspondance or any suggestions that suggest anything other than delay. And so the rule, as proposed by these lawyers, would -- if we wanted to recommend a change, if you just said is "solely for the purpose of delay," the presiding judge would cover the gravamen that they're trying to cover.

We received several letters, but nothing other than delay. "Frivolous" and "bad faith" are just terms that we use in the rules, unfortunately.

PROFESSOR EDGAR: To kind of give us a point of reference, Rule 438 talks about the insufficient by the Appellate Court of additional damages for a frivolous appeal. And the term used there is where the appeal has been taken for delay and that there was no sufficient cause for taking such appeal.

So, I'm just simply saying that, there is a judicially recognized standard for delay and no

sufficient cause for the taking of the appeal, if that's helpful.

CHAIRMAN SOULES: Well, let's see if we can get a consensus. How many feel that if we are going to put in a Paragraph H, it should be limited to "delay only" circumstances? All right. That's a clear concensus there.

How many feel that the "delay only" should be defined as "no sufficient cause for the motion," as we have done with the --

MR. MCMAINS: I think it should be a conjunctive standard, is what I think Hadley is talking about.

PROFESSOR EDGAR: I'm just saying we do have -- the rules do recognize that a "standard" is the similar vein.

CHAIRMAN SOULES: Would you read that again?

PROFESSOR EDGAR: It's Rule 438, "Where the Court shall find that an appeal or writ or writ of error has been taken for delay and that there was no sufficient cause for taking such appeal, then the appellant," and so on and so forth.

MR. BEARD: I have no problem with

that.

PROFESSOR EDGAR: You could say it's frivolous and without sufficient cause.

MR. ADAMS: No, I don't like the word "frivolous," Hadley.

PROFESSOR EDGAR: I mean "for delay and without sufficient cause."

CHAIRMAN SOULES: "For delay and without sufficient cause," that's Rusty's point.

All right. If we do add a Paragraph H, how many feel that there should be one free bite at the apple without fear of sanctions and sanctions only for subsequent motions?

How many feel that way? How many feel that these sanctions should be imposed from the first motion to recuse on?

PROFESSOR EDGAR: If it's for delay and without sufficient cause.

MR. SPARKS (SAN ANGELO): If they are imposed at all. Because if it's for delay, 18a says you have to file the thing 10 days before trial, and then it says you have got to rule on it within three days. How are you going to delay the trial if you filed it 10 days before?

CHAIRMAN SOULES: In San Antonio we

don't know until the day of trial, until we're going to pick a jury, in many instances, who our judge is going to be. And we can file it right then under the rule. If the judge is not assigned 10 days out, you don't have to file it.

MR. MORRIS: Luke, it seems to me like, even under what we've just discussed, that could really be on onerous for you people. If you don't know about the judge until the day of trial, it would have the appearance of being for purpose of delay.

CHAIRMAN SOULES: That's right. That's the same problem you've got in Travis County, too.

MR. MORRIS: I wasn't thinking. That's right. That creates a problem.

CHAIRMAN SOULES: That's why I vote for one free bite. I mean, it's bad enough just to have to look at the judge and say, "judge, I'm trying to get you off that bench."

MR. MCMAINS: Yes, but you get one free bite and they assign you another judge, you don't know that until that day either.

CHAIRMAN SOULES: If he's in your own county, of course, you follow on through.

If he's a judge in your own county, then you've got to be awful careful about the second one. If he's a visiting judge that has been brought in, a retired judge, you can recuse him under the statute. You've got that absolute right whether it's under this rule or not.

Now, that's another thing that this other rule does not address, this rule. What if you challenge the retired judge who's been brought in and put on your case, you challenge him under the statute, and he's gone, you don't even have a hearing, can a presiding judge or some other judge still assess you with the sanctions?

MR. SPARKS (EL PASO): Not if you have sufficient cause written in there.

CHAIRMAN SOULES: Well, you don't have to have any cause. All you've got to do is say, "Judge, you're a visitor, you're retired, you're on that bench, but you're gone."

MR. SPARKS (EL PASO): I understand that. But if you do that pursuant to a statute, that's got to be sufficient cause.

MR. MCMAINS: It's a matter of law.

CHAIRMAN SOULES: I see.

MR. SPARKS (SAN ANGELO): Does that

count as your freebie?

CHAIRMAN SOULES: Yes, I guess, it would count as one.

MR. SPARKS (EL PASO): The problem with freebies is, apparently, you only need it once, generally.

MR. MCMAINS: The first time you go for a motion for continuance, the next time you go for --

CHAIRMAN SOULES: There have been times in Webb County where you've needed it twice because you really did want somebody from outside to hear what your problem was.

MR. MCMAINS: Luke, I think there is another concern here, at least that I have, in terms of the necessity to make a record, as this rule kind of just shortly reads, the judge just has to find that. It doesn't require him to have a hearing. It doesn't require him to take evidence. You know, it really doesn't have any standards in it.

Technically, it doesn't even require notice. On the basis of it, you know. He can just look at the reference. Presiding judge, particularly, if he has the, power he can look at the reference and

find it to be meritless and dismiss your lawsuit.

CHAIRMAN SOULES: Do you mean if the judge does not step down? That's not what 18a says. 18a says, first of all, it has to be brought by a motion.

MR. MCMAINS: No, I understand that. I'm talking about to impose the sanctions.

CHAIRMAN SOULES: Oh, to impose the sanctions.

MR. MCMAINS: I'm saying there's nothing in here, in this rule, in regards to -- you know, the other party doesn't have to move for it. This is just something inherent that is given to the presiding judge or the designated judge. He can just rule on this at the same time he rules on your motion without any other evidence than your motion.

CHAIRMAN SOULES: We can say it is determined at the hearing on motion by the opposite party.

MR. LOW: You're saying there should be a further hearing then to determine, so a record can be made, as to the sanctions?

MR. MCMAINS: Yes. Basically, I guess, what I'm getting at is, at least, if the

other side files a motion, you have an option at that point to look at your whole cards and withdraw.

You know, if a party is really using it only for purposes of delay and the other party challenges him on it, you've got a chance, at least, to pull back.

CHAIRMAN SOULES: I see.

MR. MCMAINS: I'm not sure that he shouldn't have that prerogative.

CHAIRMAN SOULES: How many feel that this sanctions ruling should be restricted to ruling at the hearing and on motion of the opposite party? Show hands. All right. How many feel that that should not be restricted to motion of the opposite party and after hearing? The consensus is then we ought to require a motion and hearing, but it would be the same hearing.

MR. MCMAINS: It could be at the same hearing. I think you just need an opportunity to respond. So many of these motions, at least what few I've seen, are made on the basis of what, in essence, is hearsay information.

That is, it's information of belief. It's like Sam was talking about, he hears, that

somebody and he are real close at the country club or golfing buddies or something. And he doesn't have any personal knowledge of that, but he gets it from a source that he considers to be reliable.

And if that's disputed by the other side and says, "that's just not true," he ought to have a chance to back down before he is forced to go to a hearing and assert it to be true.

MR. BEARD: How much notice do you have to give on that?

MR. MCMAINS: I think, basically, it just ought to be presented at the --

MR. BEARD: You walk up there and they hand you that motion for sanctions. You don't have a whole lot --

MR. MCMAINS: If your motion is set, you'd better be prepared to go forward --

JUDGE WOOD: That situation puts the lawyer in pretty bad shape because the judge refused to recuse himself. And you know then they are going to try the case before him. And so you go right ahead then and say why you don't think he should.

I voted for the motion and I think that's

right because we need some evidence. But I tell you, I think Rusty is right. You ought to have a chance to just back up and say, "Oh, well, Judge, okay."

CHAIRMAN SOULE: Is there anybody who disagrees with Judge Wood on that? Judge, it's unanimous, the point of your suggestion there.

Well, let's just enter a line here. If a party files a motion to recuse under this rule and is determined by the presiding judge or the Judge designated by him, at the hearing, and on motion of an opposite party, that the motion to recuse is brought for the purpose of delay and without sufficient cause for such motion.

PROFESSOR EDGAR: You don't need to say "for such motion;" you already said that.

CHAIRMAN SOULES: Okay. And "for delay and without sufficient cause, the presiding judge or the judge designated by him" --

JUDGE WALLACE: Shouldn't that be the judge hearing the motion for recusal?

PROFESSOR EDGAR: Yes, the judge hearing the motion for recusal, he -- or just the judge hearing the motion regardless of which one it is.

CHAIRMAN SOULES: Okay. Then, "The judge hearing the motion may, in the interest of justice, impose any sanction as is authorized by Rule 215-2(b)."

MR. MCMAINS: Dave Beck points out, and I think he's accurate that, if you just say "without sufficient cause and for purpose of delay," well, obviously, delay is an automatic result of filing the motion, some delay.

That's why when we talked about "purpose of delay only," in essence, that kind of wraps in the standard of why it's bad faith. I mean, once he overrules it, it's without sufficient cause.

CHAIRMAN SOULES: So you want to put in, "delay only"?

MR. MCMAINS: Yes.

MR. SPARKS (EL PASO): I think you ought to put "solely for the purpose of delay," and that puts the limited accent on it.

PROFESSOR EDGAR: Read it one more time.

CHAIRMAN SOULES: Let me read through this. Is there anymore comment on it before I read it through one more time?

MR. MORRIS: Well, Luke, if you look

at these sanctions here under 215-2(b), gosh, most of those are applicable to discovery matters because that's set up for abuse of discovery.

The only one that I think anyone should be subjected to, if any, and I'm not sure I'm for any of this, would be 8.

I don't know why just because that they had solely filed something for delay, that an order of just lying further discovery should be entered as a sanction, or that an order striking out pleadings should be used. That would be terrible just because you made a judge mad and he said, "We'll just strike your pleadings, here's a sanction."

So down here under 8, it appears to me the only thing that would be reasonable to subject someone to, and that's where they would have to pay the cost, basically, reasonable expenses, including attorney's fees, for the hearing. I think otherwise --

MR. LOW: The only thing there, a lot of times I know people that would pay 7 or $800 to get a continuance.

MR. BRANSON: But they're not getting a continuance. They're just getting a bite of the

continuance.

MR. MORRIS: Yes, but we don't strike the pleadings, Buddy.

CHAIRMAN SOULES: I disagree with you, Lefty, because, you know, we've got a responsibility, in my judgment, to the people and the litigants of this state, too. And these sanctions have been carefully thought out and they get from light attorney paying attorney's fees only to serious default judgment. And the judges are administering these in discovery from A to Z. And we have got problems out there with the perception of our system.

MR. MORRIS: But, Luke, those make sense with regards to discovery because those are primarily for people who are failing to operate properly under discovery, failing to make things known, so they're striking those things.

But after all discovery is completed and someone files a motion to recuse to go back and strike stuff that's already been done, to me, that's too onerous.

CHAIRMAN SOULES: Well, you know, at what point the motion to recuse is going to be filed and found to be for delay, but if it is, the

judge could cut off discovery, strike pleadings, enter default, assess attorney's fees; he could do whatever he wishes to do. There may be just outstanding discovery of requests at that very time.

MR. MORRIS: Well, Luke, that just absolutely would be an inappropriate result just to file a motion to recuse.

MR. LOW: See, this is subject to discretion in discovery. There are cases where the judge has been reversed for taking strong sanctions and discovery things, so the courts aren't going to just abuse it. If you do, you're going to get busted.

CHAIRMAN SOULES: When a lawyer or a party files a motion to recuse solely for purpose of delay and without sufficient cause, how seriously do you punish him? You know, my view is, all the way, that 215 justifies it as far as if it comes down that way. But, obviously, there's disagreement on that, but I think we need to see it.

MR. BRANSON: I think in the instance you described earlier where the party says to his lawyer, "I don't care what you say; you need to

file this motion," and it is determined that the party is doing it solely for delay, then striking the pleadings might be appropriate.

I think where the lawyer does it, because of some ill-gotten scheme on the lawyers part, for delay, maybe he's got a witness that's out of pocket, maybe it's some other the problem, then I think to dismiss the client's cause of action because of, really, a case of legal negligence, is too severe a sanction.

CHAIRMAN SOULES: Well, you know, we had that debate whenever we put 215 in place. And I'm not saying we can't debate it again, but that's swimming against the stream if we're going to try to limit these sanctions.

MR. MORRIS: But those were discovery abuses, Luke. We're past discovery; we're up at trial.

CHAIRMAN SOULES: Your Administrative Rules that you voted down yesterday adopt all of these sanctions.

MR. BRANSON: Let me ask this: Doesn't the judge have contempt power over the parties anyway?

JUDGE THOMAS: I don't think you

should try to hold them in contempt.

CHAIRMAN SOULES: Not for that; not for a motion to recuse. A judge couldn't order a party not to file a motion they are entitled to filed.

MR. BRANSON: If they found the action was in bad faith, they couldn't?

CHAIRMAN SOULE: I don't think so.

PROFESSOR EDGAR: No.

CHAIRMAN SOULES: Well, let's go ahead and take a vote on that. We might as well get a consensus.

How many feel that sanctions in this case should be limited -- And, of course, finally, the problem with limiting to attorney's fees is that they may or may not be adequate to compensate the adverse party for the problems that had been encountered. It may not be adequate to frustrate the bringing of these solely for delay and without sufficient cause.

MR. LOW: Isn't the purpose, also, we don't want to encourage people just to file a motion to recuse judgment? We start out with the premise that most of our judges are honest and are going -- I'm not saying in all cases, but we're

going to look at it pretty objectively subject to election and so forth and we should.

It's a pretty extreme thing when you say that a judge -- because he's got a duty to review his situation. He knows what cases are coming up. If he thinks he can do it on his own -- we have judges that say, "I don't think I ought to touch this case because (loud cough) without any motions. So I think he's reviewed it and then the lawyer ought to look pretty carefully before he files a sworn motion that this judge is biased. I think that's a pretty far measure when you do that.

CHAIRMAN SOULES: Okay. How many feel that sanctions should be limited to attorney's fees and expenses? And how many feel that sanctions should expand and cover the 215 spectrum. Okay. The consensus is that the 215 spectrum should be the span of the sanctions.

You know, I guess we really don't have a problem in San Antonio because we don't get delayed. If a judge is recused, the case just goes down the hall to another judge and he gets a jury panel. So, it doesn't really happen there when you have a central docket that can be managed

differently..

PROFESSOR EDGAR: Would you read this one more time?

MR. BEARD: He can produce delays in a lot of counties.

CHAIRMAN SOULES: They can in a lot of counties, yes. And I just wanted to be sure that I'm forthcoming about how our trial system works. I don't really have a problem.

MR. MCMAINS: If I might propose maybe even a further compromise.

CHAIRMAN SOULES: On sanctions?

MR. MCMAINS: Well, not on the sanctions. Leave the sanctions as they are, but in terms of the standards. If the filing of the motion results in the delay, in disposition of the pending motion or the trial, and is found to be brought for purposes of delay, then he's entitled -- that is, which would solve the problem in part if there isn't any delay, then he hasn't gotten anything out of it anyway.

CHAIRMAN SOULES: How many feel that we ought to require that it result in delay, as well? The standard would be for the purpose of delay and without sufficient cause and resulting

in delay. I don't have the language exactly straight. How many feel all three of those should be present? Okay. How many oppose that? Okay. That's Judge Thomas against and the others for.

MR. MCMAINS: What's the problem?

JUDGE THOMAS: Well, you see, the only problem is, what about the other side that, number one has had to come down and defend, you have built in another hearing, and maybe it doesn't result in any delay, but it certainly has increased cost.

MR. SPARKS (SAN ANGELO): Did you have a lot of problems with this before?

JUDGE THOMAS: We have tremendous amount of problem with this issue, not only in the larger metropolitan areas, but in the other areas. And so what you're doing is you're increasing the cost of the litigant that's trying to go to trial.

MR. MCMAINS: Luke, I have another proposal to take care of that, I think. Suppose that we allow the sanction of attorney's fees for the making of the motion for purposes of the delay, and then, if it is resulted in the delay for all of the other sanctions, which I think

would solve the judge's problem, it's going to require a little more redrafting. Hadley and I probably could do that at lunch.

MR. LOW: That's a good idea.

CHAIRMAN SOULES: Let me just read it like I've got it here and see if we can get it passed like it is or, I mean, if we want it passed like it's written or not, then we won't put that in there.

The way I've got it now, and that's without this last suggestion, "If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215-2(b)."

MR. BEARD: I think there should be at least one day's notice to the party moving that you're asking for sanctions, that you shouldn't just walk into the courtroom and move for sanctions.

CHAIRMAN SOULES: Well, we have

scrupulously avoided trying to change the notice of motion rule any place we could avoid that. And there is a general notice of motion rule that we have. I would hope that we wouldn't start putting in notice requirements that vary from that because everybody has gotten accustomed to the general notice.

MR. SPARKS (EL PASO): Let me speak a little bit against Rusty's idea that I thought was so good when he said it. And that is, I've never seen a judge strike all the pleadings, enter a default judgment or enter a dismissal. I've never seen it, and I, unfortunately, have been in a lot of sanctions hearings.

If we adopt Rusty's amendment, it seems to me we're telling the district judge that if there is a delay, do more than the attorney's fees. And I'm here to tell you, there's always going to be delay in El Paso because if it's filed, we just can't get it done.

Our administrative judge is in Del Rio and it comes to El Paso, and that case can't be reset for three to five months. So there's always going to be a delay. And I'm not for, in anyway, encouraging a default judgment or a striking of

the pleadings. And that's the problem I see with Rusty's proposal is, the judge can look at that and say, "It does result in a delay and, therefore, I am going to give something harsher."

CHAIRMAN SOULES: The way I read it does not have Rusty's suggestion in it.

MR. SPARKS (EL PASO): No, I understand that.

CHAIRMAN SOULES: So let's vote on this and if you want it read it again -- I think there's a motion to do it this way, isn't there?

MR. SPARKS (SAN ANGELO): Luke, you've voted about five times on the thing. We've never gotten to the question of whether we think H ought to be in there at all, because I'm opposed to it. I've never filed a motion to recuse in my life. Do you understand?

CHAIRMAN SOULES: I'm getting there right now.

MR. SPARKS (SAN ANGELO): I do see situations though in San Antonio. What you-all are telling me is you don't know who your judge is until the morning you walk in there. And your client looks at you and says, "My God, that judge tried my brother and sent him to the pen."

You've got an obligation to that client, too. And all of a sudden for filing -- and I understand you're saying for delay and all that, but the whole concept of sanctions there bothers me. I don't like it.

So, I don't want it in the record that because we're not talking about whether we want it at all, we're just assuming that. We're amending it and doing 30 minutes worth of work before we get to that question.

CHAIRMAN SOULES: Sam Sparks of San Angelo has moved that the amendment 18a(h) not be adopted.

MR. MORRIS: Second.

CHAIRMAN SOULES: It's seconded. So the motion is this not be adopted. If you vote that way, this will not be recommended. If you vote negative, it will. It's the opposite way we usually take our votes.

MR. MORRIS: I think it's a real sad commentary that there is a recognized problem, and by adopting your motion, we're going to play like the problem doesn't exist. I mean, if we have a problem then I think it's our obligation to try and solve it, rather than as a matter of

philosophy, say that there isn't a problem. So, I oppose your motion.

CHAIRMAN SOULES: I'm going to put it to you without a double negative. How many feel that this should not be adopted?

MR. ADAMS: As written? As you read it?

CHAIRMAN SOULES: As amended all the way through like I've just read it. I'll read it again if you'd like. How many feel that it should be adopted? Well, it's unanimous, because even the movant didn't vote for his motion. So it's unanimous.

MR. SPARKS (SAN ANGELO): Let the record reflect that you called for the second vote very rapidly without time to count the first one. Sometimes paper doesn't reflect the reality of what's going on in a room.

CHAIRMAN SOULES: Is there a motion for a recount? If there is, I'll entertain it. Okay. Rusty, is that on this one or on another one?

MR. MCMAINS: No, it's on this one.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: The 18a motion, itself,

of course, requires the 10 days notice and such. It's really silent. The only authorization it really has is if it was assigned to the case at a later time than the 10 days.

We can be even more specific in terms of when the sanctions are authorized. If they file it more than 10 days in advance -- maybe I'm wrong, Sam. That doesn't help you in El Paso?

MR. SPARKS (EL PASO): That does.

MR. MCMAINS: The problem with more than 10 days in advance is just going to be determined before the trial hearing. So, I mean, it seems to me that the sanction problem, really, in terms of if it's file for purposes of delay and such, is largely, if it's done inside the 10-day period and if you limited the sanctions -- if you include the "for purposes of delay" standard as we proposed it, but limit it to those that are filed with less than the 10 days prior to the hearing, I really think you're going to probably eliminate most of the problem, and at the same time not penalize people for feeling like they have to do it and do it at the earlier practicable time.

CHAIRMAN SOULES: Well, you know, for those who don't get assigned, you'll never get the

benefit of the 10-day rule, and there may be abuses outside the 10-day rule. I think that's what Sam --

Sam, why don't you report on the next rule. If it's really important to come back to that, we will, but we do need to get on with our docket.

MR. SPARKS (EL PASO): We go to the next page, 124. We've gotten one page now. And this is one of several recommendations that comes from the Counsel of Administrative Judges. This appears to, in my judgment, be a good rule.

Apparently there is some difference in the way these things are handled, is the only thing I can figure from the literature that the judges have sent us.

But this rule prescribes that all cases be filed in random order in counties with two or more district courts. "And then specifically says that garnishments, bills of review, will be filed in the same court, wherein the judgment or primary debt matter is pending, which can be a problem if they're not.

And the only thing that I can see that is perhaps different is that the consolidations in cases pending are to be determined and transferred

by the court of first filing. But this rule is proposed by the Counsel of Administrative Judges.

MR. LOW: Isn't that also a practice anyway? That's what they do.

MR. MCMAINS: Yes.

MR. SPARKS (EL PASO): Generally, I think that's right.

MR. LOW: That's a general law.

MR. SPARKS (EL PASO): Apparently, though, Buddy, there must be some places where --

MR. LOW: Where they don't, yes.

MR. SPARKS (EL PASO): -- where it occurs.

MR. BECK: There's a problem in Houston with somebody filing a lawsuit against five potential defendants. But instead of filing one lawsuit, they file five. They pick the judge they want nonsuit for, and then amend their pleading to get it in the court they want. So I think this is one of the problems that this rule is designed to prevent.

MR. TINDALL: How will that cure that problem? I don't see that it really addresses a nonsuiting --

MR. MCMAINS: Well, it means that the

first case that he got filed in is --

MR. MCCONNICO: No, it doesn't.

MR. MCMAINS: I know the rule doesn't say that.

MR. BECK: It doesn't speak for the precise problem I raised; the local rule we've adopted deals with that. But I think that the more general problem with forum shopping is what this is designed to prevent.

MR. LOW: We just have it auotmatic that -- I don't know if it's a rule or what. But in Beaumont if somebody files two or three lawsuits and somebody wants to consolidate them, it's just automatically consolidated into one that's filed first.

MR. TINDALL: Yes. But unless there's a computer, you can quietly file and ask them for service and just keep playing a random game until you get the judge you want.

MR. BEARD: Well, in McLennan County we have one judge in court that tries all the criminal cases and we have three that try the civil cases as a general matter. So they would be much opposed to having random filing.

PROFESSOR EDGAR: What do you mean by

"random"? What does that mean? Will somebody tell me?

CHAIRMAN SOULES: I think they mean in a strict rotation.

PROFESSOR EDGAR: You mean serially then?

MR. TINDALL: No. It can't be strict rotation because you used to wait at the clerk's window until the right rubber stamp was to come up next.

MR. SPARKS (EL PASO): "Random" means you draw a button or something.

MR. TINDALL: Yes. There are ping-pong balls that are numbers.

JUSTICE WALLACE: In Harris County -- I think they still have it. They have little balls in a jar. And each court has 10 balls in that jar. And you reach in and pull out a ball when a case is filed. And the same court might get three in a row if it comes up. But out of every 250 cases, if there's 10 for each court, then they will all get their equal share. So I think it's different in every county as to how they randomly file.

CHAIRMAN SOULES: You know, in

counties that have separate dockets, too -- the judges in San Antonio enter an order as they may under the constitution and they have an absolute right to do under the constitution, saying that every other judge is invited to please sit in their own courts.

So every judge sits in every court. So this doesn't change a thing over there. Judge Onion sits in Judge Peeple's court and Judge Peeple in Judge Onion's court. They all sit in all the courts every day.

And I guess forum shopping should be perceived as being a terrible problem there but it's really not. On the other hand, judges who don't cooperate like that, it seems to me like this is going to kind of drive a wedge between them where they are just going to say, "You're not supposed to be entering an order in my case."

That's one of the problems that exists in Harris County, is that there is not cooperation among the sitting district judges to deal with each other's problems on an every-day blanket basis. So I don't know whether it's good or not.

MR. MCMAINS: I've got two points. One is, I've always loathed to put a "shall be

assigned" in the rule. I realize that -- I mean, I think we're dealing only with the initial assignment. But we do have the state -- what's it's in the government code on the -- I guess it's not in the government code yet, but in 200a-1, the exchange of benches within multi-district counties.

And obviously, in your practice in San Antonio, judges can hear anybody's lawsuit. And somebody is going to take this rule to mean that, "You have got to hear my lawsuit." And that that's the purpose of it. And I don't think that was what was intended, to effect the exchange of benches rules. But it might be construed to have some impact on that. And I don't think we could pass a rule that conflicts with the statute in terms of the power of any of district judges to do that.

MR. SPARKS (EL PASO): I don't know what the judges themselves who asked for this rule really meant, but on the "shall be assigned" on garnishments and bills of review, you know, I'm sure that would be delegated to the clerk. And that's a good rule and that causes a problem.

Now, our system is not like Luke's. We have

16 district court jurisdictions. And before you consolidate a case, you've got to have a motion to transfer, to transfer that case to the other case so that a judge can then determine whether he's going on consolidate them.

MR. MCMAINS: For instance, it says, though, "every motion for consolidation or joint hearing shall be heard in the court which the first case is filed," which -- whereas the exchange of benches statute specifically provides that any judge in the courthouse can sit for the other judges.

This appears to be a dictate that that not occur. And I'm saying, I think that's a conflict with the statute insofar as we dictate who should be heard.

MR. MCCONNICO: Could I speak to that? I think that only dictates for consolidation or joint hearing about the consolidation between the cases. I don't think that that dictates anything to any other hearing or the trial of a case as written.

MR. MCMAINS: Yes. But it doesn't make any difference. I mean, any restriction on exchange of benches is in derogation of the

statute.

CHAIRMAN SOULES: Does one judge in Harris County have to take every civil case that is being filed by Hermann Hospital against the dishonest employees? Because those rise out of, many of them, the same transactions under number one.

Does one judge in Harris County have to take every asbestosis case that comes out of one huge school district because they arise out of same transaction or occurrence? I mean, this thing is pretty far reaching. Read number one: In any case arising out of the same transaction or occurrence." Now, this got tabled in 1985 by our committee.

MR. BEARD: Table it again.

CHAIRMAN SOULES: Except it's time to act. Let's get it up or down.

MR. MCCONNICO: Where are you reading, Luke?

CHAIRMAN SOULES: I just know historically that number one --

JUSTICE WALLACE: It's on 27b, not 27a.

PROFESSOR EDGAR: I'm on 27A.

JUSTICE WALLACE: "A" doesn't meet to what we're been talking about. "A" just says you consolidate garnishment stuff and there isn't no case.

PROFESSOR EDGAR: Are we talking about A and B now? I thought we were just talking about 27a.

CHAIRMAN SOULES: I guess I am, I'm sorry.

PROFESSOR EDGAR: Should we consider both of them together or could they be considered separately?

CHAIRMAN SOULES: Well, it's a scheme. I don't know how you want to approach it, because you've got "A" and "B" for related cases and "C" for temporary orders, and all three of them pulled into one court-related matters.

PROFESSOR EDGAR: Well, "A" is a filing and "B" is a transfer. It seems to me they're two different things.

CHAIRMAN SOULES: Well, you file a case at random. If a related case gets filed in another court, it's to be transferred. And if temporary orders, except in emergencies, the court in which the case was filed has to hear the

temporary orders. And that's the scheme; is that right, Sam?

PROFESSOR EDGAR: So we really to need to consider A, B, and C together then.

CHAIRMAN SOULES: They're all recommended by the Counsel of Administration of Justice.

MR. SPARKS (EL PASO): Right. We were taking them individually. I don't know how we could do "B," and maybe I'm just reading "B" too generally. But I've read "B" as you could talk about one court doing something with a case in one part of state to another part of state. "A" -- you know there's no limitations on "B" anywhere, that I could see.

CHAIRMAN SOULES: Steve, are you inclined to adopt this? I'm not really understanding. I don't know whether there's any sympathy to adopt it or not really. I guess, we really need to kind of see whether the committee feels this needs to be done. And if it does, then go ahead and talk about it until we get it straightened out. And if it doesn't move on with the docket.

JUDGE THOMAS: Well, it seems to me

that the problems that this tries to address are problems that some jurisdictions, for instance, Harris County, Dallas County. And so forth, have in the forum shopping.

And so, I guess, my question would be, why do we need it here and why couldn't that be handled under the local rules? That's the way, for instance, we've done in Dallas County is, we've adopted local rules, for instance, that says you can't file five different divorce cases and pick your court. It is the court that had the case first. So I'm wondering if it wouldn't be better solved by local rules.

MR. MCCONNICO: I think that's a good suggestion.

CHAIRMAN SOULES: Okay. How many feel that 27a, b, and c should be rejected and that attention directed to the possibility of local rules for local problems?

How many oppose that? Okay that's unanimous. It's unanimous to reject 27a, b and c.

MR. SPARKS (EL PASO): Can we amend that to write the Counsel on Administrative Judges that this is a matter that we hope that they will take up with local rules instead of just saying we

object to this.

CHAIRMAN SOULES: I'll so write them and I'll send them a copy of our debate.

MR. MCMAINS: May I suggest something, Luke?

CHAIRMAN SOULES: Yes, sir.

MR. MCMAINS: I don't know where this is at; I'm sure it's in your section. Isn't the problem with the forum shopping -- couldn't it really be solved if you required that a party who is filing a lawsuit, if that lawsuit, you know, arising out of the same transaction, had ever been previously filed to allege that?

MR. BRANSON: Besides that, there are people that don't think forum shopping is a problem.

CHAIRMAN SOULES: Rule 72, Sam. We are now on Page 128, Rule 72.

MR. SPARKS (EL PASO): This is, I guess, a rule we can refer to, as Sam Sparks from San Angelo was talking about yesterday. As far as I can see, Jeremy Wicker's request is to add the adverse party or his attorneys or attorney on the notice on any pleadings, plea or motion. It, as he says, returns the rule to the way it was

before, and everybody I've talked to says they think it's an improvement. So I move that we adopt Rule 72 as presented.

CHAIRMAN SOULES: Why do we singularize parties ? Is that the only change?

MR. SPARKS (EL PASO): Yes.

CHAIRMAN SOULES: Why do we need to do that?

PROFESSOR EDGAR: Sam, what this means then, let's assume you have plaintiffs suing multiple defendants. And then one of the -- a defendant then wants to file an amended pleading and would only be required to serve the plaintiff, rather than his co-defendants. Shouldn't the other defendants be made aware of the pleadings which have been filed by the other co-defendants?

CHAIRMAN SOULES: That's why that was changed.

PROFESSOR EDGAR: That's why it was changed. And I don't understand why you would want to go back to the 384 rule.

CHAIRMAN SOULES: Is that a motion to reject, Hadley?

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: Okay.

MR. SPARKS (EL PASO): You're right.

PROFESSOR EDGAR: I think everybody ought to be advised of all pleadings which have been filed in the case because it might well affect something you want to do.

CHAIRMAN SOULES: Sam, as a matter of order, you move -- Sam, are you withdrawing your motion in favor of Hadley's?

MR. SPARKS (EL PASO): Yes.

CHAIRMAN SOULE: Hadley has moved to second that this be rejected. Those in favor show by hands. Opposed? Unanimously rejected. Next will be the rule on Page 130, Rule 99.

MR. SPARKS (EL PASO): Luke, this is one that just came in a couple of weeks ago and I'm trying to think who recommended that.

MR. BEARD: I move we reject the proposed Amendment 99.

MR. TINDALL: Why?

MR. BEARD: It's an additional sentence. Why do we need that? What does that add to the practice? You know, you either go to the sheriff or go to the plaintiff's attorney or go somewhere else.

MR. LOW: Well, there's no problem

that we know of in the area, so what's your --

PROFESSOR EDGAR: Is there some reason -- what's the reason for this Sam, do you know?

MR. SPARKS (EL PASO): Yes. This is one of a group of -- I'm trying to find some of the literature.

CHAIRMAN SOULES: Sam, while your looking at that, let me back up to Rule 72 again. There is one thing in here, "A motion of any character which is not, by law or by these rules, required to be served." That means citation, doesn't it?

PROFESSOR EDGAR: Where are you?

CHAIRMAN SOULES: Right at the top. "Whenever any party files, or asks leave to file any pleadings, plea or motion of any character which is not, by law or by these rules, required to be served".

I see, never mind. I'll withdraw it. That's fine because "served" means served and this is notice; that's right. Rule 99.

MR. SPARKS (EL PASO): The only thing I can say is that this is one of the serveral suggestions that we have received. Apparently,

different people have problems with clerks, different people have problems with the sheriffs, different people have problems with the judge issuing orders for substitute service or automatic orders for professional process servers, and this is just one of many kinds of suggestions. I don't know of any problem we have so it just comes to you sterile if you-all want to consider it or not.

CHAIRMAN SOULES: Are there clerks that will not release the citations to parties to counsel for counsel to select --

MR. TINDALL: Yes.

CHAIRMAN SOULES: -- ways to get them served?

MR. SPARKS (EL PASO): Apparently.

MR. BEARD: I've never heard of that.

MR. TINDALL: In Harris County, If you want in-county service, it's going to be -- there's a lock on all those citations by the constable's office and if you want to go get someone else to serve those papers, another constable, you can't do it. They possess the papers.

CHAIRMAN SOULES: And why do they have the pipeline from Ray Hardy's office, exclusively?

MR. TINDALL: Because administratively that's the way it's set up and unless it's an out-of-county citation as reflected in the petition that you're filing they won't give you the citation.

CHAIRMAN SOULES: Ray Hardy won't.

MR. TINDALL: That's right. So if you have got an off-duty deputy sheriff that may help you chase down a roving defendant, you've got problems.

CHAIRMAN SOULES: Ray Hardy is blocking that.

MR. TINDALL: That's right.

CHAIRMAN SOULES: He's got no right to do that.

MR. TINDALL: I don't think it ought to be in the hands of the litigants. You're trying to get service on the defendant.

MR. BEARD: I think that's a local problem .

MR. TINDALL: Well, if it's a local problem and we can't cure it there --

MR. BEARD: Slap a mandamus on him.

MR. ADAMS: What's wrong with the rule? There's nothing wrong with this rule.

CHAIRMAN SOULES: There's nothing wrong with the suggestion, is there?

MR. TINDALL: I think it's a great suggestion.

JUSTICE WALLACE: One of the problems we keep hearing is that the clerk has authority to serve by certified mail, for instance, but some of the clerks refuse to do so. They're going to do it their way because the rule says they "may" and rather than "shall". And that was suggestion I've heard from several different people.

MR. SPARKS (EL PASO): There is also, apparently, in some practices, rather than being a favored constable, it's the sheriff's department in lieu of the constable, and a lot of the people have been doing this formally by just simply going to the judge at the time of the filing and getting an order which they felt like was unnecessary order that the clerk was ordered to -- I didn't see anything wrong with the rule. I just don't file these lawsuits.

CHAIRMAN SOULES: Well, of course, Ray Hardy makes some of his own law over there. And I don't mind that being on the record. And if he's made law here that's obstructing the flow of

cases, then we need to address that.

MR. BECK: Luke, I've only heard two problems that have been raised. One is the one that Harry has mentioned, and the second one is the delay from the time you file the lawsuit until the time it's processed, citation is issued and delivered back to whomever is going to serve the citation of petition.

My concern is that this language doesn't really correct either of those problems. Because the same problem that Harry mentioned is not going to be cured because they can say. "Well, wait a minute. We have sent it to the sheriff and he is one of person's that's responsible for service." And it doesn't mention address the delay question at all. If delay is a problem, we ought to put "properly" somewhere in here. It's not in here now.

MR. SPARKS (EL PASO): Let me speak to that, because if you look at Rule 103 -- and perhaps we ought to look at these in a series. The amendment in 103 had -- and that's the next page. "Anyone who is of the age of 18 or more and competent to testify and is not a party to the suit is allowed to serve civil process."

So this would permit, of course, a plaintiff to file a lawsuit, standing there getting a citation, and having somebody to do the service. So that addresses the --

CHAIRMAN SOULES: I think that's going to be more controversial, that second part. At least it has been in previous meetings. But if we change this to read -- the suggestion in Rule 99 to say -- make it an active instead of passive a sentence. "The clerk shall promptly deliver such citation to the plaintiff as requested" or "somebody else as requested by the plaintiff." Does that get to both what you, David, and you, Harry, are saying?

MR. TINDALL: That's fine. As long as the litigant has control of where the citation goes.

CHAIRMAN SOULES: All right. How many favor the rule as now stated?

PROFESSOR EDGAR: Well, I like the way you phrased it, instead of the way it's phrased here.

CHAIRMAN SOULES: "The clerk shall promptly deliver."

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: Okay. Those in favor of it as rewritten there by me, hold your hand up. Opposed? Okay, that is recommended, unanimously.

PROFESSOR EDGAR: All right. Now, repeat that, would you?

CHAIRMAN SOULES: Yes, sir. I'll go over it again. I'm just going to read the underscored part of it. Insert from the beginning, "The clerk shall promptly deliver" and then small "s".

Well, let's see, Judge, I'm not reading the first, I'm just reading the underscored, which is the change.

JUSTICE WALLACE: "The clerk shall promptly deliver such citation."

CHAIRMAN SOULES: Yes, sir.

PROFESSOR EDGAR: "As requested" --

CHAIRMAN SOULES: And then strike -- I struck something I can't even read through it anymore. Strike "shall be delivered," and leave the rest of it.

PROFESSOR EDGAR: "The clerk shall deliver" --

CHAIRMAN SOULES: "Promptly deliver

such citations."

PROFESSOR EDGAR: "As requested by the plaintiff."

CHAIRMAN SOULES: I would just take out "shall be delivered." Here's the way I have it, "The clerk shall promptly deliver such citations to the plaintiff or the plaintiff's attorney or those persons responsible for service as set forth in these rules as shall be requested by the plaintiff or the plaintiff's attorneys."

PROFESSOR EDGAR: Why don't you put "as requested"?

MR. MCCONNICO: As may be requested.

PROFESSOR EDGAR: "As may be requested" rather than "shall be."

CHAIRMAN SOULES: "Shall be requested" should be all deleted and the word "directed" inserted, because you're talking about the plaintiff directing the delivery, and you use request for issuance of service in the previous line. So add "directed by the plaintiff or the plaintiff's attorney." I'll reread it.

"The clerk shall promptly deliver such citations to the plaintiff or the plaintiff's attorney or those persons responsible for service

as set forth in these rules as directed by the plaintiff or the plaintiff's attorney."

PROFESSOR EDGAR: Yes.

MR. BECK: Why do you need that middle phrase? Why can't you just say "The clerk shall promptly deliver such citations as directed by the plaintiff or the plaintiff's attorney"?

CHAIRMAN SOULES: Well, it limits the people that the citation can be given to, and maybe that should be limited to people that are entitled to have some control.

MR. NIX: Doesn't the next rule pick that up, though?

MR. SPARKS (EL PASO): Yes, it does.

MR. TINDALL: Well, I see a lot in this that is very good, though, because you can get there and tell the clerk, "I want to take it out to the constable right now." Otherwise, if you have to go through the machinations going to the Central constable's office, and they have got to put it on the computer, and it would be on the van run the next morning.

CHAIRMAN SOULES: I'm only being a devil's advocate with David. I probably am going to want that clerk to deliver that to my

paralegal.

MR. TINDALL: Sure.

CHAIRMAN SOULES: And not me or my client.

MR. BECK: My point is that you ought to have the right to tell the clerk how you want it delivered.

CHAIRMAN SOULES: That's David's point. I'm only trying to respond maybe why it's this way. How many feel that we ought to just have unbridled discretion with the lawyer to direct the clerk who it is delivered to? Show by hands.

MR. TINDALL: Absolutely.

CHAIRMAN SOULES: Those opposed? Because the only risk I see is a limitations suit filed to forestall limitations and put the file -- and you've got to forthwith to try to get service to forestall limitations as well.

PROFESSOR EDGAR: That's a risk the plaintiff runs when he selects that method.

CHAIRMAN SOULES: When he selects that method, then he runs that risk.

PROFESSOR EDGAR: That's a risk he runs.

CHAIRMAN SOULES: Can you see any other problem with just anybody getting it?

PROFESSOR EDGAR: No. Leave it to the plaintiff's discretion with what he wants to do with it.

CHAIRMAN SOULE: Okay. Well, we'll do that, too.

MR. SPARKS (EL PASO): Do we end it after the words "plaintiff's attorney"?

CHAIRMAN SOULES: Well, "promptly deliver such citations." Okay.

PROFESSOR EDGAR: "As directed by the plaintiff."

CHAIRMAN SOULES: Yes. We're going to strike all of the second underscored line, all of the third underscored line and "rules" on the fourth, and then read, "The clerk shall promptly deliver such citations."

JUSTICE WALLACE: "To those persons."

CHAIRMAN SOULES: "To such persons."

MR. ADAMS: Let's just say "as directed by the plaintiff."

PROFESSOR EDGAR: "To such persons as directed by the plaintiff or the plaintiff's attorney."

MR. BEARD: Luke, we say over and over again, "plaintiff or plaintiff's attorney." Why don't we have something that "plaintiff" means "plaintiff's attorneys" in appropriate cases, so we don't just keep adding those words.

MR. TINDALL: It should be the "party's attorney."

MR. BEARD: I mean, when you refer to a party, it can mean his attorney, so we don't have to just add all those words. Party includes its attorney.

CHAIRMAN SOULES: Well, I guess we'll just say "by the plaintiff," because his agent can speak for him if we're going to do that.

MR. TINDALL: Make it party, if it doesn't destroy the grammar Luke. You've got petitioners in family law cases, you've got contemnors you've got all the kinds of creatures that get citations issued.

MR. BECK: Luke, is this intended to include counterclaims?

CHAIRMAN SOULES: Well, you don't have to do that anymore. That's now clearly permitted by certified mail.

Let's go back up then in the first sentence

if we're going to change the word about petitioners, respondents, plaintiffs, defendants and so forth.

"When a petition is filed with the clerk he shall promptly issue such cititations." Why don't we say "defendant or defendant's as such citations as shall be requested by any party or his attorney."

And we can say "party." Strike attorney, if you wish, to respond to Pat's concerns. So it would be "when a petition is filed with the clerk."

PROFESSOR EDGAR: Just say "The clerk shall promptly."

CHAIRMAN SOULES: As shall be requested by any party. The clerk shall promptly deliver such citations.

MR. TINDALL: To the party requested.

CHAIRMAN SOULES: To any persons designated.

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: "By the plaintiff or the plaintiff's attorney."

PROFESSOR EDGAR: I don't know why you have to do it. I don't know why you need to have

to have "or his attorney," either one.

CHAIRMAN SOULES: A party can make a request through his agent, and I guess that's what we're saying.

How many feel like we ought to leave in "or his attorney" and how many want it to stay out? How many want to leave it in? How many want to take it out? Well, we'll leave it in.

MR. MCCONNICO: Luke, why don't you read it as written down?

CHAIRMAN SOULES: I want to be sure I've got it now and I'm going to add one other thing.

Okay. I'm just writing here on the case where most of us are not accustomed to sending the designation through. This is going to require a new piece of paper unless we put a fail-safe in it. And every time we're going to have to tell the clerk what to do because they have got their usual course of proceedings. So I just added, "In the absence of such designation, the clerk shall delivery such citations according to the clerk's ordinary course of proceedings."

There's no magic in the language, but I'm trying to get to a default position where the

clerk failing to get a designation can do something with the citation. So it would read, if we put that in, -- and you-all be thinking about how to say this --

MR. BEARD: If the plaintiff's attorney doesn't ask the clerk to do anything, they normally won't do anything anyway.

MR. TINDALL: Only mail back to the attorney.

CHAIRMAN SOULES: Well, they do in San Antonio; they send it to the sheriff and it works good. So, "When a petition is filed with the clerk the clerk, shall promptly issue such citations as shall be requested by any party or its attorney. The clerk shall promptly delivery such citations to any person designated --"

PROFESSOR EDGAR: Persons.

CHAIRMAN SOULES: --"To any person," plural?

PROFESSOR EDGAR: Well, we're talking about plural citations, so you would have plural persons.

CHAIRMAN SOULES: Persons, right. "Persons designated by the requesting party or his attorney, or in the absence of such designation

the clerk shall deliver such citations according to the clerk's ordinary course of proceedings."

PROFESSOR EDGAR: Wouldn't that be a separate sentence rather than or?

CHAIRMAN SOULES: That's fine. Any further comment on this?

MR. BECK: I really don't think we need "or the plaintiff's attorney" in there. We ought to be consistent. In the first sentence we cut it out and referred to the "party."

CHAIRMAN SOULES: Well, I'll put it back in.

MR. BECK: Why don't we just put "such party" in the second sentence instead of saying "by the plaintiff or the attorney," and you can always rule --

CHAIRMAN SOULES: Okay. I'm going to take one more show of hands. Judge Woods feels like we need it there, and I can understand that, but David Beck feels it surpluses, and I can understand that. That's the issue.

All in favor of leaving "or his attorney" there raise your hands. Three. Those who oppose leaving "or his attorney" there raise your hands. There are now six. We will delete it then, and we

can vote again on it in a little bit if you want to.

PROFESSOR EDGAR: "In the absence of designation the clerk --"

CHAIRMAN SOULES: "Shall deliver such citations according to the clerk's ordinary course of proceedings."

JUSTICE WALLACE: On that very first sentence.

CHAIRMAN SOULES: All right. Let's go over it again.

JUSTICE WALLACE: It should be "when a petition is filed the clerk shall" -- It's got to be filed with the clerk; you can't file it with any clerk.

CHAIRMAN SOULES: "Filed with the clerk.

JUSTICE WALLACE: Okay. "When a petition is filed the clerk shall promptly issue such citations."

MR. MCCONNICO: Oh, I see.

PROFESSOR EDGAR: I was wondering, really, and I was looking in the rule preceding it. There really isn't any place in the rule that says where you file.

JUSTICE WALLACE: That's the only place you can.

PROFESSOR EDGAR: I agree with that.

CHAIRMAN SOULES: You can file with the judge, some things. The judge has authority to file anything his clerk can file.

MR. MCCONNICO: Not a petition.

CHAIRMAN SOULES: Not a petition? He can't file a petition with the Judge?

PROFESSOR EDGAR: No.

JUSTICE WALLACE: No. The judge had no jurisdiction until --

PROFESSOR EDGAR: That's right.

MR. TINDALL: While we're on this rule, I have one little sentence I'd like to add at the end of what we said there. Let me read it out loud: "A party may request more than one citation to be issued for service on any party entitled to service."

If you've run into trying -- the defendant may be in Baytown; the defendant may be in Katy, and the clerk won't give you more than one.

CHAIRMAN SOULES: Is that right? Ray Hardy won't do that?

MR. TINDALL: That's right. The first

one has got to expire to get it back, and if you're trying to get --

JUDGE THOMAS: Why don't you-all just elect a new district clerk?

CHAIRMAN SOULES: I think that the first sentence covers that, Harry. It says he is to issue all the citations you request, issue "all." We'll put "all" in there then.

MR. TINDALL: I was just going to expressly say you can get more than one citation to issue for service on any party entitled service.

PROFESSOR EDGAR: Well, I don't know why you have that right anyhow.

MR. TINDALL: Well, you would think you would, Hadley.

PROFESSOR EDGAR: I think you do. I think you've just got a clerk that you're afraid to make do what he's required to do.

MR. TINDALL: He says, "Well, give me back the first citation before I issue an alias citation."

PROFESSOR EDGAR: Mandamus him. Go to the district court and mandamus him.

MR. SPARKS (EL PASO): Before we lose

everybody on this exciting topic, in the next series of things of these Rule 103's, what we already passed on Rule 103 is, as the Judge has indicated, we made it mandatory upon request for clerk to issue citation by mail.

Now, could there possibly be -- which was a good change. Could there possibly be any conflict with 99 as we're doing it where the clerk could say under this rule that they don't have to issue the citation by mail as required by Rule 103?

CHAIRMAN SOULES: I think he's to deliver to a person designated which can include the defendant.

MR. SPARKS (EL PASO): Okay.

CHAIRMAN SOULES: And let's make that clear. That is our intention, that one of the parties he can be required to deliver it to by service is the defendant himself, under the mandatory requirement that the clerk serve by certified mail.

Is that a unanimous view that that's the way this should be construed? And if so, hold your hand up?

MR. TINDALL: Sure.

CHAIRMAN SOULES: All right. That is

a unanimous view of record at this point. Is that a unanimous view that -- and of Harry, you can show this to Ray Hardy -- that the first sentence entitles a party to as many citations as that party wants to pay for against any given defendant. Is that the view? If so hold your hands up. That's unanimous and that includes Justice Wallace.

MR. TINDALL: Your first vote in two days.

JUSTICE WALLACE: That was an automatic reflex.

CHAIRMAN SOULES: All right. Then Rule 99 is approved unanimously unless I hear a dissent as we have written written it down. Okay, Rule 103.

MR. SPARKS (EL PASO): Let me save us some time on Rule 103. I wanted to remind you, we've already passed 103, which makes it mandatory on the clerk to issue the citations by mail if you request it.

Now, the next several 103's range --

CHAIRMAN SOULES: Now, that's not in this book though, is it?

MR. SPARKS (EL PASO): No.

CHAIRMAN SOULES: Okay. That's been taken out.

MR. SPARKS (EL PASO): We passed it in November of 1985, and I have it for you, which reminds me, Luke, we need to communicate, just the two of us, to get the wording right on what we are passing.

CHAIRMAN SOULES: Okay. That's fine.

MR. SPARKS (EL PASO): But let me go over the Rule 103's because I think we could spend the rest of the day on it. I don't think it's that important other than for the committee to give us direction on rewriting 103, if necessary.

All of the suggestions, and everybody in every part of the state is having service problems. They all range from the first 103, which is Page 131, that simply says that anyone over 18 can serve it.

Two, incredible -- service by -- it seems to me incredible, service by plaintiffs or their staff, counsel with these elaborate affidavits and returns and that type of thing, that run through, I just selected some, but run through page 144.

What I think we ought to do, Luke, is to get a consensus of the committee as to what service we

think 103 ought to do and then our committee will redraft one, rather than go through, individually, each of these. It goes all the way from "anybody over 18" to the way we have it now, "motion and order on anybody" to "a party who can certify the affidavits which controls litigation service with the plaintiff's lawyer if the plaintiff has a lawyer."

So you could be glad to read all of these things, but that's what it is. The most liberal one is the first one, and then there are different ways to attacking it.

We're getting communication from judges who don't like to be interrupted to sign an order on service that is routine. We're getting communications from clerks, a lot of lawyers that say that clerks won't do anything. We're getting a lot of communication with criticizing the sheriffs, or like you've got a favorite constable in Harris County.

There's just a lot of problems, so we do need to address the problems. But, now, whether we want it wide open like the first one has, or an affidavit on the service like the last one has, is what this committee should determine.

MR. BEARD: Luke, this committee has wrestled with this problem for many years. I recall Judge Cowart used to propose viable (phonetic) anything that would approach "sewer service," he called it, like they have in New York, in which the processor of service throws it in the nearest sewer and certifies that he served it and they get to be called judges. And I think we ought to be careful about changing our present rule in that respect.

MR. TINDALL: I think 44 or 47 states allow private process service. And I think that if we're serious about trying to provide speedy and efficient justice, nothing is more called for than to allow disinterested persons to serve citation.

The system is totally broke. The cases are horrible. The private process companies have been enjoined in Dallas by constables and sheriffs who are jealously holding on to this work.

We get citations into this state all the time for service as a courtesy to lawyers in other states on litigants in this state who are having to answer lawsuits in other states.

The sewer service fear has never been born

out in the states that have adopted private process. It's not borne out in the federal system. It's a means to give notice to a defendant that he's to be due in court.

We allow a postman to deliver a citation. Why in the world can't an individual who under oath delivers it to a defendant, be allowed to do it? It's just anacronysm that's long overdue.

CHAIRMAN SOULES: Well, on that point, you must get the defendant's signature on a green card before that postman has achieved service. It has to be signed by addressee only, not by agent. That's the whole problem with service from the clerk's office.

MR. TINDALL: Well, that's probably the reason that you don't use postal service as a result of that.

CHAIRMAN SOULES: It is. You can't just have it certified mail with a green card coming back if somebody signs as a party or his agent. It's got to be signed by the addressee only, and by then, they know what's going on.

MR. TINDALL: Well, I think the system is broke, 40 to 60 percent, depending on whether you count taxes in this state, are family law

cases. And chasing service consumes tens of millions of dollars of people's time in this state because you can't get effective service.

And, I mean reform is crying out in this area. I think it's a courageous proposal here to allow people to serve these papers. They're not thrown into sewers in other states. And it certainly worked for a number of years now on subpoenas, and I don't think we have had a problem of people getting picked up on attachments because of sewer subpoenas.

And I realize the subpoena is not a lawsuit but I think that fear is really misplaced particularly, if you require to return citation to be under oath by the person who served it severe penalties if it were falsely done.

MR. SPARKS (EL PASO): Let me support Harry for a minute. You notice on page 137, one of these proposals is just do it by first class mail. And there was an act introduced in the legistlature last time for that, and the legislature, in their wisdom, may well pass something like this.

So I think we should we should act because nobody relies upon -- or very few people rely upon

the sheriff's department and major cities just can't do it, I mean, this question of how many months you may be taking.

The concepts are on professional process serves, which we all use, do you do it by motion in order? Do you do did it by allowing -- as we attempted to do, or we've done in Rule 99 that we just looked at, if we adopt a change in Rule 103 and 106. Do we do it as a matter of right just by directing the clerk to deliver it to ABC Process Serving Inc.? Or do we have a motion and order for it? Or do we ignore it?

But I think we've got to liberalize it. I think the change we've made on keeping service by mail at the clerk's office is good, although we still have the right to do it in other ways. And there are some suggestions here that lawyers can do that. It may be that that's the best way to do it. We've got to do something, I view or the legislature is going to put in an act that is worse.

MR. NIX: I agree, Sam. I agree with Harry completely. We need to do something.

MR. MCCONNICO: Luke, I agree. I think we need to liberalize it. But I remember

several years ago when I was a briefing attorney and this came up to this committee, there was a lot of evidence that at that point in time presented to the committee --

MR. SPIVEY: Can you talk louder, I can't hear you?

MR. MCCONNICO: -- but there were abuses in other states and the other states have not have had perfect system. And when this came up to this committee -- oh, it's been eight, nine years ago -- the abuses and studies that were done in the other states showed how their default judgments had increased, how they had had more fights over default judgments.

And I'm not using that as an excuse not to liberalize where we are because I think we do need to liberalize. I'm just saying we need to learn from their mistakes and realize that this has a lot of consequences and maybe put some restrictions upon our system, I think, which are some of those proposals that will prevent some of the problems that have occurred in other states.

CHAIRMAN SOULES: Well, that, of course, is -- what we're getting to here -- we'll look at 106b(2). This is all we're being asked to

do, and that is, eliminate the judge from process. We're not being asked to expand anything other than eliminate the judge from process.

Now, we do have due process problems. When does a party have notice, as a matter of law, that he's been sued? When does a party not have notice, as a matter of law, that he's been sued, I guess, is really the way to state it.

And that's been the problem that's flowed back and forth across this table is, how are we sure that we, in our Texas practice, have rules that achieve this due process. If they don't, the rules are void. So there's no need to have that.

I, frankly, think the first class proposal is just unconstitutional, because the first class mail, too often, doesn't ever get where it's supposed to get. And you're talking about taking a default judgment against a party of lawsuit based on a letter. And you're going to have somebody hold that that is just unconstitutional as a rule.

Now, here, though, in 106b(2) -- I don't know whether that would be sustained on appeal; that's another story, but somebody will.

PROFESSOR EDGAR: Did you go by 103

while I was out of the room?

CHAIRMAN SOULES: Well, we're talking about 103, but I'm bringing up -- 106b(2) says that, "On a motion by any parties supported by affidavits, a judge can order that any way that achieves due process" is a way of service. It's unlimited.

MR. TINDALL: Well, that's too restrictive, imposing on litigants, middle class families, and wealthy litigants. Otherwise they have to go down there and take the judge's time to get someone other than a sheriff or constable to serve papers.

MR. LOW: Well, you got to prepare your papers. And how much longer does it take to prepare that? You have got to prepare your lawsuit anyway. Adding another paragraph and asking the judge, that doesn't take that much time.

CHAIRMAN SOULES: Well, the middle ground that has gotten a lot of our attention and has never been resolved but is still active, is some recognition of professional process servers who might even be given an oath by somebody, some official, who would have a sworn duty to carry out

some kind of office, and I assume that that takes legislative action now.

Process servers have been agitating in the legislature to get statutory recognition. I don't know where that stands. Does anybody? Harry?

MR. TINDALL: In '83 it passed overwhelmingly in the legislature and was vetoed by the governor. In'85 it never saw the light of the committee. So it's dead for years at this point.

MR. MORRIS: One of my ex-investigators is real active in that process servers group. And he says that the political cloud of the sheriffs and all those people have just got that on the bottom; it's not going to come back up. In fact, he called and allotted on this committee. I need to make that disclosure.

MR. SPIVEY: Well, how are you going to vote?

MR. MORRIS: I'm going to wait and see what's proposed.

MR. BEARD: If the legislature makes it a felony to falsely certify citation, you might accept something like that. But I just do not trust, particularly, what collection people might

do with respect to certifying service.

JUDGE THOMAS: If I remember the Dallas case correctly, the injunction said, number one, that first we had to give it to the sheriff or constable. If they couldn't serve it or refused to serve it, then we could appoint after motion and so forth, which has created a real problem, obviously, in the family courts, which is one of the areas where this is drasticly needed.

Thirty percent, for instance, of my contempt docket this week alone had to be reset for lack of service. So, I guess my only plea would be if you want to put restrictions, can you have, in family law cases, get the judges out of it because and let them do it with process servers because we need it in emergency situations.

CHAIRMAN SOULES: That goes to a different problem. Judge Thomas has identified a different problem and this is in one 106b the principle paragraph. And maybe this could be deleted. Maybe the last half of that could be deleted.

Why should a request for substitute service be depended upon first stating that service has been attempted in the regular way? Why can't you

just go in, conclude that you can't get it the regular way and talk to your judge about if and get -- of course, I know Harry doesn't want to ask the judge for anything on this, and I'm not trying to --

MR. TINDALL: No, we've already changed that, Luke.

CHAIRMAN SOULES: What?

MR. TINDALL: We've changed that.

CHAIRMAN SOULES: Changed what?

MR. TINDALL: Not having to show that service is impractical.

CHAIRMAN SOULES: When? Is that a part of what we got down?

MR. TINDALL: Sam brought that up in our November meeting.

CHAIRMAN SOULES: Was that passed?

MR. SPARKS (EL PASO): What's that?

CHAIRMAN SOULES: That we predicate subsitute service on showing that there's been an attempt at regular service. Have we eliminated that predicate?

MR. SPARKS (EL PASO): No. B-2, is that what we're talking about?

CHAIRMAN SOULES: It would be the

second half of B where it says, "and stating specifically the facts showing that service has been attempted on either A-1 or A-2."

MR. SPARKS (EL PASO): No. We did approve the 106 in November, but that doesn't do it. That's one of the things that are kind of in here. For example, if you look on Page 133 -- you know, they start with 103 and then kind of end up in 106, and this gets into the private process server.

103, though, was intended -- and I don't know if it accomplishes it. But simply as Buddy was saying in the petition, just ask. You don't have to have an affidavit; you don't have to have a motion and that type of thing, but ask the service be by John Doe or ABC Company or whatever, and you can just get an order. There's no necessity for the prerequisite. And that is, I think, what you're talking about.

Right now, I see it all the time, the lawyers just sign an affidavit that they can't get service, you know, really when they never even tried just so they can get service out, which is a bad system.

CHAIRMAN SOULES: Well, you've got to

show that you've tried and the sheriffs and constable tried to serve.

MR. SPARKS (EL PASO): I understand. I just get the lawsuits all the time.

CHAIRMAN SOULES: Of course, all that gets is motion to quash, I guess, and 21 extra days to answer it, because you've been served.

But what if we just delete that prerequisite and permit it to go directly to the judge from the outset for subsitute service? I realize that doesn't solve all of Harry's problems or Judge Thomas'. But it eliminates a first shot through the sheriff and the constable and you can, at least, have the judge determine what service is warranted that will be reasonably effective to give the defendants notice of the suit.

MR. TINDALL: The judges are going to be deceived with orders over there. It's going to be called substituted service.

CHAIRMAN SOULES: Jump over that problem. Now, we say we're going to authorize, as they say here, private process serving companies. I'll form that. I'll have my paralegals. We'll set up a little private process serving company. And everybody will have a private process serving

company. And it will be a D/B/A. It's cheaper to file an assumed name certificate than it is to get a corporation unless you want to that have that. And here you go.

Now then, you've just authorized everybody to serve. Now, that may or may not be what we want to do, but that's essentially what you do.

MR. BECK: Luke, I think we're confusing the issue when we start talking about 106b and 103 together.

103 deals with the notion of whether we want to spawn a group of professional process servers. And from the comments that have been made by this group it seems to me that the group, here is in favor of spawning a group of professional process servers.

However, there's a concern about potential abuses. Because there are no standards, either set by statute or otherwise, there is no certification for these people. They don't even have to attest under oath that they've served anybody.

And it seems to me that if we're going to pass 103, which I would be in favor of, that somehow we've got to look at, say, 107 and maybe

try to build some teeth in there.

One thing we can require, at the very least, is that these people, when they serve somebody, they attest that they've done it under oath, so that if they throw something in the sewer, there's some remedy we can have against them.

MR. TINDALL: I agree.

CHAIRMAN SOULES: Okay. I don't believe that we can authorize private process servers without authorized members of the general public. Because I do not think that we can create officers of the court; I think they are created by statute.

MR. BECK: But that would be the effect though.

CHAIRMAN SOULES: So we're just talking about wide open, anybody can serve over the age of 18 that can testify.

MR. TINDALL: We can say anyone over 18 who is qualified as a notary public, and that would narrow the class of folks, and then go with David's suggestion of putting in the penalties that the citation be returned under oath.

MR. BEARD: I don't think that notary public is narrowing down to anything.

MR. TINDALL: Well, I'm just saying --

MR. ADAMS: Well, the federal system works and it doesn't have to be done by a notary public. The Court appoints a person to serve and that's it. I don't know why that system wouldn't work on a statewide system the same way.

MR. NIX: It would.

MR. ADAMS: I don't know why we have to over-complicate the thing.

MR. BEARD: If the court orders it I don't have any problem. I just think the court needs to -- under the federal system -- why don't we just go in there and mail it to them, and if they answer you assess the cost. But the federal system allows service any way the state allows it, too, because whatever we do here is going to kick over and work in the other courts.

MR. TINDALL: We've all been on a case, I guess, after a number of years in which there's even a dispute whether the sheriff or constable did their job right, the defendant in claiming he never got those papers.

MR. NIX: That's a problem we have in East Texas all the time, Harry. If we're going to require people to swear to an oath and they start

requiring deputy sheriffs and constables in East Texas -- because believe me, if you're going to let some of those constables serve these papers, you might as well let anybody.

MR. TINDALL: I have no reservation about requiring the service being under oath. I think that's sensible.

MR. LOW: Anybody would be an improvement over some of those constables.

CHAIRMAN SOULES: All right. Let's get everybody's vote on this. This is going to take some rewriting, Sam. And we've got a September meeting and we can address the changes in citation in September. We have got too much writing to do here. But you go ahead, Sam.

MR. SPARKS (EL PASO): Let me ask you to get a consensus vote on this because on Rule 103, if you turn to Page 133, there are two things that, really, most everybody communicated with me favored.

One is similar to that proposed, except to make a change like, instead of somebody personally -- a person specially appointed, to put it by order where you don't have to have a motion, you don't have to have an affidavit, but you do have a

court order that "X" served. That's going on right now and it goes on in federal systems. Specially appointed, it doesn't make any sense, but somebody appointed by court order to do it, and that way you can get it in.

Secondly, and that gives some control to the judge who, other than the sheriff's department, would do it.

PROFESSOR EDGAR: Sam, one question in that regard. Are you asking whether or not the person designated should -- that a single order entered by a particular judge would authorize that person in any court, or whether or not you would only be in that court, and then whether or not it would have to be on motion each time that person was to serve.

MR. SPARKS (EL PASO): It's a motion that's filed as a forum motion in our part of country. Of course, they would have the attached affidavit, but it's really not correct. And it's an order that this particular case is limited to a case.

PROFESSOR EDGAR: Why should it be? Now, you're asking for guidance. But it seems to me that if a court is going to authorize "X" to

serve process in this particular case, why that person should not be authorized to serve in all cases in that court.

MR. LOW: In other words, an approved list.

PROFESSOR EDGAR: An approved list. Something like that. It seems to me that's far more efficient if that's consensus of the committee.

CHAIRMAN SOULES: In federal court you don't take a default after 10:00 a.m. on the Monday next following the expiration of 20 days. You only get a default on motion. In Texas you get a default judgment. And that's always been a very keystone concern of this committee.

We have a strong default judgment practice. And the consequences of that, after certain time periods run, are your rights are determined, essentially.

And that's why the service of citation has -- we've always been -- kept a pretty tight reign on it. But are we going to open it up to anybody over the age of 18 who is competent to testify to serve without a court order?

If the judge is going to assign a blanket

order appointing people who can serve, he's going to have several paralegals, and every law firm that's got several paralegals are going to be in an order somewhere, and that doesn't seem to me to be much help.

MR. BEARD: Could we let Harris County judges have a panel, the Dallas County judges, domestic relations court, have certain people that they make a panel to do the service and it be their duty to keep control of them as they review them.

CHAIRMAN SOULES: That sets up a class of people, without statutory authority, who have the right to make money out of the judicial process. And I don't know where the courts get the power to create officers of the court and to create that class of people.

MR. BECK: Not only that, but it creates a lot more work for the judges and their secretaries and a lot of other people.

CHAIRMAN SOULES: All right. Let's just get a consensus to find out whether we go forward with this. I'd like to see a consensus on two things.

First of all, at minimum, do we eliminate

showing that regular service was tried and failed before you can ask the Court for substitute service? I realize we may be wanting to eliminate that altogether. This is 106. How many feel that we should eliminate the showing of regular service before you can try to get substitute service? That's unanimous. There's no opposition that I see. Any opposition? That's unanimous.

Now, how many feel that we should open up service to any person over the age of 18 years of age and competent to testify, I guess, provided that he is required to certify service under oath.

MR. SPARKS (EL PASO): Do you mean without anything else?

CHAIRMAN SOULES: Without anything; without any order whatsoever. Just anybody can do it. How many are opposed to that?

PROFESSOR EDGAR: I don't know whether I am or not. I've got a question about it, Luther.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: What are we going to do about the default judgment rule that requires a showing of a extensive fraud or defalcation by court personnel?

Now, that person has not been appointed. He has no official sanction. Certainly we would want the defaulting party to be able to successfully attack that default judgment, but yet this person doesn't fall within any of the Court's guidelines.

So I really have some reluctance in not having that person designated by the Court in some way to say that he is court personnel or something like that.

CHAIRMAN SOULES: Well, the committee has voted, unanimously to delete the requirement of showing regular service in 106b as a predicate to substitute service. The committee has voted 7 to 6 to reject the permission of persons, other than sheriffs and constables, to serve without court order.

MR. SPARKS (EL PASO): Well, Luke, I don't know if the committee thinks that we should do that. 106 comes in if 103 doesn't work. And 106 says if you make that showing, you can leave it at the house or with somebody under 16. I don't know if we'd want to do that.

CHAIRMAN SOULES: Read 106b(2).

MR. BRANSON: By the way, I was out of

room and I would vote in favor of that, if you want to let the chair vote.

CHAIRMAN SOULES: Chair votes to say reject it for all the reasons that we've talked about. Now, the court can consider the fact that we're 8 to 7.

MR. MORRIS: Well, Luke, it seems to me like, and I may be naive and abusive as Steve McConnico mentioned, that I'm not aware of, but it seems to me like if I'm wanting to serve someone, whoever I pick, in essence -- I'm an attorney and I'm an officer of the court, and if I get involved in some scammy deal, I'll lose my license.

It seems to me like, we ought to, rather than impeding -- and there are often times when I'm trying to find somebody who is trying to avoid me, and I need very badly to get service on them. I don't have time to Micky Mouse around running and getting orders if I've got the person identified and located.

Now, I'm an officer of the court. And if I select someone that participates in throwing it in the sewer, then I ought to be on the line.

MR. LOW: But you don't know that, Lefty.

PROFESSOR EDGAR: Well, you may not know it.

MR. MORRIS: But it seems to me like that's my job, Hadley, is to select someone who is responsible and competent to get service.

CHAIRMAN SOULES: Is there any other comment on this, because if I didn't follow the proper rules of order in taking that vote, I want to complete it.

MR. TINDALL: I'm not sure what we voted on.

JUDGE THOMAS: I want to know what we voted on.

CHAIRMAN SOULES: All right. The vote was, first of all, unanimous to, at least, delete the showing of attempts of regular service before you can get subsitute service under B-1 or B-2 of Rule 106.

The second one was, are we going to recommend to the court that any person over the age of 18, competent to testify, is permitted to serve process in Texas on the condition that he be required to return that citation under oath?

Now, that's what's on table, that last part, and we'll discuss it and then we'll vote.

MR. BRANSON: Can we require to carry a bond?

CHAIRMAN SOULES: No, we can't do that. That's legislature.

MR. MCMAINS: I don't have any problem with the concept of requiring him to do it under oath, but I think there's a pragmatic problem in terms of the fact that most of the citation forms are printed and on deposit, don't have a place for it. It costs a lot of money to replace all of the paperwork.

CHAIRMAN SOULES: We'd have to do that on a blank anyway because the signature line says "sheriff or constable."

MR. MCMAINS: Well, that may be. But what I was going to suggest was that you could actually accomplish more, I would think, if merely you said provided that no default could be taken without the person who is not an officer testifying as to the proof of service, you know, at the default hearing.

MR. TINDALL: That's fine.

MR. MCMAINS: That gives the judge complete control over the ability -- he sees the person they're sitting there, they're testifying

under oath that they served it. That's strong proof of service as you would ever want.

MR. SPARKS (EL PASO): On your consensus, I am for the change, but I still think that we ought to have a court order. And that's the only thing that keeps me from voting for the proposal as you do.

CHAIRMAN SOULES: Do you think you should have the court order?

MR. SPARKS (EL PASO): Yes, I think so.

CHAIRMAN SOULES: Then you don't need a change because you can do it under B-2 with a court order. Anybody can serve under any circumstances. But we've voted unanimously to go straight to that kind of service without having to go through substitute service.

MR. SPARKS (EL PASO): If that amendment is made, yes, you're right.

CHAIRMAN SOULES: Well, we voted to recommend that.

JUDGE THOMAS: But B-2 would require a motion.

CHAIRMAN SOULES: Well, it's the ex parte motion; you don't have service. Because an

order is a foregoing motion granted, and you've got to set forth the reasons why you want substitute service, and the court finds that that service is warranted and will be reasonably effective to give the defendant notice of a suit.

JUDGE THOMAS: Right.

MR. BECK: I know I'm probably confused about what we voted on, but what bothers me is that under 103 we are allowing anyone to serve process. Whereas under 106, we require before anyone can serve process, they must be a disinterested adult. So we have different standards under 103 than we do under 106b, and is that the intent on this committee?

MR. TINDALL: No, I'm not supporting that. It should be the same.

MR. BECK: We're running the two together and I'm confused as to what we're voting on. Because 103 deals with initial service of process. 106b only comes into play if 103 doesn't work.

MR. SPARKS (SAN ANGELO): After direct.

MR. BECK: Correct.

MR. TINDALL: It should be "any

disinterested adult over 18."

CHAIRMAN SOULES: 106b does not require that the service be by a disinterested adult.

MR. SPARKS (SAN ANGELO): Well, where is the rule? I think it does.

CHAIRMAN SOULES: Well, read 106b(2).

MR. SPARKS (SAN ANGELO): Luke, 106b(2) is service after you can't get direct service then that is service where you leave it at his job or his house or -- it's indirect service after you can't get direct.

CHAIRMAN SOULES: It says in any manner.

MR. SPARKS (EL PASO): First of all, if we eliminate that 106, we're just eliminating 103.

CHAIRMAN SOULES: Not on B-2. B-1 has disinterested adults in it, but not B-2. B-2 is any way the judge says will work, period.

MR. SPARKS (SAN ANGELO): After you've failed with direct service.

CHAIRMAN SOULES: We've already voted. We're going to take that out.

MR. TINDALL: 178 on subpoenas talks

about any person who is not a party and is not less than 18 years of age. Now, that's the same thing as a disinterested person, isn't it?

CHAIRMAN SOULES: Sure. Disinterested adults.

MR. TINDALL: To me, the same language should be in 103 and 106. For instance, I think Rusty has got a good point to delay the concerns about the sewer service. If you take a default judgment using anyone over 18 that's not a sheriff or constable that you require them to come to court because that's not going to come up one in a thousands times and that cures the problem, but it gets the defendants in court.

JUDGE THOMAS: Luke, it seems to me that whatever our recommendation is, it would have more weight if we could get a more unanimous decision. And what I hear the stumbling block to be is it should be done with a court order. So my suggestion or an alternative would be, that in whatever it is that you're trying to get served, you put and I want service by thus and so, and you get an order in every case.

And I withdraw the objection about a judge having to sign an order because, actually, in a

family law case where this becomes important, the Judge is going to have to sign a temporary restraining order or a writ or something else so they can sit there and sign new orders. And that way I think we could probably get a unanimous vote.

CHAIRMAN SOULES: Judge, let me see if I understand you.

JUDGE THOMAS: You see I'd rather see everything under 103, so there's no question. And what you say there is that anyone can do it as long as you have a court order. You don't require the motion, you don't do all of that other.

JUSTICE WALLACE: Does anybody on the committee practice out in the rural areas where you have got multi-county districts? How would that affect getting the court order from the judge where the judge might be three counties away and comes to your county once every two months.

JUDGE WOOD: Judge, my notion about that is you, basically, do not have the problem.

MR. LOW: In those areas you don't.

JUDGE WOOD: You don't have the problem. The fact is, we don't even have the problem in Corpus Christi that I know of.

I would have a tendency, as a member on this committee, to defer to the judgment of these people in Harris and Dallas and those counties, because it's something, really, that we, down in our part of the country, have no problem with, and, therefore, are not too confident, perhaps, to pass on.

CHAIRMAN SOULES: Judge Thomas, why does not the mere deletion of the predicate of the attempted regular service get us to where you're proposing? That is, because the judge can sign an order. Of course, there has to be a motion and an affidavit.

JUDGE THOMAS: Why would you increase the paperwork of the lawyers? I mean, we're going to grant them, Luke. And particularly, when we're trying to get a kid and we have a parental kidnapping or we're trying to keep somebody from ripping off the bank account.

We're talking about the ordinary divorce case, the ordinary divorce case involving not a lot of money, but you do have restraining orders. Why increase the legal fees? So designate it, you get your court order, and everybody goes on.

PROFESSOR EDGAR: Looking at Rule 104,

I'm trying to think through on that a little further. If the Court, under Rule 104, can designate an adult in the county in the event there is no officer qualified to serve as a person authorized to serve, then why couldn't the Court, by the same token, designate any private person in the county to serve without a requirement that there first be no one otherwise qualified.

CHAIRMAN SOULES: Well they can in individual cases under 106b(2).

PROFESSOR EDGAR: Yes, but I'm just talking about generally. I'm talking about under Rule 103.

I mean, if under Rule 104, we have a partially populated county, and the sheriff and a constable, for some reason, are disqualified, the law now allows the Court to appoint some disinterested adult to serve in place of the constable or sheriff. Now, that's authorized.

Now, if that's authorized then why can't the Court just go ahead and appoint a private person in the absence of disqualification?

CHAIRMAN SOULES: Anybody have a response to that?

MR. TINDALL: I think it's a great

idea.

MR. LOW: I thought that's what we kind of we're doing.

PROFESSOR EDGAR: Yes, but we're getting hung up, though, on whether or not the Court could really appoint a disinterested person as an "officer of the court." I think maybe he can.

MR. LOW: Well, he makes the witness become an officer of the court when he's sworn in --

PROFESSOR EDGAR: Well, that was something Luke was concerned about a while ago.

CHAIRMAN SOULES: Well, I think that whenever the Court has no way to get service, the Court can get service somehow and that's what 104 does.

PROFESSOR EDGAR: I understand that. But if the Court has that power, though, to designate officers of the court because of disqualification, why can't the Court designate somebody in the absence of disqualification?

CHAIRMAN SOULES: I think it's a broader issue; I don't think you have the compelling need to the court, and I'm not sure the

Court has got that power.

MR. LOW: I believe the Court can make anybody he wants to an officer.

MR. BRANSON: Hadley, why don't you formulate that in the form of a motion and let's see if we --

PROFESSOR EDGAR: This is Sam's committee and he's asking us for guidance. And I'm just trying to figure out some broad principles here that we might use to maybe consolidate and coordinate these rules to carry into effect what we want.

MR. SPARKS (EL PASO): I think we've gotten on this point all the guidance that we're going to get. And that is, one, if we eliminate in 106 the necessity of showing prior service, and, two, the consensus as to whether or not we -- you know, if we do that we've got the court order bit anyway if we eliminate also the necessity of an affidavit.

The only other question is, do you want to be more liberal and in 103 allow any disinterested person over 18 without a court order to do it? If we vote on that, then we've got our consensus.

CHAIRMAN SOULES: All right. Let me

get one intermediate issue. Should the motion to require substitute service setting out the reasons for it be verified? How many feel that it should be verified?

PROFESSOR EDGAR: I think it should be.

CHAIRMAN SOULES: The lawyer can verify it.

MR. SPIVEY: Are you talking about the motion or the return?

CHAIRMAN SOULES: The motion to get substitute.

MR. TINDALL: What are you are verifying to?

MR. SPARKS (SAN ANGELO): What are you verifying? You don't even have to show you have tried now.

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: That's right. It's not necessary.

MR. TINDALL: I thought it was going to be even without a motion; it was just going to be an order of the court.

MR. SPIVEY: I'd rather have a lawyer's representation than an oath.

MR. BRANSON: Well, you can file a motion saying "I need it," and then not swear "I need it."

CHAIRMAN SOULES: So the consensus is it need not be verified.

MR. TINDALL: No motion.

MR. ADAMS: I don't think we need a motion. That just makes paperwork for everyone concerned. You don't do that in federal court. You just submit an order there that the clerk signs that appoints somebody that is properly qualified to serve.

But if you want a judge to do it, you still don't need a motion; you just have an order that accompanies the petition.

CHAIRMAN SOULES: So you would strike all of B down to -- just start out "The Court may authorize service" -- just the last phrase.

MR. TINDALL: So how would it read, Luke?

CHAIRMAN SOULES: Well, B would just be, "The court may authorize service," 1 and 2.

MR. SPARKS (SAN ANGELO): Luke, it sure seems like you have got more opportunity for abuse in service under 106 where you're just

leaving it with somebody at the house. To me, you have got two separate things. One is, you have got direct service, where a defendant has been handed something. Anybody over 18 that's willing to take an oath says, "Yeah, I gave it to him." Okay, that's one question, maybe with a default like we're talking about and Rusty's statement.

But you've got a separate problem. If somebody comes in and says, "I've tried; we can't find this guy." You understand? He's hiding in the bathroom or something. Then you're giving to anybody at the house.

MR. BRANSON: Which bathroom?

MR. SPARKS (SAN ANGELO): I don't know, but you're just leaving it at the job or the house or something. And are we now saying that you don't even have to try to get direct before you can just leave it at the house?

CHAIRMAN SOULES: That's right.

MR. SPARKS (SAN ANGELO): Okay.

CHAIRMAN SOULES: You go to the judge and the judge can sign an order authorizing screen door service or he can authorize any other manner of service, but at least you've the got the judge involved. He's authorizing it.

PROFESSOR EDGAR: I'm not in favor of that.

MR. TINDALL: I'm not in favor of that. Luke, all I'm saying is that, you know, personal service is fine by anyone, but if you're going to leave it at the screen door with anyone over 16, then I think that's another issue that none of us have quarreled about.

MR. SPARKS (SAN ANGELO): See, Luke, that's what I'm trying to say. I'm for liberalizing direct service, but if you can't get direct, I still want the guy served. I don't want it stuck in his screen door.

MR. TINDALL: I'm not suggesting we liberalize the substituted service at last-known place of employment.

MR. SPARKS (EL PASO): What I'm going to do is, I'm going to draft a new Rule 103. If you look at Page 133, and the only difference I'm changing from Judge Marsh is when he says "a person specially appointed" to insert the word "by court order" to serve it. No affidavit; you can handle it in your petition if you want to. And that way, there's no affidavit, there's no motion and the Court can sign an order appointing a

person to serve petition. And then if anybody comes up with anything else, they can argue about it then.

CHAIRMAN SOULES: Where is that, Sam?

MR. SPARKS (EL PASO): It's on Page 133.

CHAIRMAN SOULES: 133, Rule 103, and what are you going to put in? You're going to delete the underscored and substitute something for it?

MR. SPARKS (EL PASO): No. If you look at the underscored, I'm going to say "to a person specially appointed by court order to serve it."

JUDGE THOMAS: And then change 107 and make them return it under oath?

MR. SPARKS (EL PASO): Well, that was my next question. Do you want us to prepare a return under oath in that event?

PROFESSOR EDGAR: Yes.

MR. LOW: Either that or what Rusty was talking about.

PROFESSOR EDGAR: Sam, if I might ask a question. By "a person specially appointed," do you mean to include artificial persons in addition

to natural persons? Including process serving companies, is that your intention?

MR. SPARKS (EL PASO): You told me yesterday that "person" meant "corporation."

PROFESSOR EDGAR: That's right. But in other instances, we've used a private party or process serving company, at least, some of the proposed drafters have. And I'm wondering if you mean the word "persons" to include that class as well.

MR. SPARKS (EL PASO): I thought it would.

PROFESSOR EDGAR: Well then, why don't we say that then?

MR. BEARD: I would be opposed to that.

PROFESSOR EDGAR: But that's what we mean.

MR. BEARD: We use "adult person" here.

PROFESSOR EDGAR: Well then, we don't mean process serving companies. That's what I'm trying to find out.

MR. SPARKS (EL PASO): I think unless you change "person" though -- I was convinced

yesterday with you and Dorsaneo that "person" means "corporation."

PROFESSOR EDGAR: Well, I know. But I think what they're saying here now is that we need an adult person, that is, a human being.

MR. SPARKS (EL PASO): Okay. I don't care; it's whatever the committee wants to do.

PROFESSOR EDGAR: I'm just asking; I'm just wanting to know what you mean.

CHAIRMAN SOULES: Disinterested adult person?

PROFESSOR EDGAR: All right, disinterested adult person.

MR. TINDALL: Well, that's awkward phraseology. Any other person authorized by a court order.

MR. LOW: You know, I think we're almost in accord. But everybody is talking about different things at different times.

CHAIRMAN SOULES: Sam's point on 103 at the top of 133 is getting to -- maybe we can get to a point where we can pass this. "All process may be served by the sheriff or any constable of any county in which the party to be served is found or" -- I think that's suppose to

be "by any disinterested adult person."

MR. SPARKS (EL PASO): You don't really need "person." You need "disinterested adult."

CHAIRMAN SOULES: "Disinterested adult."

MR. TINDALL: "Authorized by court order."

CHAIRMAN SOULES: "Authorized by court order."

MR. TINDALL: Yes. "Authorized by court order."

CHAIRMAN SOULES: Now, we're going to have process servers trying to get blanket orders. Is that what we're intending to facilitate?

MR. LOW: I don't think that's --

CHAIRMAN SOULES: Okay. Then I think we need specially-appointed language in there.

PROFESSOR EDGAR: Specially authorized?

MR. TINDALL: If you're authorized, you're going to be by an order of the court.

CHAIRMAN SOULES: Now, what were you saying there, Harry? By any adult authorized by court order?

MR. TINDALL: Yes.

CHAIRMAN SOULES: "Any disinterested adult authorized by court order to serve."

PROFESSOR EDGAR: Well, now, the sentence starts out in the plural, "all the process," and now we're talking about "it."

MR. MCCONNICO: Just say "serve process."

CHAIRMAN SOULES: In a particular case?

MR. TINDALL: Yes. That kills off the idea of a standing order.

MR. SPARKS (EL PASO): I move for the adoption of that.

MR. TINDALL: I second it.

CHAIRMAN SOULES: "All process may be served by the sheriff or any constable of any county in which the party to be served is found or by any disinterested adult authorized by court order to serve process in a particular case or if by mail --"

MR. SPARKS (EL PASO): We've amended that already, so just stop this amendment right there.

CHAIRMAN SOULES: What did we amend it

to, though?

PROFESSOR EDWARDS: What you need to do is add the language we're going to add and add it to the last part of the sentence. Because, you see "if by mail, either of the county" refers back to the sheriff or constable.

So the language to be inserted should be inserted at the end of the sentence rather than the beginning of it.

CHAIRMAN SOULES: Let's go ahead. We may clean it up, but if we say "or if by mail, either by the sheriff or any constable of the county --"

"Service by registered or certified mail and citation by publication shall be made by the clerk."

MR. SPARKS (EL PASO): Yes, we've already made that change.

CHAIRMAN SOULES: Now, does everybody have the focus of this now?

MR. MCCONNICO: One question. Hadley, do you think the use of the word "adult" eliminates the professional process serving companies?

PROFESSOR EDGAR: No, but I think it

eliminates the company being designated. By "adults," you're talking about a human being. But it would not eliminate a person who is an employee of a process serving company. But it would still have to be in each particular case.

CHAIRMAN SOULES: All in favor of 103 as now proposed, show by hands. Okay. Those opposed? That's unanimous. And it's the version that we've worked on at the top of Page 133. And as I understand the tenor of subsequent conversations, you do not want to delete that language from 106b that we first talked about. You still want that as predicate to 16-year old service or any or manner; is that correct?

MR. SPARKS (EL PASO): Yes.

CHAIRMAN SOULES: Okay. So that will be changed.

PROFESSOR EDGAR: There's some confusing language here in this 103 we just looked at. It says, "either by the sheriff or constable of the county in which the case is a party." We don't mean that.

MR. MCCONNICO: Well, I thought that's what was changed and talked about.

MR. TINDALL: Could you read 103 as we

voted on it?

PROFESSOR EDGAR: In which the party -- in which the case is pending.

MR. MCCONNICO: Yes.

PROFESSOR EDGAR: Not as a party but is pending. "The county in which the case is pending."

MR. MCCONNICO: But the rest of the sentence doesn't make sense then, because it then says, "is pending to or interested in the outcome of the suit." We've got to change all of that.

PROFESSOR EDGAR: Well that's because the person that was quoting the old Rule 103 missed a line.

CHAIRMAN SOULES: They sure did.

PROFESSOR EDGAR: It doesn't make sense.

MR. SPARKS (SAN ANGELO): We can have a case pending in one county, but the parties in another county and the sheriff or constable in the county where the person to be served is the one that has to serve it over there.

PROFESSOR EDGAR: It should read, "by the sheriff or constable of the county in which the case is pending or of the county in which the

party to be served is found." That's what the old rule says, and that's what was intended.

MR. SPARKS (SAN ANGELO): Hadley, you're not suggesting that a sheriff from Tom Green County is authorized to go to Houston and serve process, are you?

PROFESSOR EDGAR: No.

MR. SPARKS (SAN ANGELO): Well, the case may be pending in San Angelo.

PROFESSOR EDGAR: Well, the rule as it now reads says, "or if by mail either of the county in which the case is pending or of the county in which the party to be served is found."

That refers back to the sheriff or constable either in the county in which it is pending can serve it or in the county in the which the defendant is to be found can serve it. And I think that's what we intend to retain. At least that's what Rule 103 now states.

MR. TINDALL: The sheriff in Harris can serve Tom Green by mail.

PROFESSOR EDGAR: That's right. By mail, that's right. In fact, under Rule 108, I think the resident in Tom Green can serve in Louisiana by mail.

MR. SPARKS (SAN ANGELO): That's correct.

CHAIRMAN SOULES: Sam, there's a lot of language in 103, as it now exists, that is not in this paragraph at the top of 133, either shown stricken through or not changed.

PROFESSOR EDGAR: I think it was simply an error in transcribing it here on this page because it does not show to be omitted. .

CHAIRMAN SOULES: They don't even show all the language after the semicolon. So can I prevail on you to get our thoughts into this and have it for us in September in final form?

MR. SPARKS (EL PASO): I've got a note on it.

CHAIRMAN SOULES: Okay.

MR. SPARKS (EL PASO): I've got another one. If you go right across the page, I need one more guidance, and that is the only other suggestion of Rule 103 that I think we need to decide on as a consensus.

On Page 132 on your book there are other suggestions made but we've discussed them down to the last paragraph, and that is "allows the attorney for the party seeking service to do the

certified mail." We need to know if you want us to draft a rule in new proposed 103 that would allow that?

CHAIRMAN SOULES: How many want the problem of having to become a party for the proof of service by certified mail?

MR. NIX: I need it in East Texas.

CHAIRMAN SOULES: Do you?

MR. TINDALL: I think it's a good one.

MR. NIX: My office has to do the clerk's work in about five counties surrounding me up there. And I'm always sending secretaries and paralegals to one clerk's office to the other to get out my citation by mail.

And it would be so much simpler and so much easier if we could just simply do it right there at the office and get it out from the office. It sure would save me a lot of paralegals.

MR. MCMAINS: You've got to have green cards signed by the adressee only in order to get default --

MR. TINDALL: That ties back into what we talked about earlier anyway on freedom to give the plaintiff the control of the citation. You can bring him back and mail it to him directly

from your office.

CHAIRMAN SOULES: Sam, tell me where that is again.

PROFESSOR EDGAR: Page 132.

MR. SPARKS (EL PASO): Page 132, the last phrase in that suggestion.

CHAIRMAN SOULES: Does the first part of that -- let me see.

PROFESSOR EDGAR: No, the only thing he's asking us about is the last part of that, not all the added language, but just whether or not the parties who are seeking service can initiate the certified mail.

CHAIRMAN SOULES: Sam, there's not any need to do this other business. These rules are pretty confusingly written. What you're really talking about is tagging onto 103 after the word "pending" at the end, the phrase, "or may be made by the party or the attorney of the party who is seeking service."

MR. SPARKS (EL PASO): I'm not so sure that I like the wording there. What I'm really talking about is the concept that the plaintiff's lawyer can go down and get the file, get the citations and have his or her office handle the

mail.

CHAIRMAN SOULES: How many favor that? Show your hands. Opposed? That's unanimous. Okay. That will be a part of your rewrite for our September meeting. So you're going to work on 103 in those respects. Is there anything else on 103 or 106?

MR. SPARKS (EL PASO): No.

PROFESSOR EDGAR: Now, Rule 103, the title will have to be changed, though, to "officer or person who may serve." We'll have to change the title.

MR. SPARKS (EL PASO): Say that to me again.

PROFESSOR EDGAR: Well, Rule 103 is now entitled "officer who may serve." So we need to change the title.

MR. SPARKS (EL PASO): Yes. How about Rule 104?

MR. SPARKS (SAN ANGELO): I think it's gone.

MR. SPARKS (EL PASO): The next one is Rule 107. And this is one of many requests by Representative Patricia Hill. I don't know who she is. And this particular incident she wanted

to eliminate the 10 days filing of the citation before default. I found no support for that.

CHAIRMAN SOULES: Pat Hill is the wife of Federal District Judge Hill in Dallas. There's a lot of preference in her suggestions for the federal rules. That's where she's coming from I think in part, which is fine. I'm not criticizing it.

MR. SPARKS (EL PASO): I'm not either; I just asked because I didn't know and everybody seemed to like the 10-day rule, but I have no feeling one way or the other.

PROFESSOR EDGAR: I move that we reject this proposal.

MR. SPARKS (EL PASO): I second it.

CHAIRMAN SOULES: All in favor, show by hands. Opposed? Unanimously rejected.

MR. SPARKS (EL PASO): The next is Rule 107.

CHAIRMAN SOULES: That was 107, wasn't it? Oh, You got another page of it.

MR. SPARKS (EL PASO): I think, basically, we've gotten everything that we want to get. I think the redrafting, we've got enough information to be able to be go through all of

these. Okay. So the next one is Rule 142.

MR. BEARD: Before you get to that, Sam, 108a is a problem when you're trying to serve a defendant in a foreign country because of the treaties that the United States has entered into. And this rule is very misleading. And you serve them under this rule, and you find out that it's not any good because of the treaties that the United States has entered into. I don't know how to get this on the notice. I got educated by Fulbright & Jaworski about how to serve a company in Germany.

MR. NIX: I got educated by Strasburger & Price.

MR. BEARD: The ruling is misleading for an ignorant country lawyer. So I don't know how exactly to get --

CHAIRMAN SOULES: Which one?

PROFESSOR EDGAR: 108A. It's not in there. Look in the rule book.

MR. BEARD: It's got, you can serve R.R.R.R. -- you can't serve except in certain specific ways by virtue of these treaties which the United States has entered into. For example, in Germany you may translate the petition into

German and serve it on a specific organization in Germany.

MR. SPARKS (EL PASO): It's more than that. All of your deposition rules, your interrogatory rules, none of them apply in a case where you're dealing with a firm or a person in a country that has a treaty with the United States. So you can't take depositions in some countries and you have to to go through, you know, all that translation verbally.

MR. BEARD: Well, it's sort of a trap that we ought to give some notice in 108a that is not real simple.

MR. TINDALL: Now, this is a bear trap as it reads.

MR. NIX: I don't think there needs to be any change in the rule at all, Pat. Sometimes they will simply come in and file an answer. When they don't is when you start having those treaty problems.

MR. MCCONNICO: I've had the same experience in a Japanese corporation.

MR. BEARD: You can't read 108a and know what's getting ready to happen to you if they assert their right.

MR. SPIVEY: How about just saying "pursuant to the treaty."

CHAIRMAN SOULES: We're not going to be able to address that without a written submission. We realize we have got a problem. Anybody who wants to pitch in a written submission, we'll take it up.

JUSTICE WALLACE: Nothing much we can do about it.

CHAIRMAN SOULES: Sam, on 142 and 143 you're going to roll that into 103 and 106 and 107. You're going to consider a rewrite on all of those?

MR. SPARKS (EL PASO): Yes, sir.

CHAIRMAN SOULES: Okay.

MR. SPARKS (EL PASO): Because they have the same guiding light.

CHAIRMAN SOULES: Okay. I'm with you now and we're on Page 144, Rule 142. Thank you.

MR. SPARKS (EL PASO): I just don't have any experience and nobody wrote me on this one, so it's up there. The proposal is to take out the sentence where an attorney or officer of the court cannot be a surety in the case, except on special issue court. So eliminate the last

sentence in the rule.

MR. BEARD: I move to eliminate.

MR. NIX: I second it.

PROFESSOR EDGAR: Well, would you want a judge being a surety in the case? That's one thing this is designed to preclude.

CHAIRMAN SOULES: That would disqualify him. If that doesn't give him an interest in the case, I don't know what would. That's one way that judge can get --

PROFESSOR EDGAR: Maybe I'll withdraw that.

CHAIRMAN SOULES: That's one way the judge could get rid of that bear.

MR. BEARD: I have never yet had a judge to fail to give leave to a signed surety. I think it should be eliminated.

MR. SPARKS (EL PASO): In light of that great experience, I move that we adopt Rule 142 as recommended by the committee.

CHAIRMAN SOULES: That doesn't help the uninitiated avoid being disqualified in the case. I mean, clearly, if you sign on as surety, you can now be made a party. And when you're made a party, you have a problem representing other

parties. When you sign on an as a surety you can sure find yourself without a client.

MR. BEARD: Well, a surety for cost you have got to pay. I mean, if you don't pay, you're a party out of it, and sure you get sued.

CHAIRMAN SOULES: But that's just by the clerk.

MR. TINDALL: Well, as I read this rule, you can go down and file a petition without paying costs.

JUSTICE WALLACE: But you can't get service.

MR. TINDALL: You just can't get service. Is that what this says?

JUSTICE WALLACE: Yes.

MR. TINDALL: Well, that obviously conflicts with fee statutes where they do have filing fees.

CHAIRMAN SOULES: Well, let's get to what's here then. Those in favor of deleting the second sentence of Rule 142, show by hands. That's 8. Those opposed, show hands. That's unanimous; that will be deleted.

MR. SPARKS (EL PASO): We may have deleted a sentence that just shouldn't have been

there in the first place.

MR. MCCMAINS: What's the whole rule?

MR. SPARKS (EL PASO): It says "security for costs."

MR. MCMAINS: But you're saying that the only costs incurred are the prices you've got to pay before you get anything.

MR. TINDALL: But this would imply that you could file a suit without paying costs. You've got a fat chance with that.

MR. SPARKS (SAN ANGELO): But you can't get citation.

MR. TINDALL: You can't get citation.

MR. SPARKS (SAN ANGELO): But we've told the clerk back here earlier to immediately issue citation on the filing; we just amended that just a while ago. That would mean to imply without costs, the clerk better issue that citation.

MR. SPARKS (EL PASO): On page 145, let me give you some background on this one. This is a proposed new rule. And, apparently, in most of all of the jurisdictions, if not all, when a petition is filed in forma pauperis, the clerk automatically files an objection and the Court

automatically normally signs overruling the clerk's objection, and there's nobody else to object to it at that point.

In some cases there are apparently clerks and judges who don't much care for legal assistance people and so they require hearings. And this comes from a group of attorneys. I couldn't tell you who they are. But this is a proposed new procedure for avoiding that problem for people that are screened by legal assistance offices and they will file affidavits and then avoid the necessity of hearings before summons and/or citations are issued. And that's the purpose of the rule.

MR. SPARKS (SAN ANGELO): It won't work for you, Gilbert, because that one says if you get a contingent fee --

MR. ADAMS: Yeah. I think it ought to be struck. I don't think that had any business in there.

MR. SPARKS (SAN ANGELO): No, that's just saying if you're going to get a contingent fee that you can't take pauper's oath.

MR. ADAMS: None of the contingent fees are here.

MR. SPARKS (SAN ANGELO): Well, I don't think that has anything to do with it.

MR. LOW: What do you recommend, Sam.

MR. SPARKS (EL PASO): I just really don't have any -- this comes from the Gulf Coast Legal Foundation. It was a letter to Justice Wallace by Robert Byrd, Executive Director, and he had a lot of stamps. He sent it to a lot of lawyers, some judges -- a lot of judges. Ray Hardy seems to be favored with it. County attorneys, president of the bar associations, and that type of thing.

MR. TINDALL: Ray Hardy is in favor of this rule?

MR. SPARKS (EL PASO): No, no, no. But he got a copy of this letter. I assume he's be one of those given the focus of the problem.

MR. TINDALL: This is a problem in Harris County once more.

MR. LOW: I thought you were just ready to vote against it automatically.

MR. TINDALL: Well, I understand Bexar County, for example, they don't fight the pauper's right. If legal aid takes the case the district clerk makes no contest on the fees.

MR. ADAMS: That's probably true.

JUDGE THOMAS: Dallas County fights every one.

MR. TINDALL: Harris County fights every one.

CHAIRMAN SOULES: The problem that the clerks have raised is that they have a duty to collect fees from everybody that can pay, Gilbert, they don't have independent --

MR. SPARKS (EL PASO): Speak up, Luke, I can't hear you.

CHAIRMAN SOULES: Who wants to state this problem, that some feel that their duties requires them to uphold the justice of the law and get a finding. And they want to be out from under that or be told they have to, one way or the other. David Garcia, San Antonio, doesn't worry about it. We've been told here, if the legal aid takes a case he relies on their assessment. But, of course, not everybody that goes in forma pauperis comes through that organization.

MR. NIX: Well, apparently, some people think the rule is needed. Is there any opposition to it, that you know of, Luke?

CHAIRMAN SOULES: You know, I am not

just quite into the details of it.

MR. SPARKS (EL PASO): Let me tell you that there is this plus in this proposed rule: It gives far more information than anything else and allows, at least, an intelligent basis on how to do it. Otherwise, it's just unable to pay as sworn to.

And it also provides that at any time you can come in. This is a sworn affidavit that's filed. I really think it's a better procedure than we have now and, therefore, I think we ought to consider it.

PROFESSOR EDGAR: Sam, I have a question. Is it really complete though? I've just scanned it quickly here, but in 145, Paragraph 1 it states what happens if the Court finds that the party is able to pay costs. But then it never does say what happens if the Court finds that the party is unable to pay costs. At least, I don't see it anywhere here. I'm just suggesting that it might be incomplete.

MR. BRANSON: Doesn't it initially have it in lieu of filing security?

MR. SPARKS (EL PASO): At that point it's already done. The petition is filed and the

service has been issued on the affidavit.

PROFESSOR EDGAR: Well, why? I don't see why because this is going to replace what is now Rule 145.

MR. SPARKS (EL PASO): Well, if you look at 145, Paragraph 1, which probably should be A, "Upon filing of the affadavit, the clerk shall docket the action or appeal and accord such other typical services as are provided by any party." Then it says, "If the Court shall find at the first regular hearing," and it goes on.

PROFESSOR EDGAR: I don't have any problem, but I think there needs to be some more language here. I think if you just literally follow Rule 145, you're just kind of sitting there in limbo in the event the Court finds that you're unable to pay costs. It just seems to me to be incomplete.

MR. MCMAINS: The current Rule 145 is only in response to having been ruled for costs, and Rule 143. Because you only have to give security for costs.

CHAIRMAN SOULES: Isn't that the security for costs that's required for citation and all other things, Rusty?

MR. MCMAINS: Well, that's with both; it's actually both. 142, of course, was the one we just took the second sentence out of.

CHAIRMAN SOULES: Well, when you get to 145 it's all security for costs whether you've been ruled or otherwise.

MR. MCMAINS: It's any party required to give security for cost. And you can be required by motion to rule for costs under 143, or the clerk, may require you to give it when you first file it, under 142.

CHAIRMAN SOULES: The new 145 eliminates challenge by the clerk, doesn't it?

MR. SPARKS (EL PASO): Yes. It makes a presumption. The clerk then will issue the process or do whatever the attorney has requested. And at the first hearing, then that question is determined. If it's determined that the party is not indigent, then all process stops and all costs have to be paid.

MR. TINDALL: I think it's a good rule. I know the Gulf Coast folks get jacked around on these court costs alot, and evidently, by affidavit, by them, as opposed to their client, if they are representing it on a no-fee basis.

CHAIRMAN SOULES: The 145 rewritten does not state who has standing to challenge the affidavit. It omits that completely.

MR. SPARKS (EL PASO): That's true. But it does say it is to be determined at the first regular hearing.

MR. BEARD: "If" the Court shall find; he doesn't have to do anything.

CHAIRMAN SOULES: There could be nothing done.

MR. MCCONNICO: Why do they need "at the first regular hearing"? Why doesn't it just say, "If the Court shall find that the party" --

CHAIRMAN SOULES: In the course of action.

MR. MCCONNICO: -- "in the course of action."

CHAIRMAN SOULES: Where does it say anything about in the event a contest is filed?

MR. BEARD: It doesn't say anything. The party needs to be able to contest.

CHAIRMAN SOULES: What they have eliminated here is, they haven't said who, if anybody, has standing to raise it other than the Court. And the clerks will probably consider that

helpful because they're no longer specifically told that they have that right, and then you put that just position with their duty to collect fees, feel compelled.

MR. MCMAINS: Well, one thing in 145 that it does and it shouldn't do, because it doesn't belong there, is the stuff on appeal. It says "or appeal," and we've got an entire set of appeal rules in our Appellate Rules dealing with affidavits, inability to pay, how you do that, what the time limits are, et cetera.

MR. BEARD: What is the exclusion other than a party receiving a government entitlement? Wouldn't that take about half the people in the United States?

CHAIRMAN SOULES: "Based on indigency," it says that.

MR. BEARD: No.

PROFESSOR EDGAR: In looking at the last sentence of paragraph number 1, does this mean that even a defendant who prevails could nevertheless be assessed costs?

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: I don't think that's fair.

MR. MCCONNICO: I don't either.

PROFESSOR EDGAR: I mean, if the plaintiff loses and he can't pay the cost, why should the defendant who prevails be assessed the cost? And I'm thinking of child -- domestic cases and things like this. You have an indigent wife and, okay, so she doesn't have to pay the cost, why should the husband who prevails be required to pay the costs?

CHAIRMAN SOULES: That part of it is pretty clearly pointed, isn't it, to the indigent?

PROFESSOR EDGAR: Well, I don't mind not requiring the indigent to pay the cost, but why should you assess it against the prevailing party?

CHAIRMAN SOULES: And that's a pretty partisan sentence there because what they're trying to do is get the clerks off their backs and they can get the defendant to pay it. Mr. Clerk, don't worry about it; don't bother us anymore with it. I think there is merit to what you, Hadley, and Steve say about that.

Here's a direct question: Should we include the last sentence of the present Rule 145 which places the burden in the event a contest is filed

and label it something about contest, so that, at least, the rule anticipates that there could be a contest? Or do we not want to have that?

MR. BEARD: The defendant should be able to contest. Because he's incurring a lot of costs that will be assessed against the plaintiff if he's successful. He should be able to contest and demand securities for costs, rule for cost.

MR. SPARKS (EL PASO): You know, in the spirit that this was offered, they shouldn't complain about us putting in a contest provision of the parties. They really just want to have the ability to go down, file a lawsuit, have it issued to get service to get the thing started, rather than having a bottleneck that they feel sure is -- so, you know, we have to redraft this anyway because of the language there.

But other than that one sentence that surely needs work on that Hadley points out, contesting rights and the removal of all reference to appeal, that Rusty has -- Does anybody else have anything else or whether they want us to go forward and present anything next time?

MR. MCCONNICO: Sam, I just have a couple of housecleaning things in that first

paragraph of the one's that's numbered "procedure." I would eliminate the word "typical services." We don't know what "typical services" as are provided by any party.

The first paragraph above that where it says, "A party who is unable to afford costs is defined as a person who is presently receiving government entitlement based on being an indigent or any other person who has no present ability to pay costs," I would consider eliminating "present." He might, you know, gain the ability to pay costs later.

CHAIRMAN SOULES: You never know when "present" is. Is it present in the future or present today? It really is just a matter of drafting; it doesn't help much. Are we going to preclude the clerk from contesting pauper's oath?

MR. BEARD: Yes, let's do that.

CHAIRMAN SOULES: It gets them out of the stream, but it also gets the officer of the state who is responsible for collecting these fees eliminated from the proceedings. They complain they don't want be there, but should they be there?

PROFESSOR EDGAR: Well, is that really

a practical matter? Is that really a substantial source of income? I'm talking about after contest has been filed, is it really significant?

CHAIRMAN SOULES: I wouldn't think so. I think they're pursuing them because they feel they have duties. And that would just put the parties at risk of not being able to recover deposition costs, or what have you, out of pocket.

PROFESSOR EDGAR: If the opponent wants to file a contest, then he has a right to do so.

CHAIRMAN SOULES: We would leave the duty to collect costs --

PROFESSOR EDGAR: Or duty to contest on the part of the litigants.

CHAIRMAN SOULES: I guess you could say, "On motion of a party or on Court's own motion they could be contested." And at least that would give the Court that.

JUSTICE WALLACE: Well, now we amended that rule, not too long ago, to let the court reporters contest those too, because they're the ones who are really getting clobbered.

Most counties make no provision and civil

cases pay the court reporter on those indigent statement of facts. They are just working gratis when they prepare one.

CHAIRMAN SOULES: That's in the Appellant Rules, isn't it, Rusty? The power of the court reporter to contest the affidavit for a statement of facts.

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Because the court reporter doesn't have to take a deposition.

JUSTICE WALLACE: Or a statement of facts either.

CHAIRMAN SOULES: Or a statement of facts.-

JUSTICE WALLACE: What rule is that?

PROFESSOR EDGAR: It's in the Appellate Rules.

MR. MCMAINS: I don't think they can preclude from preparing the statement of facts, but they -- and that's not an excuse for them. They don't have to require them in advance, but they have a right to move for security in a cause.

PROFESSOR EDGAR: 355C.

JUDGE TUNKS: Luke, aren't we talking about preparing a statement of facts, if you have

to prepare a statement of facts if you've been paid or the party has sufficient bond?

CHAIRMAN SOULES: He has not a duty to do that?

(Off the record discussion ensued.

CHAIRMAN SOULES: Okay we're going to then have contest based on motion of party on the Court's own motion. The clerk is just given mandatory ministerial duties under this new 145. You shall file when that oath is made. I don't know whether Ray Hardy will quit pursuing the collection of costs.

MR. MCMAINS: The problem is, though, if you do what's suggested about taking out "other typical services," which I agree is kind of a strange term, there isn't any provision here that they don't have to deposit any costs to service.

The only thing at issue is a docket of the action, if you were to take that out. So you would never have a hearing if you never get service. I mean, I assume that one of the real problems is the ability to issue service, and I think that's what they meant, is they want

service.

MR. SPARKS (EL PASO): Pat doesn't want to give them anything they didn't ask for.

CHAIRMAN SOULES: We have, in 145, all other services required of the clerk. Why do we need to change that to typical services? That's been around for a long time. I guess somebody knows what that means by now.

MR. MCCAINS: Well, what I was saying, the suggestion is made to take out all references to typical services. I don't know. Just leave typical services there. They do other things besides issue process. They put it on the docket sheets -- it says, "shall issue process and perform all other services required of him."

CHAIRMAN SOULES: In the same manner that security had been given; that's what you want to say.

MR. MCMAINS: Some clerk is liable to read that and if you take the process requirement out, they're liable to read it as --

CHAIRMAN SOULES: So we're going to say, "upon the filing of the affidavit, the clerk shall docket the action," strike "or appeal," because we cover that elsewhere.

PROFESSOR EDGAR: What rule?

CHAIRMAN SOULES: This is Rule 145 as shown on page 145 of our material. Strike "or appeal" on the first line of the paragraph that starts -- well the first one. The very first line says "or an appeal," strike that. I believe that's all in the lead-in paragraph.

Then in paragraph enumerated as 1 under "procedure" of the first line strike "or appeal," leave the word "and," strike the rest of that sentence. We'll insert their language from the present rule that says after the word "and," the words "perform all other services required of him, in the same manner."

JUSTICE WALLACE: Shouldn't we pick up with "shall issue service process and perform?" In other words, pick up those three sentences just prior to --

CHAIRMAN SOULES: "Docket the action," yes, sir. "Shall docket the action, issue process," so we'll stop after "docket the action," and pick up the old rule "issue process and perform all other services required of him in the same manner as if security had been given."

PROFESSOR EDGAR: Do you want to

include the justice court here, too? The rule includes the justice court, but this only talks about clerks.

MR. MCMAINS: You mean 145 talks about justice courts?

PROFESSOR EDGAR: Yes.

MR. MCMAINS: Current Rule 145?

PROFESSOR EDGAR: Yes, current rule. And, obviously, 145 was written only for cases in courts that have clerks, but you might also need to file it also in the JP Courts.

MR. MCMAINS: Except that the only thing that 145 refers to is 142 or 143. The only time they're required is to give security under the rule. 142 is if the clerk requires it, and 143 is if it's on a motion by any party, the rule for costs.

CHAIRMAN SOULES: What about the justice rules back there? Broadus Spivey is bailiwick.

PROFESSOR EDGAR: Broadus, what are your thoughts on this?

MR. SPIVEY: It's unfair. I want everybody to do their own thinking.

(Off the record discussion)

CHAIRMAN SOULES: I guess we should put that in there because I'm sure there's some filing fees. Justice rules operate a lot more simply than some of the others. You recuse if by challenge.

And I've never seen this word before on special process. The justice in the case of an emergency may "depute" any person of character. There's a lot of interesting stuff back in there. But anyway I guess there's some reason why the justice courts, Rusty, can require deposits.

MR. MCMAINS: Well, the justice court rules start to the exception that the district court rules apply.

PROFESSOR EDGAR: Also, there's a provision Rule 749a for a pauper's affidavit on appeal from the JP to the county court.

JUSTICE WALLACE: I asked Rusty about that.

PROFESSOR EDGAR: You really need to think about that in connection with this because there appears to be some different procedures, and I think that needs to be stated also.

MR. MCMAINS: Of course, I think that's the reason for taking it out of 145, I mean taking the appeal references out of 145.

CHAIRMAN SOULES: Well, is there any provision for a JP collecting a fee whenever a suit is filed?

JUSTICE WALLACE: Well, there's a provision for the county clerk. They can enforce retainer suits, which I can imagine this type of individual would be the defendant more often than not.

And if they appeal to the county court, then they've got to pay the filing fees just like they were the original plaintiff. And, perhaps, if we're going to do this, we should make some provision that the county clerk would not be able to require those fees in order to docket their appeals from that forced retainer suit.

CHAIRMAN SOULES: I don't see any provision for the JP collecting a filing fee. I mean, that's in the justice court when the suit is docketed. You made a good point there, Judge.

Well, I guess, we need to look at a rewrite. What we're saying is the committee wants this rule but we want to see how it dovetails into justice

courts because that's in 145, originally, but not in this. And we want to revise the services reference. Now, what else do we need to do now?

MR. SPARKS (EL PASO): Contest rights, and remove the word "appeal."

CHAIRMAN SOULES: And remove the word "appeal."

PROFESSOR EDGAR: And that last sentence in number 1, too.

CHAIRMAN SOULES: And delete the taxing against the defendants. Okay. That's Rule 145. With those changes, what's the vote of the committee to send this along with Sam for rewrite and then final a consideration next time pursuant to approval? How many feel it should be approved if we can modify as we've indicated? Show by hands. Those opposed? That's unanimous. And I guess we'll take our lunch break at this point.

PROFESSOR EDGAR: You did strike the word "presented" before "ability" up there didn't you, as Steve suggested?

CHAIRMAN SOULES: Yes. Where is that, Steve? I have not struck it, but I want to.

PROFESSOR EDGAR: Fourth line from the top "present ability."

MR. MCCONNICO: I also suggested striking "typical" before services.

CHAIRMAN SOULES: Well, we're going to strike all that out. And that's good.

(Recess - lunch.

MR. SPARKS (EL PASO): On page 146, ever since I've been on the Adminstration of Justice Committee and this committee there's always been at least a 30-minute argument devoted to nonsuit.

162, as outlined in your book on Page 146, is the redrafting that the committee wanted us to do last time. We had a lot of talk about it last time and that's the redrafting.

To remind you of one of the reasons for the requested rule, as I recall, is about half of the jurisdictions require orders of nonsuit, half say that you just do it with the clerk; that's one point.

The other point was, there were about three different proposals. We, I think, rejected one of them and the other two are suppose to be incorporated in 162 as prepared. That's all

really I have.

PROFESSOR EDGAR: Would this repeal Rule 164?

MR. SPARKS (EL PASO): It would make it unnecessary, yes. It really combines those two.

PROFESSOR EDGAR: Are you moving that this be adopted, Sam?

MR. SPARKS (EL PASO): Well, you know, all of these are not my rules, but I'm just bringing them before you. We've had a good bit of correspondence, not lately, but in the last year, particularly, with judges and clerks on Rule 162.

PROFESSOR EDGAR: Well, I move that it be adopted then.

MR. BRANSON: Somewhere, I'm having trouble telling what we did. What did we do other than combine Rule 162 and 164?

MR. SPARKS (EL PASO): Well, this makes it clear that there is no necessity for an order, for one thing. That's in the first sentence.

And then Rusty had a problem with one of the suggestions with regard to court costs, so we had to break down the last part to make it clear about

court costs. And the way we resolved it was really just stating what would happen to cost if it was dismissal of the whole lawsuit and did not state anything on cost if it was just the dismissal of one party.

CHAIRMAN SOULES: And what's added is this business about nonsuits do not affect pending motions for sanctions. And that was Damon Ball's request out of San Antonio where he felt that cases were being nonsuited and then refiled in order to escape orders for sanctions.

MR. LOW: 164 has that in it now.

CHAIRMAN SOULES: Does it?

MR. LOW: Yes. 164 says the same thing in the event of motions for sanctions intent or the party taking a nonsuit has been ordered to pay attorney's fees or other costs or both sanctions are finally -- Court's order and they ought to pay such on both. Nonsuits shall have no affect on the liability.

CHAIRMAN SOULES: Well, I'm going back too far with my memory. We got that done in '84 then.

MR. MCMAINS: I think what happened, or probably the reason for this, is that 162 is

the notice of dismissal rule, and that just talks about it. 163 then talks about dismissal as party served. It says when it will not prejudice another party, the plaintiff may do so.

MR. LOW: I think 162 was kind of contemplating dismissal prior to a trial, and 164 is a nonsuit you take during the trial.

MR. MCMAINS: Right. And 164 is a trial.

CHAIRMAN SOULES: Anybody see anything wrong with the proposed change?

MR. LOW: It doesn't change anything.

CHAIRMAN SOULES: From the bottom counting up 6 lines "have no affect 'on'" instead of "for" any pending motion.

PROFESSOR EDGAR: Right.

MR. LOW: The old rule used "upon" but I don't think that's even proper.

MR. MORRIS: Why is this needed?

CHAIRMAN SOULES: Costs.

MR. SPARKS (EL PASO): Lefty, we wanted it made clear that you don't need an order, but you file a notice and you have to serve the notice on the other party; that's one.

Secondly, Judge Barrow (phonetic) wanted a

reflection as to the cost authorizing the clerk, if it's nonsuited, as a whole that the clerk could tax the cost to the nonsuited party. I think those are really the only two suggestions that are incorporated in this proposal.

CHAIRMAN SOULES: Any further discussion? Those in favor of the proposed change to Rule 162 show by hands. Opposed? That's unanimous. And I guess, Sam, you're going to do some rewrite on 164 to combine it. Or do we repeal 164?

MR. MCMAINS: 164 and 163 are repealed.

MR. SPARKS (EL PASO): It makes it one rule.

PROFESSOR EDGAR: You mean 162 and 164.

MR. SPARKS (EL PASO): All of them.

MR. MCMAINS: Well, that's true.

CHAIRMAN SOULES: Then your comment on that when you put it in final form, should be that we're revising Rule 162 and combining Rules 163 and 164 with it.

PROFESSOR EDGAR: You haven't changed 163.

MR. MCMAINS: Yes, it is; it's in here. It's been brought into this rule.

MR. LOW: The only thing, Rusty, 163 kind of deals with where you don't dismiss the whole suit but just a party.

MR. MCMAINS: Yes. Rule 162 is really not the same thing. 162 and 164 are the two rules that are being combined.

MR. MORRIS: I have a problem. A nonsuit, under, 164 doesn't require anything. You can just say, "I pick up sticks," and go home. But here under this Rule 162, it's written now, it says, "A copy of notice shall be served in accordance with Rule 21A." I mean, it seems to me like we may be backhandedly, if we take 164 out of there, abolishing the rights the plaintiffs have always historically enjoyed of just nonsuiting the hell out of a case.

MR. LOW: 162 says that in accordance with Rule 21A; so does the new proposal.

MR. MORRIS: Look at 164. That's our right to nonsuit. If we're right in the middle of a trial and we want to pick up our briefcase and leave, we don't have time for 21A notices and all that kind of stuff.

CHAIRMAN SOULES: What if we put into the title "dismissal or nonsuit"? "Any time before the plaintiff has introduced all of his evidence other than rebuttle evidence, the plaintiff may dismiss a case or take a nonsuit upon filing of a notice."

MR. LOW: "Dismiss a case by announcement in open court."

CHAIRMAN SOULES: If we say "take a nonsuit," we can adopt the prior practice on that without having to spell out what it's been, I think.

I see what Lefty's problem is. He doesn't want to get to the point where we don't have nonsuit rights anymore by repealing 164, which is a nonsuit rule. But if we're going to combine them, we ought to combine both concepts expressly. Is that your point, Lefty?

MR. MORRIS: In essence. But if you look at 164, I mean, there is no notice provision. It just says, "The plaintiff may take a nonsuit."

MR. MCMAINS: The whole rule contemplates you're in trial. You don't have a porblem with the other side not knowing what's

going on.

CHAIRMAN SOULES: Lefty, being as a matter of history for the record, what we're doing, it's, I think, thought by the prevailing view that you take a nonsuit even if the judge says nothing but the rule doesn't say that.

And the only way you can get something into the minutes is for the Court to sign an order. And this rule, as it's written now, says that the the clerk will enter in the minutes copy of the notice. So it clearly excludes the Judge from the nonsuit practice.

Some courts rule on your taking a nonsuit and then that becomes a part of minutes; otherwise, it doesn't get into the minutes. So, you see, this makes a notice all there is, and expressly makes a notice all that's required for a nonsuit. And then the clerk acts on that and puts it into his minutes. That's the reason notice is used.

MR. BRANSON: But he's saying actual notice would be appropriate as opposed to 21A notice. And if you go back and look at 21A, it really talks about delivery to your opponent, and there's no reason to have to have a secretary during trial sit down and type up a nonsuit

notice.

MR. MORRIS: The truth of the matter is, if you're in trial, you don't need a notice, if you have a right to quit.

PROFESSOR EDGAR: You see, these rules really talk about two different things. Rule 162 is talking about dismissal prior to trial. And 164 is talking about nonsuit during trial. And we're trying to combine both of them without making the distinction that Lefty is concerned about it, and I think he's right.

I don't really know whether we should expect one rule to do double duty. I guess, really, what I'm saying, Sam, is that, couldn't we incorporate the change which you're doing by changing Rule 164 and leaving 162 as it is?

MR. LOW: What would be wrong with putting -- take a nonsuit. You can take a nonsuit in open court or dismiss a case upon the filing the notice of dismissal. You're talking about both of them.

When you take a nonsuit, the only way I know how to do it is in open court.

CHAIRMAN SOULES: No, you can take a nonsuit not in open court.

MR. LOW: Well, that's a dismissal; we can call it that. It's like a cross-claim and a cross-action.

MR. MORRIS: Well, it looks to me like the rule that we're considering here today on Page 146 was only intended to take the place of Rule 162. It wasn't intended to even get down into 164. Isn't that something we kind of engrafted upon after we got in here?

MR. SPARKS (EL PASO): No. They wanted to combine these two rules because they were given problems. And also, even when you're in trial and you say, "I take a nonsuit," I don't know what you-all's practice is, but something formally has to go to the clerk, even if it's a -- that's right, the Court can enter a docket.

MR. MORRIS: The Court can enter on a docket sheet and you go on to the house.

MR. SPARKS (EL PASO): I remember when we first argued about this years and years ago. Jim Ray (phonetic) of Corpus Christi drafted one, a nonsuit rule for the defendant, too, and it didn't pass.

CHAIRMAN SOULES: Would this solve the the problem if we -- and I hate to impose on Sam,

but I guess we're going to always do that since he's got this big subcommittee, a big responsibility of this subcommittee -- take the taxing of costs and put it in both places; keep both 162 and 164, put the taxing costs in both and provide that the nonsuit shall be noted in the minutes by the clerk; not the notice shall be entered, but the nonsuit shall be noted. Nonsuit shall be entered, I guess, because entry is important.

MR. BRANSON: On the judge docket sheet?

CHAIRMAN SOULES: Well, wherever. They will probably put it in the minutes, and it needs to go in the minutes.

JUDGE THOMAS: The only thing they run through the minutes is a signed order of some sort.

CHAIRMAN SOULES: Not if this court says they put something else in there.

JUDGE THOMAS: No, but, I mean, it needs to be pretty clear what you want them to do.

CHAIRMAN SOULES: Right. Well, this says for dismissals that the --

MR. MCMAINS: It already says that.

PROFESSOR EDGAR: Rule 162 already says that.

CHAIRMAN SOULES: Okay. So we've got that, Judge.

MR. SPARKS (EL PASO): Let me give you an example of some of the problems you have. Pat was just saying in Dallas you have to have an order of nonsuit in at least one case. That's true in some of the courts in El Paso.

After a couple of years of a closed file, I frequently get one of these things; we're going to dismiss this case in 60 days if you don't do something. And it's a case that was nonsuited during trial or before trial or what-not, and it's been carried as an open case for all this period of time because nothing formal ever got to the clerk's office.

I can certainly do what Luke is asking, redrafting 164. But I guess I'm being dense. I don't see Lefty's problem. All the additional requirement would be that you would have to file some written notice of nonsuit and send a copy of it.

CHAIRMAN SOULES: We have got to go back, Sam. We have got to go back in time to Rule

21A when we amended Rule 21A.

Rule 21A used to say, "Every notice required by these rules not in a pending case other than citation," and we couldn't figure out what in the hell "not in a pending case" meant. Because we figured every notice had to be in a pending case because pending case meant a case on file. So we took it out; just eliminated that language.

Then we found out what it meant. That meant a case on trial. Now then, we don't have the general notice provision for what happens whenever you file a motion and a case on trial. It just falls under, if a judge hears it, then he's shortened the time which is also something we put into 21. We put that into 21A.

MR. BRANSON: We've also got some notices, Luke, for depositions to perpetuate testimony in cases that are not pending.

CHAIRMAN SOULES: Well, that's a lawsuit, to petition to take a deposition.

MR. BRANSON: Don't you have notice provisions within that rule?

CHAIRMAN SOULES: Well, actually the way a deposition, perpetual testimony is taken is the same as filing a lawsuit. In essence, that's

what it is.

MR. BRANSON: Sam, what Lefty is saying is, it slows you down getting out of Dodge if you have to stop and type what you're doing.

MR. SPARKS (EL PASO): I understand that. What do we do? Do you want the clerk to enter it on the minutes?

CHAIRMAN SOULES: He wants the notice and, I guess, have the nonsuit entered in the minutes.

MR. MORRIS: Yes. You could have nonsuits entered in the record.

MR. SPARKS (EL PASO): I'll say entered in the record, the minutes of the court.

MR. MORRIS: Yes. But if I'm over there and I want a nonsuit, I don't want to have to sit there and write up a motion and hand it to the lawyer and go hand it to the judge.

CHAIRMAN SOULES: So, we could just underline this, I think, where it says, "any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, plaintiff may dismiss a case upon the filing of dismissal, or take a nonsuit, which shall be entered in the minutes." If we want to keep them combined.

MR. BEARD: I think we ought to combine them.

MR. TINDALL: Clerks are still going to want an order to close those files. That's just their mind saying either there's a judgment or an order of some kind.

CHAIRMAN SOULES: At least there you've got the clerk of the judge that's on the bench; you don't have Ray Hardy. And that judge can tell the clerk, "Enter that in my minutes."

But we've taken the order out of this. I mean, we've said what is to be done and no order is required. The clerk is supposed to enter the notice of dismissal or the nonsuit and not the order.

MR. MCMAINS: It doesn't really say that no order is required. You took it out, it looks like, but you -- why don't we tell them that the nonsuit or dismissal shall be effective upon the filing of another subject to these other pending motions and no prejudices to the other parties and shall be entered in the minutes as if an order of the court.

And that's really what you want communicated, what they want to solve, in terms of the question

of whether you need an order or not.

CHAIRMAN SOULES: Let's see if we can do this: "At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, plaintiff may dismiss a case or take a nonsuit," and just strike "upon filing of a notice of dismissal," and we'll put it back in in a minute, "which shall be entered in the minutes." "Notice of the dismissal or nonsuit --"

PROFESSOR EDGAR: No, I don't want the nonsuit served in accordance with 21A, just the notice of dismissal. In other words, Lefty doesn't want to have to prepare a motion in order to take a nonsuit in open court. Is that right, Lefty?

MR. MORRIS: That's correct.

PROFESSOR EDGAR: He's not required to do that now.

MR. MORRIS: Are we going to, you know, prepare a notice and hand it out around the courtroom if I have multiple defendants?

PROFESSOR EDGAR: According to the notice of dismissal, that should be served in accordance with 21A. But then lawyers are going to wonder what's the difference between the notice

of dismissal and a nonsuit. That's why I suggested that we retain 162 and 164 because they're both related to different things.

CHAIRMAN SOULES: There is certainly logic in that. How many feel we ought to preserve 162 and 164 and just take care of the problems in the rules respectively? All right. That's a consensus. And, Sam, can you do that?

JUSTICE WALLACE: Can you clear that up the difference between the two? 162 says, "At any time prior to commencement of trial, a plaintiff may dismiss the case" and it's clear we're talking about dismissal before trial. And then on 164, it's clearly a nonsuit because it states, "upon trial you may take a nonsuit."

PROFESSOR EDGAR: Yes.

MR. SPARKS (EL PASO): Then on 162 you can just say "dismissal before trial" as the caption.

CHAIRMAN SOULES: "Prior to commencement of trial."

JUSTICE WALLACE: "Any time prior to commencement of trial."

MR. SPARKS (EL PASO): How about Rusty's idea that we just add a sentence.

CHAIRMAN SOULES: And say, "no order is necessary." I think everybody agrees with that, don't they?

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: And then nonsuit will be "nonsuit during trial" and dismissal will be "dismissal prior to commencement of trial."

JUDGE WOOD: There should be some language limiting the right to take a nonsuit during trial, in trial.

JUDGE TUNKS: Before the Court when they take a nonsuit in court. I imagine the lawyer wouldn't just go home and decide that he doesn't want to try that case anymore and not come back.

MR. SPARKS (EL PASO): Did I get the consensus, Luke, that the sentence, "no order is required" should be in both rules?

CHAIRMAN SOULES: Right.

MR. SPARKS (EL PASO): I'll redraw 164 and we'll keep them both.

MR. MCMAINS: 163 in that regard probably ought to be -- I mean, if you're going to put language in there about no order is necessary, you may want the same thing on 163.

CHAIRMAN SOULES: You might call Jeremy Wicker and find out where 2088 is now, too, and 163.

JUSTICE WALLACE: You could just say that "nonsuit shall be effective upon the announcement of same."

PROFESSOR EDGAR: What is 2088?

MR. SPARKS (EL PASO): I just asked that.

MR. BEARD: You can't sue the sureties in certain cases without nonsuit.

MR. SPARKS (EL PASO): A dumb question then is: Do we still need 163? We have got dismissal before.

PROFESSOR EDGAR: This dismissal is for less than all the parties.

MR. MCMAINS: What we need to do is revise 162 to include dismissal of a whole case or any party that had been served, any one or more parties.

PROFESSOR EDGAR: 162 is really dismissal as to less than all parties.

(Off the record discussion ensued.

MR. SPARKS (EL PASO): Are we really ready to go on or am I sufficiently confused?

CHAIRMAN SOULES: Well, I'm trying to find the language we used in connection with the request to say that no court order is necessary.

PROFESSOR EDGAR: Request for dismissal would be 169.

JUDGE TUNKS: I think that's in the cases, but not in the rules.

CHAIRMAN SOULES: It's in the rule somewhere, Judge, but I don't remember where we put it.

PROFESSOR EDGAR: It's 169; it's the second paragraph about the third or fourth line. Is that what you're talking about? "Without the necessity of a court order and less." Is that the language you're looking for?

CHAIRMAN SOULES: Yes, that's right. And that really ought to be over in 215. We didn't make it that far. I don't know whether that's the best language or not. We said "the matter is admitted without necessity of a court order in 169." That may or may not be the best way to say it over here, "without necessity of court order." All right.

MR. SPARKS (EL PASO): 165a is a proposal from the Counsel on Administrative Judges. It seems to be a modified version of what you-all do.

PROFESSOR EDGAR: Doesn't this conflict, though, with what we were talking about yesterday that there are certain types of family matters that we might want to keep on file for a long period of time? Because civil cases certainly include those matters.

JUDGE THOMAS: They haven't mediated in two years, so I don't think they're going to.

CHAIRMAN SOULES: This is dangerous. We got a file back there in our file, and for whatever reason, we haven't paid attention to for a couple years. Without notice, without anything, it gets dismissed because we haven't remembered it and filed a motion to retain.

Now then, we've got a suit that's barred by limitations that has been dismissed. Now, that wasn't a very good suit. But the suit against the lawyer that let it happen is a real good suit; it's a better suit.

And I would guess this right here: I think between the administrative rules that we've

wrestled with if they become effective, or if they don't, and 165a as we worked on it through the COAJ in this committee, and with a lot of attention, and it didn't get done exactly like we wanted it when the Court got it up through 1984, takes care of that, of the judges dockets and they don't need another quick cut of cases.

MR. BECK: I might add, this is also going to be in conflict with the local rules of Harris County, Texas because we have a dismissal docket down there. And the courts moved it, I think, from two years to three years and there's some consideration of moving it from three to four.

MR. BRANSON: We voted while you were out of the room to make Harris County part of, I believe it was, Louisiana.

MR. MORRIS: How do we word a motion if we wanted to defeat this thing, Luke?

CHAIRMAN SOULES: Just move that it be rejected.

MR. MORRIS: I move that Rule 165a as proposed be rejected.

MR. SPARKS (SAN ANGELO): I second it.

CHAIRMAN SOULES: Moved and seconded.

Any further discussion? All in favor of rejecting this hold your hands up. Opposed? It is unanimously rejected.

165a-2

MR. SPARKS (EL PASO): On Rule 155a-2, Page 149, this is on reinstatement that expressly, "a motion to reinstate must set forth grounds showing good cause."

CHAIRMAN SOULES: Well, so far, we lawyers have managed to keep that out, even though the judge probably requires it. What is good cause? Have you forgot about it? Again these rules, dismissals for want of prosecution terminate a party's rights in most cases.

MR. BECK: Luke, the only concern I've got about it is this. I think you ought to have some standard. If reinstatement is pro forma, then what are we really accomplishing?

If you've got a case, an automobile accident case, that is ready for trial in six to eight months and just -- the reasons it's not being pushed to trial is because one or more of the attorneys is not pushing the case for trial, particularly, the plaintiff's attorney, why shouldn't that person, after the expiration of some period of time, have to show good cause as to

why he's not pushing it? I mean, all the rule says now is, you state what the grounds are. The grounds are, "I'm too busy."

MR. BRANSON: Well, I'll tell you what, though, what happens is, when the notice comes in that it's dismissed, David, it gets the plaintiffs' attention and shortly thereafter something is usually done.

MR. BECK: I've had instances where a lawyer has filed eight of these.

MR. MORRIS: Well, but, David, also think about the litigant's right on this thing. To me, you're punishing the litigant who perhaps, maybe, didn't have a great deal of wisdom in selecting an attorney. Just removing their rights on that case.

MR. BECK: What I'm trying to do is, to put pressure on the attorney to prosecute the case, that's what I'm trying to do.

PROFESSOR EDGAR: It seems to me like rather the litigant might be in better position because he has a better case against the attorney than he did against the original defendant.

CHAIRMAN SOULES: Let's read the second paragraph of 165a(2). We were able to get

this and maybe we want to abandon it now. "The Court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional on the result of conscious indifference, but was due to an accident or mistake or that the failure has been otherwise reasonably explained." Now, that's the standard now, not good cause.

MR. SPARKS (SAN ANGELO): Luke, that standard has problems within itself. One of problems is: I had a case up in Fort Worth, which is not my local docket. And it gets set for a trial, and it's more than two years old. And I don't get a notice of the setting.

Now, I file a motion to reinstate within the time limits and the judge looks at me and the clerk is there, and the clerk swears they mailed me a copy, and the judge says that it's going to be dismissed.

And I was ripping the knees out of my pants, saying, "Judge, I've deposed people; it's ready." But their general rule in Fort Worth is that if a clerk tells the judge she sent the notice out, you're dismissed.

CHAIRMAN SOULES: Well, do we want a

reasonable explanation or good cause? And they are different, very clearly different in our laws. Right now the bar has the benefit of reasonable explanation test as opposed to good cause test and good cause test is tougher. How many want to continue the reasonable explanation burden? Show by hands.

MR. SPARKS (SAN ANGELO): Yes, continue what we got now.

CHAIRMAN SOULES: How many want to make it more stringent and turn it to good cause? Okay. It's unanimous, then, to retain what we have as far as the test. Is that equivalent to rejection of this? Is there any comment? So we have a unanimous rejection of 165a as proposed by Judge Nelson, with the direction of everybody's attention to the second paragraph of one 165a(2) that sets the test, different than the test than good cause test.

MR. SPARKS (EL PASO): Okay. Rule 165 on Page 150, Jim Kronzer wanted to go back to the six months. So the two changes in here are 30 to 180 days. And down at the bottom, if a motion reinstated is not decided by written order within 75 days to change to 45 days after a timely motion

to reinstate is filed.

I have to ask Rusty; I don't remember why we were requested to put 45 other than 75, but I'm sure there's some reason. This was one that was tabled and we were supposed to bring it back, but 180 days is a change from 30 days to six months.

PROFESSOR EDGAR: Well, the 75 days, I think, coincides with the time that a motion for new trial is overruled by operational law.

MR. MCMAINS: The old rule which is the one he's supposed to have changed, runs the dates on 165a as consistent with ordinary judgment in that, you've got 30 days to file it, unless you didn't get notice of it, in which case 306a takes care of it, although it's max 90 days, I think, under 306a. It doesn't extend it more than 90 days as to when your time is started.

This appears to say, and the way they have just changed it it says it shall be filed within 180 days after the order of dismissal is signed or within the period provided by Rule 306a.

The period provided by Rule 306a becomes irrelevant because it's a lesser period than 180 days, quite frankly, I mean, your extension period. And giving them an automatic six months

if they knew about it the day after it happened, doesn't make a whole lot of sense to me, frankly. It doesn't require -- the old rule was six months from the date that it happened, but it had to be at least 30 days after you got notice of it. If you got notice of it before that period up to a maximum of six months, then that's where you're time is.

I guess my basic problem is, we tried real hard to make all the Appellate Rules run at the same time to the best possible, and I'm not sure that this doesn't start screwing that up again.

MR. LOW: Rusty, what would it do with -- a trial court, generally, has jurisdiction -- a dismissal is a judgment; that's the judgment. After judgment is entered a trial court has jurisdiction 30 days. This is really giving the trial court jurisdiction for 180 days in a judgment situation like this is what it's doing, isn't it?

MR. MCMAINS: It's attempting to say that there's a difference in a motion for reinstatement than a motion for new trial. And what we were trying to do was to try to move it back into where it was the same type of practice.

That's the reason we changed the time, originally.

The 306a rule requires actual notice of the judgment. And if you don't get actual notice of the judgment, then you can postpone it. The time don't start for a substantial period of time not to exceed 90 days. I mean, I just don't see that this is a problem, frankly.

MR. SPARKS (SAN ANGELO): But I'm telling you the case I was talking about. The problem is, nobody sends you notice, and under 306a you've got to file a --

MR. MCMAINS: You file your motion, and if the judge finds that did you have notice --

MR. SPARKS (SAN ANGELO): If you're outside of the 90 days, you've got to file a bill of reviews.

PROFESSOR EDGAR: You file a motion bill of review.

MR. SPARKS (SAN ANGELO): That's right. You can't get it reinstated and you haven't done a thing wrong and nobody sent you a notice.

I think that's what Kronzer is addressing, is that you get into a situation where a case gets dismissed, you never get notice, and 306a cuts you

off. Your time shouldn't start running on dismissals until you know you've been dismissed, and he's upping that to six months.

PROFESSOR EDGAR: Well, Sam, it's just like anything, though, you have got to consider the concern of courts to have finality to judgments. That principal runs through here, though, and at some point a judgment has to be final. And the purpose of 306a and Rule 165a is to try have the finality of judgment all to have occurred at the same time.

And if you didn't get notice, then certainly you should be entitled to some type of relief. But you don't get relief by way of an appeal of the case; you get if by equitable bill of review.

MR. SPARKS (SAN ANGELO): Hadley, what I'm telling you is, you have a case there; you've deposed everybody involved. You and the other attorneys think it's ready to go. The judge dismisses it under a local dismissal rule. The clerk says, "I sent notice out." They sent it by regular mail, and there's no telling who the notice went to. It didn't go to the attorney involved. And the time periods under 306a run. And instead of getting a simple reinstatement when

all the lawyers are ready to try the case, you have to go to bill of review. That holds you to an entirely different standard to get the case tried than a motion to reinstate.

I happen to agree with Kronzer that you're taking away the time limits. And I don't understand, there needs to be some period of time, but there is a problem there.

PROFESSOR EDGAR: Well, not the standard, really, for the motion to reinstate as we see here under 165a(2), which is the reasonable explanation standard, is very similar to the standard on bill of review. So the standard is really about the same. You just have to file a separate lawsuit. And you preserve the concept of finality of judgments.

MR. MCMAINS: I know it's of no assistance to you but the fact of the matter is that the Rule in 306a(4) specifically requires that you got notice of the judgment, and I don't care whether the clerk -- the clerk's mailing it to you is not notice; it's actual notice. And there's no basis for a trial court's finding that you didn't get actual notice.

And you have a right to, you know, if you're

within the time periods -- now, that doesn't mean the 30 days. That means that if you filed within 30 days of when you actually acquired notice. And if you did that you, have an appeal right and you have a remedy straight by appeal and you ought to win that. Because if there's no controverting evidence that you didn't have actual knowledge, all they have got is the clerk saying that they mailed it, and you say, "I didn't get it." I don't think that's any evidence.

MR. LOW: And an order of dismissal is a judgment. There is no question.

MR. MCMAINS: That's right. And I think you have an appeal record there, not just a bill of review.

PROFESSOR EDGAR: If it's within the 30-day period.

MR. BECK: Of actual notice.

MR. MCMAINS: You have an appeal right if it's within 30 days of actual notice and not more than 90 days delay.

MR. BEARD: Do we need to address the issue of whether the attorney of record needs the firm or the actual lawyer on the pleading? There is some practice now that does not put the firm's

name on the pleadings to avoid that issue.

CHAIRMAN SOULES: Why should the motion to reinstate be permitted more time than a motion for new trial? I mean, of course, we have to assume actual knowledge within 90 days. You've now got actual knowledge within 90 days, and why should you have more than 30, once you've got actual knowledge of the judgment in the ordinary case motion for new trial.

MR. SPARKS (SAN ANGELO): Motions for new trials you can do without it because you're trying the case and you lost and you're asking for new trial.

CHAIRMAN SOULES: Why do you need 180 days? It looks to me like a lawyer ought to have to act quicker once he knows a case has been dismissed.

MR. SPARKS (SAN ANGELO): But you don't, Luke, that's the problem. You pick up the phone and you call the clerk and say, "I want a setting on this case." And the clerk says, "That case has been dismissed," and that's the first you hear about it.

CHAIRMAN SOULES: Is that within or outside of 90 days?

MR. SPARKS (SAN ANGELO): That was outside of 90 days.

CHAIRMAN SOULES: Well then, you don't have anything but a bill of review; that's right now.

MR. SPARKS (SAN ANGELO): But it was within 30 days of when I knew about it.

MR. MCMAINS: No, he has 120 days.

MR. SPARKS (SAN ANGELO): I read it just like he does. And the judge read it that way. And the judge was kind enough to let me go ahead and try my case.

CHAIRMAN SOULES: How does he get 120 days?

MR. MCMAINS: Because it starts the period from your date of actual notice. The period under 306a doesn't start until you get actual notice but that delay is not to exceed 90 days. That's when the period starts.

So if you don't get it for 90 days, at the end of 90 days it starts, and you have got 30 more days in which to do something. So actually the big discrepancy between 120 and 180 days is really where it is.

CHAIRMAN SOULES: Well, except that

this would give you the 90 plus 180.

MR. MCMAINS: Well, this will give you 180 days if you learned it about the day after, the way it's written.

MR. SPARKS (SAN ANGELO): If you look at it the other way, this gives you 180 days to discover that it's happened without anybody claiming they sent you anything.

CHAIRMAN SOULES: That's right.

MR. SPARKS (SAN ANGELO): In other words, you ought to go down there every six months or so and see where your case is. That's what this rule is saying. It doesn't put the arbritrary 306 limitations on it.

CHAIRMAN SOULES: Well, it does. It adds the 90 days in 306a to the 180. Because the only change is the change from 30 to 180, so this now gives you 270 days to file a motion to reinstate assuming that your actual knowledge occurred on the 90th day. I'm not here saying it matters to me one way or the other. 90 was short, but at least we got it.

MR. MCMAINS: I don't care. With the concept in 306a there, I would feel better about -- because I think the parties that don't notice

of the judgement are in just as bad a shape as no notice of dismissal. That's a universal problem. I just think that if you want to change the number, it ought to be changed in 306a, and not in this rule, to make it where it's universal. I don't have any problem with that.

CHAIRMAN SOULES: Because once a party knows, he should have to act promptly. That's my point. Once he knows, if he's within the period when he has rights, and he knows those rights, he should have to act.

MR. MCMAINS: So if we're going to change it, I would move that it be changed in 306a. You can close to there if you change 306a to 120 days -- kind of a compromise. It starts 120 days, so that gives you 150 days, basically, to find out and to get it filed.

CHAIRMAN SOULES: That makes more sense to me because you're not giving the party six months to wait around and decide whether he wants to file a motion to reinstate when he knows he's been dismissed.

MR. MCMAINS: Well, also there is a Supreme Court rule that says that this rule controls over the motion for new trial rule and

the motion for new trial rule doesn't apply when it's a motion to dismiss. And we wanted to change this rule, that's the case prior to that. It is a Supreme Court case. One of the reasons we changed it was to make it so it, at least, looked alike.

CHAIRMAN SOULES: Without regard to whether we extend the 90-day period that's in 306a, what's the committee's view on how promptly should a lawyer have to act when he gets knowledge within a period where he has time?

MR. MCMAINS: I think 30 days is reasonable from the date he gets knowledge.

CHAIRMAN SOULES: So, is it the concensus that we not change 30 to 180 in paragraph 2 of 165a? Those that think we should not make that change, show by hands. Those who think that that period, that I just talked about should be extended, shows by hands. So, it's unanimous that we leave 165a(2) at 30 days.

(Off the record discussion ensued.

CHAIRMAN SOULES: I'm not sure I understand the second proposed change from 75 to

45. What's the function of that?

MR. MCMAINS: It's a retreat again to the old time tables. We don't need it if we had done it the way we -- he actually has more time to play with it if you do it the way we're talking about it.

CHAIRMAN SOULES: Well, isn't the motion for new trial overruled by operational law in 75 days?

MR. MCCONNICO: Yes.

CHAIRMAN SOULES: Why shouldn't this be the same?

MR. SPARKS (SAN ANGELO): He wants to start his appeal more promptly.

CHAIRMAN SOULES: This is less time.

MR. LOW: I know it's less time, but he ought to have more time to act. Within 45 days then he knows; he doesn't have to wait around that many days then. He's already waited 180, so he just wants to start cutting time after that.

CHAIRMAN SOULES: The judge has got all the marbles on this one. When this Rule 165a came through this committee, it was recommended to the Supreme Court that the case be reinstated if there was not a written order overruling the

motion for reinstatement in 75 days so that you didn't get into that traffic that we see in country so much that judges never do pass on motions for reinstatement. You can't get a hearing; you can't get anything. Now, they just let the time expire and then appellate steps start. I guess this has happened to some of you-all.

MR. LOW: What's the difference between a motion for reinstatement and a motion for new trial? You said the Supreme Court has distinguished them.

MR. MCMAINS: Well, prior to our last amendment, 165a, where the times ran the same, the Supreme Court said the 329 times do not control the motion for reinstatement. They're controlled by 165a, and you don't have the same time periods. And that one, in fact, is what Luke was talking about. That one required an action in court. You had to get it heard and get it ruled on before you can be -- and what he did was he had his motion to reinstate overruled and then he filed a motion for new trial and tried it and they just said it didn't work.

CHAIRMAN SOULES: Okay. Do we have a

consensus, or do we have unanimity that both those time changes be rejected, and 165a, and that is without regard to Sam's desire to change Rule 306a which Sam you're at liberty to submit for our September meeting?

MR. SPARKS (EL PASO): That isn't on my committee.

CHAIRMAN SOULES: Okay. Roll that over to somebody else. 166b.

MR. SPARKS (EL PASO): I can let Hadley talk to you about 166b. I think it's been corrected now, hasn't it?

PROFESSOR EDGAR: I don't think so.

MR. BEARD: Just a moment Luke. I raised that question about notice to a firm is notice to attorney. Is notice to the firm notice to the attorney of record?

CHAIRMAN SOULES: We've got that somewhere in these materials because it's been complained about. Reese Harrison sent a request in on it. Have we skipped over that? Let's see.

MR. MCMAINS: That wasn't part of the change.

CHAIRMAN SOULES: We have skipped over that because we're going to need to get somebody

to work on Judge Thomas' committee. But I believe that that is in Rule 10 and 10a. Anyway Reese Harrison has raised that point.

PROFESSOR EDGAR: My concern is that the rules, as I read them, do not expressly recognize the situation in which a party may designate a person as a consultive-only expert simply to make them immune from discovery.

And I know of a situation in which a party simply designated some people who otherwise had knowledge of relevant facts but were simply designated as consultive-only experts to render them not subject to discovery.

And I don't think that was the purpose of the intent of the rule, and I have made several requests to the Committee on the Administration of Justice to consider this rule, and either I can't explain what my problem is, but they have summarily rejected it because they say that's it's already covered by the rule itself, and I don't see where it's covered.

CHAIRMAN SOULES: It's covered and not covered. When Rule 166b went to the Supreme Court from this committee in 1983, this committee recommended that the Court permit the discovery of

the identity of the consulting expert so that he could be deposed and you could test any representation -- well, actually, no representation. You could test whether or not his work product had helped to form the basis of the testifying expert. Because if you establish that, then you could get the consulting expert's report, and there wasn't any other way that either people on the COAJ or this committee saw to keep everybody honest on that issue.

But the Supreme Court changed 166b and, made a rule that prohibited the discovery of the identity of a consulting expert.

PROFESSOR EDGAR: I have no problem with that.

CHAIRMAN SOULES: Two, but if you find out who he is, you can notice his deposition and the only thing that is privileged is what's privileged.

He has to answer every question that's asked to him except what is privileged and what's privileged is his work product, his communications, and so forth.

Then you move to privilege. Once you find out who he is, he is not immune from deposition

just because he is a consulting expert. But everything that he's learned and knows within the protection of the now so-called investigative privilege is privileged by the investigative privilege. And you can't discover that, but you can discover anything else he knows.

MR. BECK: By it specifically excludes from that any information which any consulting expert witness, any opinion of an expert consulting witness, that should have been relied upon by a testifying expert. So you can get to it, if it's relied upon.

CHAIRMAN SOULES: If it's relied upon, right. I'm saying, the investigative privilege has things in and out, but whatever it precludes from discovery is protected whenever you notice a consulting expert's deposition. But he's still got to answer every question that's outside the investigative privilege, attorney-client privilege, whatever else.

MR. BRANSON: Hadley, the problem that I see and there's a glitch that you're addressing that's a real glitch. But by addressing it, you create a lot more problems, I fear, in maybe solving it.

For example, if you've got to where the identity of all consulting experts was discoverable, plaintiff in a malpractice suit could not get his case reviewed, period.

This is a practical matter. You can get the cases reviewed now by a doctor who says, "I'm not going to testify for you, but I'll tell you where the negligence is." Because you can say your not going to have to testify and your opinions are not going to be discovered.

So, you basically have done what the legislature was unable to do, and that is, eradicate medical negligence practice.

PROFESSOR EDGAR: I'm not suggesting we go as far as Luke's earlier recommendation to the Supreme Court; I'm not suggesting that. What I'm saying is that, if there is a person that has knowledge of relevant facts -- for example, a nurse in the operating room. The hospital then immediately designates that nurse as a consultive-only expert, and you can't take the deposition of that nurse because she's been so designated.

CHAIRMAN SOULES: There is a 1985 or '86 Supreme Court of Texas mandamus case that

says, "Nothing, no privilege can prevent the discovery of persons having knowledge of relevant facts." That's a quote right out of the opinion.

PROFESSOR EDGAR: That case is not that broad. I know exactly what you're talking about. Everytime the Court has been confronted with a related problem like this, they have made the statement that that person had knowledge of relevant facts and, therefore, those facts were subject to discovery.

MR. BRANSON: But, Hadley, how are you going to get to the nurse, in your situation, without getting to any consultant who has reviewed the case? How are you going to get to the nurse without getting to the doctor?

CHAIRMAN SOULES: This is Murray Jordan (phonetic) case that I'm telling you about. It's a mandamus case against Murray Jordan, involving Nurse Jones. And in about the third page of the Supreme Court Journal, it says, "No privilege precludes can prevent a party from discovering persons with knowledge of relevant facts, not even the attorney-client privilege."

MR. MCCONNICO: But I think all Hadley is doing is codifying. Now, he thinks that the

law is not that clear, and I think it probably is.

There's another case where there's officers in a corporation, and then all of a sudden you say this officer in the corporation is a consultant, so you can't get in and you can't ask him all these questions. And the Supreme Court said, "No, that's not right." He said, "They have knowledge of relevant facts; you can ask him anything you want."

I think all Hadley is trying to do is say you cannot make people immune from giving testimony by simply calling them a consultant if they have knowledge of relevant facts. I don't think he's opening up the door where you can get to a pure consultant.

PROFESSOR EDGAR: Not at all. I don't want to go that far. I'm just saying that I think that anybody that has knowledge of relevant facts should be subject to discovery and their depositions taken as to those matters. And I don't think the rules clearly allow that.

Now, the cases have tried to deal with it, but I think the rules could be worded to make that clear. If that isn't the law, it ought to be the

law, certainly. And I think the rules should expressly provide for it. That's all I'm saying.

MR. LOW: One other thing. We discussed this. We had a big discussion about nine years ago on this committee. And Kronzer and I had an idea that we were going to try to draft and we weren't smart enough to draft it.

The idea we could state. And the idea at that time was that, for instance, I have a case, a hospital table falls. And then I send it to Shieldstone, and they say, "well, it's defective." And then my people say, "Okay. You designate them as consultants." We designate them as consultants and then they come in. Well, that shouldn't be. Or I get a case and I send it to so and so and they say it's not the case.

So Kronzer made the suggestion, and I don't know if this committee wants to even think about that. But the suggestion was made at that time, in order to have a consulting expert, that you have to first designate under seal that this person is a consulting expert, that you have not gotten -- you know, you haven't sent it to him, he hasn't seen the product, you have not given him a hypothetical situation; he's a true consulting

expert.

Once he is so designated, other people can't do anything unless you come in and show that, you know, that person has relevant knowledge, you know, or something, that he was really the corporate president and had these things. But he can never be a testifying expert.

In other words, you make an option. You can't just say, "Well, he may be a testifying expert, but if he's going to give a bad opinion for me, then he's going to be a consultant."

Try to make an option and avoid that, because in the first sample I gave, we ended up finally settling the case. But I tell you what, if I had not been able to designate Shieldstone as a consulting expert, that case would have been settled within a week, I guarantee you.

CHAIRMAN SOULES: That would be clearly a departure from the rules and the cases that are there now. Because we now designate you know, 30 days before trial. You can pick and choose and do all that.

MR. LOW: I understand I'm just saying that idea. And then they told Kronzer and me to draft it, and I couldn't do it. And I asked

Kronzer, and he said he couldn't do it. And maybe it can't be done.

CHAIRMAN SOULES: If we want that, let's get it by another suggestion. Hadley's got one here. The only thing that I have a concern about with the way this is drafted, it says, "What you can get." Is this limiting? Because you can get -- I think it's Allen vs. Humphrey (phonetic), is that you have the in-house expert as opposed to the out-house expert. And the in-house expert's opinions were protected because he was permitted to be designated as an expert for opinions but he still testified as a fact witness.

We're going to have to write in everything that is discoverable, it seems to me, if we go this way. And I have always regarded the rule on all cases, and I haven't seen any case otherwise. But there they may not be going along with us.

Anything that was not privileged is discoverable, that's what the rule says. So everything that's outside of the shroud of attorney-client work product investigative privilege is discoverable, period, and we don't have to restate that. We've said it that way. We've said everything is discoverable except

what's privileged.

PROFESSOR EDGAR: I understand that.

CHAIRMAN SOULES: Now, are we going to say it again or are we going to run the risk that this is going to be the limitation as to all you can get from an consulting expert?

MR. BRANSON: Why don't we move the question on Hadley's recommendation?

PROFESSOR EDGAR: Well, all I'm saying is, and I don't care how you word it -- I'm just saying that I think the rules should make it expressly clear, rather than having to reread by looking at a mirror, that anybody that has knowledge of relevant fact their information is subject to discovery.

Because, you see, this paragraph here on Paragraph 166b(3), the last sentence says, Nothing in Paragraph 3 "shall render nondiscoverable." The problem is over here in 166-2(E) you are rendered nondiscoverable. I mean, you see, that's dealing with experts. And reports and that limits you to -- that says that only testifying experts and consultive experts upon whom the testifying expert relies is subject to discovery.

And I think that we should say nothing in

Paragraphs 2 and 3 shall render nondiscoverable; that's all I'm suggesting. It's not any major rennovation.

CHAIRMAN SOULES: I'm sorry. I've wasted a lot of time on this.

PROFESSOR EDGAR: I've had difficulty trying to explain my position here.

CHAIRMAN SOULES: I apologize. No, I wasn't following. Show me that sentence, please, exactly where it is.

MR. MCMAINS: It's immediately before parenthesis 1 in E. Page 159 of the old rules.

PROFESSOR EDGAR: See the very last paragraph, Paragraph 3, dealing with exemptions. It says, "Nothing in Paragraph 3," which is the exemption paragraph, "shall render nondiscoverable." But I'm concerned about -- judges have taken the position that Paragraph 2E renders it nondiscoverable. And, therefore, this paragraph doesn't apply.

And all I'm saying is that we ought to refer -- well, look right here. It says, "Nothing in Paragraph 3 shall render nondiscoverable." But trial judges are saying, "Well, the reason it's nondiscoverable is not because of Paragraph 3, but

because of Paragraph 2E." And that's from talking about experts and their reports. Scope of Discovery and E is reports of experts.

CHAIRMAN SOULES: I'm convinced. Anybody else convinced?

PROFESSOR EDGAR: I'm just trying to say, it's not any big deal.

CHAIRMAN SOULES: I apologize.

PROFESSOR EDGAR: I'm not trying to open up Pandora's box and make all consultive experts subject to discovery on what --

CHAIRMAN SOULES: Frank has moved the question. Is everybody in favor of this? All in favor, show by hands.

MR. MORRIS: Luke, I'm still a little bit confused as to what he's saying.

CHAIRMAN SOULES: Okay. Paragraph 2 -- let's just start at the front of the rules so we can all get in together. It starts with 166b(1), Form of Discovery, (2) Scope of Discovery; A, B, C, D, E. Now, that's 2E. Right now the rule says, nothing in Paragraph 3 "shall render nondiscoverable." The judges are saying, according to Hadley, that not 3, but 2E renders certain things nondiscoverable. And that should

not render nondiscoverable these points. And Hadley, I think, is right. That's consistent with the cases that are coming out of the Supreme Court.

MR. MCMAINS: The problem is the consulting privilege is not in 3 as an exemption. It's in 2 in the Scope of Discovery as a limitation.

PROFESSOR EDGAR: That's right. And therefore, we should refer to Paragraph 2 in addition for Paragraph 3. That's all I'm saying.

MR. MCCONNICO: To clarify the state of law.

CHAIRMAN SOULES: And that's what the Murray Jordan case holds, so we might as well say it. Everybody in favor show by hands. Opposed? And I appologize for being slow to catch your point.

PROFESSOR EDGAR: I've had difficulty trying to explain this to people.

MR. SPARKS (EL PASO): If you-all think that you're having trouble with Hadley, then I want you to read 166f. This is a recommendation. Let me just briefly tell you about it. I hope it won't require much

discussion. This is one from the Counsel of Administrative Judges. I'm not sure what motions, but all motions -- you file the motion, you accompany it with an order, you can request an oral argument. A response is no limitation for the time but if you don't respond it is the representation of no opposition.

The Court can set a hearing or the movant can set a hearing. If you don't go, they can award cost of attorney's fees and make such other orders as justice requires. And I'm going to step out of the role of custodian and move we reject Rule 166f.

MR. MCCONNICO: Second.

MR. SPARKS (EL PASO): We're on Page 152.

PROFESSOR EDGAR: Judge Thomas, could you, perhaps, tell us the background for this motion? Do you have any idea?

JUDGE THOMAS: I haven't the foggiest.

PROFESSOR EDGAR: Judge Wallace, do you have any idea?

CHAIRMAN SOULES: I realize the motion has been made and seconded. This is consistent with some Houston practice which has not been a

problem for me there. I don't know whether it has been for David Beck or Harry Tindall. I don't even know if it applies to the family law courts over there.

But this permits a court to rule on something that's submitted and not opposed when neither party has asked for a hearing, or something that's been submitted that's been filed and opposed when neither party has asked for a hearing. It permits him to pass on that without a hearing, doesn't it?

MR. SPARKS (EL PASO): I'm not opposed to that portion of it if we want to draw it. It's the other things that are in here. To me, it is more cumbersome than the Federal Rules, where you have to respond within such period of time, and there you rarely get a hearing even if you ask for one.

MR. MCCONNICO: Luke, I think this rule is really dangerous, because read the first two lines, "the judge of the court in which the case is pending will hear all matters."

Now, that's everything. Then you go down to service, motions and responses shall be served in accordance with Rule 21 on all attorneys. What

this means is you can get three days notice of a motion for summary judgment hearing where under 166a we at least get 21 days' notice.

I think everybody is going to agree that we should have more than three days' notice for a motion of summary judgment. Then you go down to the next paragraph, Section 3 of the submission date, and they're giving us "motions shall bear submission date of at least 10 days from the date of filing."

That means, if you need to have a motion heard earlier than 10 days, it's going to have to be an exception. I think the time periods in this rule are just dangerous for the way trial practice is conducted.

MR. BECK: This is inconsistent with a lot of local rules and local customs, for example, the centralized docket system. This requires the judge to hear every matter pending in his court and you can't do that in a centralized docket system. And I move we reject it.

CHAIRMAN SOULES: Okay. Motion has been made twice. Seconded twice. All in favor of rejecting this rule, hold up your hand. Opposed? Unanimously rejected.

MR. SPARKS (EL PASO): On Page 155 now this is a new rule.

CHAIRMAN SOULES: Sam, before you do it, can I ask this: Is there a sense of the committee that we should make provision in the rules, and this would be a redraft next submission, that matters can be heard if neither parties asks for oral hearings on some submission date and that telephone hearings could be conducted? This falls right into what we were talking about.

Should we provide for that to try to cut down lawyer time in court where it's not necessary. Because in San Antonio, if a motion is filed and you don't show up, the judge grants the motion.

MR. LOW: You know, there should be because, for instance, I have got a matter in Conroe now that's not even contested, but the judge won't hear it unless we come argue it. He won't enter a motion. I got an order; I had to go to Conroe. It wasn't even contested.

CHAIRMAN SOULES: Shall we placate the administrative judges, at least, to the extent that we're willing to write that motions can be submitted in writing unless a request is asked on

whatever their time periods may be, not less than 10 days? How about that for if they're going to be submitted in writing?

MR. TINDALL: What's wrong with the three-day rule?

CHAIRMAN SOULES: That's awful quick to get it and file a written response and ask for a hearing. Suppose the respondent wants a hearing. Three days is pretty short, maybe in trial.

MR. BEARD: Are you talking about an affidavit -- doing away with evidentiary hearings and then doing it on affidavit?

CHAIRMAN SOULES: No, no. I'm talking about a motion for sanctions.

MR. MCCONNICO: Just have it in writing.

JUDGE WOOD: Well, if it requires evidence, you're not going to change the practice and do it by affidavit, like the federal court does, you know.

CHAIRMAN SOULES: I guess under the Rules of Evidence since hearsay is now -- I guess they could be heard on affidavits -- motions, if the judge wants to and if the parties -- well,

suppose a defendant doesn't ask for an oral hearing, he just submits an counter-affidavit with his response.

MR. BEARD: I think that's an substantial change in our practice.

CHAIRMAN SOULES: It is. It permits the ruling on motions without hearing.

MR. BEARD: We've done that on venue now, but are we going to take the next step?

CHAIRMAN SOULES: That's what we're talking about right now. How many feel that we should attempt to write a rule that permits ruling on written motions if neither party asks for a hearing, and also permit telephone hearings if either party asks for a hearing? Show by hands. How many are opposed to that? Eight to one. We'll at least try that. Sam, I know, Harry Tindall has offered to help you in your committee and he's the only one that's opposed to this.

MR. TINDALL: I don't mind telephone hearings. What I'm opposed to is just having to return to the federal practice where you send things into the night and later you get a ruling.

CHAIRMAN SOULES: I said if neither party asks for a hearing. That's not the case in

federal court. Both parties could ask for a hearing and you don't get it.

MR. SPARKS (EL PASO): Let me ask if there's a local rule where we can start working on that.

MR. MCCONNICO: Harris County.

MR. SPARKS (EL PASO): Would you send me a copy?

MR. MCCONNICO: Sure.

MR. SPARKS (EL PASO): Then I'll send it back to Harry.

CHAIRMAN SOULES: Thank you for letting me interrupt you, Sam, and I'm sorry about it.

MR. SPARKS (EL PASO): Rule 188A is a new rule. Let me tell you the purpose of the rule. It goes back a little bit to our practice years ago when many of us started practicing. Apparently, there's a problem when they want to take a deposition say in a Kansas trial, many of these states have the old statutes that they can file a certificate to send down a certified notice or what-not, and the court reporter here says, "There is not any way I can get a valid subpoena or anything like that."

So the purpose of this rule is to get a certified copy of whatever that state procedure is, file it here so that there could be a valid subpoena issued and a deposition taken in Texas on a case pending in a foreign jurisdiction.

The representation is made that we don't have anything that this would embody the Article 3769-A and we need a rule for it, and that's really the purpose of it. The rule itself appears, as far as I can see, to be easily complied with. But that was the purpose.

MR. TINDALL: Isn't there the uniform Foreign Deposition Act, that's probably in the Civil Practice Remedies Code now? How would you put it in two places?

MR. SPARKS (EL PASO): I assume that would be the successor of Article 3769-A.

CHAIRMAN SOULES: This is the converse of 188, where we can take depositions over there. How does somebody get a deposition in Texas?

MR. TINDALL: The same way.

MR. SPIVEY: Well, what are you talking about, Luke? It may already be completely addressed in the Rules of -- what do you call it?

MR. TINDALL: Civil Practice Remedies

Code is where court reporters here take depositions for lawyers in other states. Uniform Foreign Deposition Act, we've had it for 30 or 40 years.

MR. MCCONNICO: That doesn't apply to other states, does it?

MR. TINDALL: Yes.

PROFESSOR EDGAR: I would suggest we take look at the statute and see what we're talking about before we decide this.

CHAIRMAN SOULES: Sam, Doak Bishop did all this work on farm states and farm jurisdictions and service and discovery. My suggestion would be that we take this Rule 188-A and send it to Doak and ask him to give us input and to key it to his previous work.

He's even written a law review article about it. And I'm sure, knowing him, that he'll respond and give us information on it. Is the committee willing to ask Sam to just submit this to Doak for his guidance?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Okay. He's at Hughes & Luce.

MR. SPARKS (EL PASO): Rule 201 on

Page 156. I think you can just read it quicker than I can talk about it. Change the word "organization" and "it" to "deponent."

CHAIRMAN SOULES: Does this help to clarify the present rule? It seems to me it does. Does anyone see any objection to this 201(4) on Page 156?

MR. MCCONNICO: Wait a minute.

PROFESSOR EDGAR: The underlined portion here "will testify and the notice shall further direct that the person or persons designated" is actually in the original, so that should not be underlined.

MR. BRANSON: What did John say? Did he give you examples of what his problem was?

MR. SPARKS (EL PASO): I can read to you right quick what he says. He says, "the substitution of the word 'deponent' for the word 'organization,' 'it,' and 'its' makes the ruling clearer." I have added the words "notice" and "by the deponent" at the places where I have underlined. There's really no changes, just make it clear.

CHAIRMAN SOULES: It just uses "deponent" every place that otherwise we see "its"

or "organization" and opens up with "deponent." Besides that, the language, even the underscored language, that has been pointed out is there. So using "deponent" every place to identify --

MR. BRANSON: And by "deponent," you're referring again to the organization or the corporation.

CHAIRMAN SOULES: "When the deponent named is a public or private corporation," et cetera. Then the "deponent" and the "deponent" and the "deponent" will do all these things instead of the "organization" or "its." It's better grammer.

PROFESSOR EDGAR: The words that have been left out, though, are not bracketed. Some of them are and some of them aren't. Somebody really needs to go through and carefully re-edit it.

MR. BRANSON: Why don't we give Sam the authority to redo that using "deponent" instsead of "organization."

CHAIRMAN SOULES: Harry, will you help him on that? All we're really proving here is to put the "deponent" every place that we're talking about, because "organization" may not be as broad in scope as "deponent" is.

MR. LOW: And the notice shall direct.

CHAIRMAN SOULES: And the notice shall direct. That part of it down there where it says "the notice shall direct," the "notice" in the underscored portion is new clarifying all the underscored. Some of the underscored is not new; but it's already there. Harry, would you do that?

MR. TINDALL: Be glad to.

CHAIRMAN SOULES: Are those changes then as far as "the notice shall direct" and identifying as the "deponent" consistently -- are they acceptable? All in favor show by hands. Opposed? Okay. That's unanimous.

MR. SPARKS (EL PASO): Rule 204(4), this one is J. Harris Morgan's. We've already approved, in November, 204; and as you know, all of the furor about having not to be to be able to waive leading questions or nonresponsive answers. And to remind you-all what we have already approved was the words: "Absent express agreement recorded in the deposition to the contrary, A, objections to the form of questions or nonresponsiveness of the answers are waived if not made at the taking of an oral deposition." And B,

"the court shall not otherwise be confined to objections made at the taking of the testimony.

CHAIRMAN SOULES: What we've got here has been adopted in substance in other committee action, right?

MR. SPARKS (EL PASO): That's correct. And what Mr. Morgan really is returning to the old rule before we somehow or another got into the horror of not being able to waive those things.

CHAIRMAN SOULES: Okay. This sort of shows -- am I looking at the right one Charlie Haworth?

PROFESSOR EDGAR: We have approved, I think, the one on page 157.

MR. SPARKS (EL PASO): Both of these are the same thing, though. They're headed on the street, just different cars. We've done what they are seeking to remedy.

CHAIRMAN SOULES: Okay. Is it the consensus of the Committee that that's accurate, that we have done what Charlie Haworth and Harris Morgan wanted? Okay. I'll write them accordingly, and we've provided that the parties can waive objections to form and responsiveness by

agreement stated in the record.

MR. TINDALL: Otherwise if you just give a notice deposition, they've got to make the objections.

PROFESSOR EDGAR: " "Unless otherwise agreed."

CHAIRMAN SOULES: It can be agreed that that can be waived, but if it's not expressly waived on the deposition transcript --

MR. LOW: Well, it shouldn't be waived, it should be reserved. Or you waive it if you don't reserve it.

CHAIRMAN SOULES: All right. Reserved.

MR. BRANSON: Mr. Chairman, that's pre-empting some questions that are raised over here in the next page or so. Tom Ragland's, for instance, would knock that requirement of contemporaneous objection out altogether.

CHAIRMAN SOULES: That's been rejected by earlier action of the Committee.

PROFESSOR EDGAR: Now, Hayworth says here on page 157 that, "this change so that his recommendation on Rule 166b is in keeping with Rule 204." And I don't see anything in 166b that

even talks about this or is designed to talk about it. Is there another rule that we're missing here?

MR. SPARKS (EL PASO): All three of these, including, really, Tom's, go to the same thing. I don't know if we rejected Tom's suggestion, Luke. I think it was the same thing; he's just knocking out what was stuck in that's giving us so much problem.

MR. TINDALL: Well, the one we're going with is Haworth's, right?

PROFESSOR EDGAR: That's right.

MR. TINDALL: Morgan's is not being accepted because he wants to go to the old practice.

MR. SPARKS (EL PASO): Do you want me to read what we've already done? Because we're not going with any of those three. We adopted one earlier in November before all this came out. Let me read this carefully and you-all listen. This will be 2044.

JUDGE CASSAB: It says, "the officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an

objection is made by any of the parties or attorneys engaged in the taking of the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the Court in which the case is pending. Absent express agreement recorded in the deposition to the contrary; A, objections to the form of the question or nonresponsiveness of the answers are waived if not made at the taking of an oral deposition; B, the Court shall not otherwise be confined to objections made at the taking of the testimony."

Of course, we talked about that, but primarily that says, make your agreements recorded in the deposition and you can then live with that stipulation.

MR. SPARKS (EL PASO): We received just a ton of suggestions on 204 when it was made on nonwaiving of those two things.

CHAIRMAN SOULES: Okay. How many feel that we should go with our previous action and let that stand? Show by hands. How many would change our previous action on this?

MR. BRANSON: Let me raise an issue that I'm sure we've all confronted at one time or

another, and I'm not sure where in the rules to address it. But you get into a deposition and all of a sudden, without any reasons, your opponent instructs the witness, question after question, not to answer the question.

There ought to be some way for expeditious relief from that. I've been in some Federal Courts where you could just pick up the telephone and call the Judge, and he stops it.

But I don't think we have any real provision for that and it sure is frustrating to be off in New York someplace, having spent a lot of money and time to get there, and all of a sudden, it's apparent from the second question, that you're going to have to go back and get a second ruling and come back again. Is there any way we could address that as a committee?

MR. BEARD: Why do you have to go back? Order them to come back down here and appear before the Court.

MR. BRANSON: Sometimes the courts are not quite as upset about what's happened to you as you are.

JUSTICE WALLACE: Well, we got a provision, as long as you're in the State, the

District Court in El Paso can rule on a case pending in Texarkana. But I don't know if there's anything we can do telling a judge in New York he's got to rule on a case pending down here.

MR. BRANSON: Well, but could you set up some provision maybe for just getting on the telephone with a judge? Because what happens is, you've wasted a lot of money for your client and a lot of effort; and I've had it happened two or three times in product suits where you get off up north someplace and people start acting like Yankees on you all of a sudden, and you just can't get anything done.

MR. MCMAINS: A provision that we have, of course, will certify the questions.

MR. LOW: See, in federal court, Frank, I don't think there's a rule, we just do it.

MR. BRANSON: I know it, but people are used to doing it in federal court, and they're not used to it in state court. And it really is frustrating and expensive.

CHAIRMAN SOULES: We do it. We call the judge. Usually the presiding judge you know, whoever is handling the daily docket.

MR. BRANSON: Well, you could, but by the time you get the old boy on the phone, your opponent has already left and taken the court reporter with him. There's not much you can do but talk to a judge for a few minutes. So, is there some way we could build in a remedy for that? I mean, it cuts both ways. I'm sure the plaintiffs are going to do it, too.

CHAIRMAN SOULES: I don't know, Frank. Give that some thought, and if you come up with something, give us a proposal.

MR. MCMAINS: Okay. It could be treated, I think, as a sanction in the discovery rules on failure to make discovery.

CHAIRMAN SOULES: If it's a party.

MR. BRANSON: If it's not a party.

MR. LOW: What you're talking about could come well within the means of telephone conference that they're speaking in terms of.

You know, certain hearings by telephone that there could be a provision for hearing. And that if an attorney who is in the middle of a deposition asks for a conference with a judge that the other attorney is compelled to participate in, or wait, or something like that until -- you know,

that could be coordinated with just what Sam was doing.

CHAIRMAN SOULES: Yes. You can put in there that at that telephone hearing that the courts may entertain oral motions made by telephone where notice has been given to the other side.

MR. BEARD: If the lawyer on the other side of the case is instructing that witness not to testify, it looks to me like you can impose sanction, move to order them to appear before the judge down here in Texas --

MR. BRANSON: I agree, Pat, but it just never --

MR. LOW: Let me tell you. We were in New York, and it's hard to get up there, and the defendant was just telling this man -- just I mean, it's ridiculous. We said, "Look you're being ridiculous." Got Judge Fisher on the phone, told him what the questions were and he said, "Don't call me again." He said, "You just answer and I don't want to be called back." Well, we've got a fine deposition; we didn't have to go through all that stuff.

MR. BEARD: But there aren't a whole

lot of of Judge Fishers around.

MR. BRANSON: Well, but you could at least get a ruling, and most of the time, you can't even get your adversary to state a reason in the record for telling her not to answer. And other than just get up and slap the old boy in the head, you can't get an answer in the thing.

CHAIRMAN SOULES: Under Peoples, of course, if you're really trying to set up your point for sanctions, you can ask that the question be answered and kept under seal, and that would be one way to really set it up when you get back home.

And we all got stories to tell. We were up taking depositions at U.S. Steel and noticed Rodrick (phonetic) the Chairman, and he was just too busy. And we said, "Well, that's fine. We're in Pittsburg today, next time we want his deposition we're going to move that it be done in San Antonio." And Mr. Rodrick found an hour for us that day.

MR. BRANSON: But Luke, you don't have a party. It's the nonparty cases that are so frustrating.

CHAIRMAN SOULES: That's a problem.

MR. BRANSON: You've really zapped them pretty good with no-party cases.

CHAIRMAN SOULES: How does a Texas judge impose sanctions on a nonparty in New York anyway?

MR. SPARKS (SAN ANGELO): Well, they don't let him testify in Texas on the trial of the case.

PROFESSOR EDGAR: And, of course, if it's the attorney that's instructing, then you could enter sanctions against the attorney.

MR. BRANSON: Then you might get some defense lawyers who would rather stay in New York than come back and face sanctions.

CHAIRMAN SOULES: There you go. Well, why don't we try to write something into our telephone hearings that judges may entertain?

MR. SPARKS (EL PASO): I'll sure work on anything that Frank presents to me in writing.

CHAIRMAN SOULES: Okay. 205.

MR. SPARKS (EL PASO): I will say the only lawyer that I'm aware of that anybody in my firm has had to go to the courtroom to complete the deposition was Frank.

Okay. 205. 205 is three separate

suggestions by attorney Charles Matthews and a court reporter George Hickman. Mr. Matthews, I think, is with Exxon, or at least he writes on Exxon stationery.

The first one was rejected by the Court of the Administration of Justice, which led to the second one, and I've now got a third one submitted. All of them are trying to address the problems that court reporters have. But all of them say that the original transcript of the deposition goes to the witness or, in the case of a party, goes to the attorney of the party and then sets out the procedures that they will do to get the signature.

We briefly discussed this on the first submission, but, unfortunately, instead of being acted upon this table, and we have received now the other two -- but they all simply say the officer taking the deposition submit the original deposition.

I haven't found any support for these requests on our subcommittee. Nobody has really been having problems getting the signatures and changes in depositions. But all of these are from the same people; they are just three different

times submitted.

CHAIRMAN SOULES: Dorsaneo has addressed this, Sam. And what one of the problems is we don't say anywhere what the deposition is, and I don't really know that that's a problem. But Bill has thought about it professorially and thought it might be a problem, and that's why he favors calling this the original deposition transcript.

The way the rule is written out, I think the first paragraph requires that the original goes to the witness, and then we can file a copy if he doesn't sign and return it. That's the spirit of it. And all we're doing here is saying the original deposition transcript. Now, what a deposition transcript is, we know, it's in the book that we get.

When you notice a deposition, you don't notice a deposition transcript. But whenever you send something to the witness, you send him the transcript so that is clarifying, to some extent, if it needs to be clarified.

MR. SPARKS (EL PASO): That change is, of course, in both, but on page -- I've got 71-1, which would be in your book 165.

CHAIRMAN SOULES: Yes. I'm looking at 165 which seems to be the more correct. There has been some practice to erase from that original and hairline or write over it. And that was thought not to be a proper practice and that we should say, "no erasers or obliterations of any kind shall be made in the original testimony"; that's the second part.

Then the changes are to be furnished. And I think the rule right now says that the changes are to be made before the officer that takes them, which is just not the way it's done. They're really made on a legal pad or other notes and then sent in, if the original ever comes back -- sent in with it. So the furnishing of the changes and the statement of the reasons to the officer more describes what we really do.

Then the deposition shall then be signed before any officer that can give an oath. And sometimes, I think, we have been -- I don't know whether that's in the original or not. Most of us permit if we're going to send the original to a witness or to a lawyer, we permit that it can be signed before any Notary. So that really goes along with the practice.

And then if within 20 days of the deposition the witness does not sign, then a true copy of the transcript be filed. And Rule 205, as it appears on 165, really does clarify for the non-initiated how it is that you get the original out, what happens when you do, how you get changes back to the officer, what he does with them and then what you do if you never do get them back.

It deals with transcripts and sets the mechanics that most of us follow for making changes. Other than that, it doesn't change the practice, and so it may be a good suggestion, that is, the one that's on 165.

MR. SPARKS (EL PASO): And the one that's on 163, the only difference that I can detect, Luke, on those two is that it allows changes to be made before any officer authorized to administer an oath, unless the parties by stipulation waive signing.

PROFESSOR EDGAR: So does the one on 165.

MR. SPARKS (EL PASO): Oh, does it? The one I have says,"The changes and the statement of the reasons shall be entered upon the deposition by the deposition officer."

CHAIRMAN SOULES: The deposition officer doesn't really enter changes on the transcript; you get an errata sheet. Let's see. "The deposition shall then be signed by the witness." It should probably be, "The deposition transcript and any changes shall then be signed." Then you would have the changes also made under oath.

JUDGE THOMAS: Are you on 165?

CHAIRMAN SOULES: I'm on 165, and I'm down a little bit below the middle of the page, over here where it says"the deposition." "The deposition transcript and any changes."

MR. TINDALL: If it's sent to the witness at the lawyer's office, the lawyer's secretary cannot be the person that makes the changes as this is written in.

CHAIRMAN SOULES: I'm sorry?

MR. TINDALL: If the deposition is sent to the lawyer's office and they make the changes in the lawyer's office, that's not going to be permitted by this proposed rule.

CHAIRMAN SOULES: Yes, it would be.

MR. TINDALL: The deposition officer is only on the errata sheet, right?

CHAIRMAN SOULES: No. We're saying the deposition transcript and any changes shall then be signed by the witness under oath before any officer authorized to administer an oath.

MR. TINDALL: What about this endless problem? Does that then become the official testimony of the witness or do you still get into this impeachment problem?

CHAIRMAN SOULES: You get both ways; you read it both ways in trial. The changes don't supercede the original testimony. You can use them both. You can use the original and you can either acknowledge when you use the original that he changed it or let him do it when he gets it back on redirect.

So I do think that the changes should be signed under oath, and that's not provided in this one on Page 165. But if we just change that sentence to say, "the deposition transcript" at "the deposition," and then add "transcript and any changes shall then be signed by the witness" and underline "under oath."

MR. BRANSON: So that way, you've got the witness already on a perjury charge that he swore one way one time and another at another

time.

CHAIRMAN SOULES: Well, he is also stating the reasons for his changes, and the reasons, presumably, would exonerate him from a perjury charge; it was mistakenly given, he didn't hear the question right.

MR. BRANSON: He meant to say "yes" instead of "no."

MR. SPARKS (EL PASO): "My lawyer explained this to me."

PROFESSOR EDGAR: Is it redundant to say"signed by the witness under oath before any officer authorized to administer an oath."

CHAIRMAN SOULES: It is not to me, because he can sign before an officer authorized to administer the oath without getting the oath administered.

PROFESSOR EDGAR: What if you say "subscribed"? You know, "subscribed" and "sworn" are still two different things.

CHAIRMAN SOULES: With those changes, is there any further discussion of this? Are we ready to vote?

PROFESSOR EDGAR: One other thing: On the next page, next to the last line, the Court

"determines," the Court doesn't "hold"; trial court "determines."

CHAIRMAN SOULES: Let's see. Okay. Then change the word "holds" to "determines" in the next to the last line on Page 166, which incidentally puts a burden on us to get our witnesses in and review those because if we don't and a copy gets filed on the 21st day, we're stuck unless there's a good reason for not having it signed, and that's already in the rule. Okay, with those changes is there any other discussion?

PROFESSOR EDGAR: This whole last sentence just goes on and on and on. Why don't we put a period after "therefore" at the top of page 2 and then start a new sentence saying, "The deposition may then be used as fully" --

CHAIRMAN SOULES: The copy of the deposition transcript --

PROFESSOR EDGAR: -- "may then be used as fully as" -- why don't you just say, "may be used for all purposes"?

CHAIRMAN SOULES: Well, you get into substantive objections.

PROFESSOR EDGAR: All right, "may be used as though signed." "May be used as fully as

though signed" kind of sounds awkward to me.

CHAIRMAN SOULES: Just "used as though signed"? It's still a little awkward. That gets the concept part across. An unsigned one is a signed one, in effect, for purposes of court. Why don't we leave that alone since we have so much to do.

PROFESSOR EDGAR: Then just put a comma instead of a semi-colon.

CHAIRMAN SOULES: Where is that?

PROFESSOR EDGAR: You have a semi-colon after "signed," don't you?

CHAIRMAN SOULES: Yes. Change that to a comma. Okay.

Any further discussion on 205? Those in favor of the changes proposed in 205 as it appears on 165, show by hands. Opposed? That's unanimous. And does that then carry with it the rejection of the ones on 161 and 163 since we're using 165 to make changes? Is that the consensus? It is? Okay. Unanimously adopted the Rule 205 changes on 165 and 166. Okay, Sam.

MR. SPARKS (EL PASO): Well, the next I call -- Newell (phonetic) -- because we had tabled these and he advises me that package B is

probably still the one that we ought to be looking at, or at least was the one that was most consistent with all of the comments. So we got Rule 207 package B in there for you. We talked about it the last two times. I don't know of any additional thing I can say about it. The rule is here, though. Does anybody have any questions?

PROFESSOR BLAKELY: May I just make a comment, Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, please do.

PROFESSOR BLAKELY: This is one of the places where the Rules of Evidence articulate with the Rules of Civil Procedure. And this package, of course, includes the two Evidence Rules on Page 168, the back side.

207, as Sam indicated, is pretty much what was agreed on last time. And we had a consensus up until about 20 minutes until the meeting. And Rusty raised the question about late-joined parties. And so Rule 207-1(c) was put in to deal with late-joined parties; the depositions have already been taken and then someone becomes a party.

Now, 207-1 A and B defines same proceeding,

and the deposition is admissible against all those people described in A and B. But then somebody becomes a party and C deals with that. If one becomes a party after the deposition is taken and has an interest similar to that of any party described in A or B above, the deposition is admissible against him only if he's had reasonable opportunity after becoming a party to redepose the deponent and has failed to exercise that oportunity.

I telephoned Rusty and talked with him about it. And after talking with him, I drew this. This is not his language, but I drew it in an effort to satisfy him. And this was then sent out to Sam Sparks' subcommittee and to the Evidence (phonetic) subcommittee, and no negatives were picked up on it. I move the approval of the package which would be the two Evidence Rules and 207.

MR. BRANSON: Second.

CHAIRMAN SOULES: Motion was moved and seconded. Any further discussion?

MR. BRANSON: Let me ask one question, please. Let's say you had severed litigations.

PROFESSOR BLAKELY: You had what?

MR. BRANSON: You had a lawsuit against General Motors tried in Florida and a witness testified in that case on a similar occurrence. And a case was subsequently brought in Texas. Is it your reading of the rules -- .

PROFESSOR BLAKELY: This involves General Mortors and some other plaintiff?

MR. BRANSON: Yes. Is it your reading that under that set of facts that testimony would be admissible in the Texas case?

PROFESSOR BLAKELY: Well, you would move over to the Evidence Rule 804. This is not same proceeding as defined in 207. So it would have to come in under 804. And it would require to come in -- the deponent would have to be unavailable. And it would have to be -- well, I'll just read it.

"If the party against whom the testimony is now offered or a person with a similar interest had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." So that's your question: Is the party against whom it's offered have a similar interest?

MR. BRANSON: So the answer would be

"yes." Let's take it one step further. If I understand what you're saying, and that's what I perceive, the Federal Rules were, and I thought that's what we adopted.

If it was a General Motors automobile that was involved in the Florida case, but the same problem existed in a Ford Motor Company automobile in a Texas case, and you're dealing with the same type problem, then you've got a party with similar interest and our rules would allow the testimony if you could convince the judge that it was a party with similar interest in the previous case.

PROFESSOR BLAKELY: Well, that would be your question. Was it a person with similar interest? Now, Frank, that is broader than the Federal Rule. Federal Rule is more narrow. The party against whom it's offered would have had to be the same party or his predecessor in interest. But this language was put in by the Liaison Committee, a person with a similar interest, really, I think, with the same proceeding defined broadly in mind.

Jim Kronzer used this hypothetical: An asbestos case, lots of plaintiffs, lots of defendants, and experts have been thoroughly

jumped on by high quality lawyers. And then way late somebody else is brought into the lawsuit or joins. That deposition ought to be admissible against that person because he's not going to be anymore effective dealing with that expert than has already been achieved.

Really, that's a late-joined party in the same proceeding. And so I really don't know what is meant by"if a person with a similar interest" in a different proceeding. And I can pose you a case, which worries me a good deal, which might be under that language.

Suppose A and B are two strangers sitting side by side on a bus and you have a bus accident, and their necks are jerked simultaneously and symmetrically and so forth.

A-B bus is tried first and a witness testifies favorably to bus on something about the accident. That witness is unavailable when B-B bus comes along so the bus wants to introduce that testimony against B.

A's attorney was in his first year out of law school. B's attorney, who has not had his day in court on that one, and who had 20 years' experience trying cases, says, "I've never had my

day in court on that thing." It's unfair to saddle me with the job that A's attorney did. But bus says, "You have a similar interest and so it's admissible against you." That's troublesome.

MR. BRANSON: Would our revisions cover that so that he would have an opportunity to depose the person before testimony used --

PROFESSOR BLAKELY: No. These are different lawsuits and you'd be dealing with 804-B(1). And your troublesome phrase is, "If the party against whom the testimony is now offered or a person with a similar interest." And I'm inclined to think that part ought to be struck, "or person with similar interest," and just track the Federal Rule on that.

MR. SPIVEY: How does the Federal Rule read?

PROFESSOR BLAKELY: It's the party against whom the testimony is now offered or his predecessor in interest.

MR. BRANSON: Even though it would solve that problem, it sure creates additional problems that I think currently have broadened the scope of trial practice in Texas and are favorable, and that is, situations where you've

got national defendants using different experts merely because one expert got up in New Jersey and gave answers they didn't like on cross examination, and you denied litigants in Texas an opportunity to use those admissions many times against the party, if you don't do that.

It may not be an individual corporation. It may be an industry like the asbestos case, where you've got really favorable testimony in one state and the litigants ought not to have to go back through that process.

PROFESSOR BLAKELY: Well, now, you're talking about the late-joined party in the same proceeding?

MR. BRANSON: No, sir. I was talking about our original hypothetical, where you had one corporation -- but they are parties with similar interests. And as I understand it, you're asking to strike that provision which would knock that out of 804, wouldn't it?

PROFESSOR BLAKELY: Yes.

MR. BRANSON: That's not before the committee today, is it?

CHAIRMAN SOULES: Yes.

PROFESSOR BLAKELY: I think this whole

package is tied together.

PROFESSOR EDGAR: Two evidence rules and 207.

CHAIRMAN SOULES: That's the only unresolved issue, I guess, is that.

PROFESSOR EDGAR: Well, it just seems to me that there's something fundamentally unfair if you have a different lawsuit and simply because you have a similar interest, you can use those depositions interchangably. I think I like the federal rule, which is a little more restrictive, myself.

MR. BRANSON: That was very heavily thought out in the Rules of Evidence committee, wasn't it, Dean?

PROFESSOR BLAKELY: It was discussed.

MR. BRANSON: I was on it and because it conflicted in PJC. I think I did attend that meeting. I thought the consensus of that committee was that the rule we adopted was a fair rule in the federal.

PROFESSOR BLAKELY: Yes. The majority did. I don't remember the exact vote on it.

CHAIRMAN SOULES: They have got two asbestos companies, and they have got the same

product, and have similar interest. There's been testimony or deposition in a case involving asbestos company A that helps prove up your case against asbestos company B. You could use the testimony or the deposition of asbestos company A in proving your case against asbestos company B. That's the way this is written right now.

If there is a similar, you have to go through the findings, the trial court has to find the threshold issues that they are similar interests. Now, that's the issue that we have got to vote up or down here.

MR. BRANSON: My question, though, is, is part of our charge from the Supreme Court to go back and redo what previously encouraged to be by the Supreme Court to which the Rules of Evidence Committee has already thought and hashed out and determined was fair? Is it our job now to go back and say, "no, that committee is wrong," when they spent -- whereas we spent maybe 20 minutes on it.

If I remember that was a heated discussion in the Rules of Evidence Committee, and it took a long time. And all of these issues were hashed and rehashed and the general consensus -- I think Justice Wallace was on the committee -- was that

we should go with the way it is, and I'm really unwilling to superimpose our will on that committee.

CHAIRMAN SOULES: Well, it's not a question of jurisdiction, but let's find out a question of -- how many feel that we want to change the Rule of Evidence? That is the rule as it is.

JUDGE WOOD: Let me ask one question.

PROFESSOR BLAKELY: I just want to make a general comment with respect to what Frank's saying. Almost every piece of advice that we now give the Supreme Court is to change some rule, which on some prior occasion, some group has debated and thought out and often heated in all these things that you say.

MR. BRANSON: Except that committee was really, as I understood, a blue chip committee that the Court really encouraged and has just recently come out with this work.

PROFESSOR BLAKELY: Well, I certainly wouldn't want to disagree if there was some fine people on it.

CHAIRMAN SOULES: Hold it just a second. We're changing our computer-driven

machine over here so that these fine ladies can have all this on computer and maybe get a printout faster.

MR. LOW: Say, for instance, that some young kid has got a plaintiff's asbestos case, and he takes some expert's deposition. And Scotty Baldwin (phonetic) has also got a plaintiff's case. That defendant can use a deposition that the kid took when he didn't do much of a job when Baldwin doesn't want to be bound by it and he wants a shot at that guy?

CHAIRMAN SOULES: He can take his deposition.

MR. BRANSON: That's a two-way street there.

CHAIRMAN SOULES: That's the rule now. Do we want to change it? Show by hands.

JUDGE WOOD: Let me ask one question.

CHAIRMAN SOULES: Okay. Excuse me, Judge, I'm sorry.

JUDGE WOOD: I think we dealt with this before. But my question is: What if the deponent is dead and can't be deposed, and yet he has been fully deposed by a good lawyer and it's in the same case?

PROFESSOR BLAKELY: It would not be admissible against that late-joined party.

JUDGE WOOD: All right. Now, the other thing is, it would be admissable, however, under 2 if it complied with these things here at the trial upon the hearing of a motion or interlocutory proceeding, "any part or all of the deposition taken in a different proceeding may be used subject to the provisions and the requirements of the Texas Rules of Evidence."

PROFESSOR BLAKELY: And that Judge, right there, because you're dealing with a different proceeding, would throw you into 804-B(1), which we were just talking about.

CHAIRMAN SOULES: How many feel 804-B(1) should be left alone and we ought to address the changes only that are being offered in 207 and 801(3). Show by hands.

JUDGE TUNKS: I'm sorry, I didn't understand your question.

CHAIRMAN SOULES: All right, Judge. Well, we would delete the "same or" out of 804, but otherwise, leave that alone.

MR. MCCONNICO: Luke, as I understand it, the only thing we're talking about deleting

from 804-B(1) is the phrase, "or a person with a similar interest."

PROFESSOR EDGAR: And I thought Newell was suggesting that maybe we insert the Federal Rule talking about predecessor in interest for a person with a similar interest. I thought that was your suggestion, was it not?

PROFESSOR BLAKELY: It was, yes.

MR. BRANSON: That's really a major change in the existing law that I think if you're going to address ought to be studied more, and I'm not willing to address it.

CHAIRMAN SOULES: Please, let me get on with this part of it. 804-1 there is one written change proposed, no others. That keys to the changes in 801-A(3) and the changes in 207. What we've been talking about the last few minutes doesn't bear on what's before us here in writing.

PROFESSOR BLAKELY: It's something that I added there, orally.

CHAIRMAN SOULES: We can take that up in September if we wish. Obviously, that's something I think does need discussion, Frank. And maybe we do want to suggest that that be changed. Maybe the Rules of Evidence Committee

wants to address it first.

But we do have before us the use of depositions against newly-joined parties who had an opportunity to take the deposition again and didn't exercise it. We don't have any Texas law on that, and different practices prevail in different courts.

And then we have the use of prior testimony being addressed in order to accommodate that part, that change of Rule 207. I haven't really heard any opposition to that. Is there opposition to those changes?

MR. BECK: I have a question with respect to 207-1(c).

CHAIRMAN SOULES: Okay.

MR. BECK: It gets back to, I think, some of the same questions that Frank had raised earlier. And that is, what is an interest similar to that of any party described above? And, you know, I know we always talk in terms of major cases like the asbestos cases, but what about the more typical case where A sues B and then 45 days before trial, C is added as a party defendant. Does that mean that C has an interest similar to B because they're both defendant?

CHAIRMAN SOULES: Well, we've got a peremtory challenge law that helps us there. I don't know a better way to say it.

PROFESSOR EDGAR: I'd say, yes. They do have a similar interest. I'd say, yes.

CHAIRMAN SOULES: Just because they're co-defendants?

PROFESSOR EDGAR: Yes. Their interest is similar in that they are both jointly trying to defend a lawsuit involving joint and several liability.

CHAIRMAN SOULES: Well, he didn't say joint and several liability; he just said new defendants in.

PROFESSOR EDGAR: Well, but you're still talking about joint and several liability.

CHAIRMAN SOULES: Maybe; maybe not.

PROFESSOR EDGAR: I don't know of any cases involving several liability, do you, where you have multiple defendants where their interests are similar?

CHAIRMAN SOULES: If you had two lenders with different commitments, they wouldn't be jointly and severally liable.

PROFESSOR EDGAR: : Well, then you

would have several causes of actions, wouldn't you?

CHAIRMAN SOULES: You might, but they would still be co-defendants.

PROFESSOR EDGAR: Then they may not have similar interests.

MR. ADAMS: Luke, I think in our discussion in the Evidence Committee was that they had a similar interest in cross-examination or development of evidence. That's the similar interest that they're talking about.

PROFESSOR EDGAR: Similar objective in defeating the plaintiff.

MR. ADAMS: Yes. The objective is cross-examining or developing the evidence of that witness.

CHAIRMAN SOULES: Does that help you, David, if we set down a similar interest in the development of the evidence?

MR. BECK: As to that witness. Yes. That would make it a little more clear. Because you can make the argument as Frank just did. And that is that your defendant and all defendants have an interest in poring the plaintiff out, therefore, you have an interest similar to one of

the parties.

MR. LOW: Now, you have got a multi-party case and one of them is a manufacturer and the other one is a service organization, you know, that services the product. They both don't want the plaintiff to win. But one of them sure doesn't want the product to be defective and the other one sure doesn't want it to be a service in misuse.

MR. BECK: That's right. And the witness may go to just one of those issues.

PROFESSOR BLAKELY: Luke, could you borrow from 804-B(1) the language, "similar motive to develop the testimony by direct, cross or redirect examination"?

JUDGE WOOD: I think that's good.

MR. BRANSON: Isn't the real question whether they had smiliar overall motives, though?

MR. LOW: With regard to that witness.

MR. BRANSON: As it applies to the testimony.

(Off the record discussion (ensued.

CHAIRMAN SOULES: That does clarify

it, David.

JUDGE WOOD: Does that deal with intervenor who comes in?

PROFESSOR EDGAR: Just picking up the language that appears on the next page in 804-C(1) that says, "had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." Just insert that instead of "an interest similar." And I think that will take care of your problem.

MR. LOW: I hate to add confusion to it, but what would you do with a situation where this guy is an actual eye witness, and two defendants would want to show that the plaintiff was not really bleeding in the head and didn't get hit in the head by this jetway door. And they would be similar there, but he also has facts with regard to whether the thing actually broke here or whether it was a servicing problem. And you got the people with the service contract fighting with the people that manufactured it. So he might have one little similar motive to part of it, but as to the major part, there may not. I just got through trying a case exactly like that.

MR. ADAMS: Then we ought to have an

addition then, "with regard to the portion of testimony that's offered." They have to have the similar motive and opportunity to develop.

MR. LOW: I mean, if you just let it have one, that one witness, the two defendants rejoined issue in trying to prove the man wasn't bleeding in the head, but after that we sure crossed swords.

CHAIRMAN SOULES: Well, you have the bottom part of it and that is, it's admissable to the party who was not present at the time of the deposition only if he had an opportunity to take the deposition and didn't. And he has a similar interest and we've now drawn up that. So it would seem to me, Buddy, that --

MR. LOW: I just wouldn't want it argued that somebody could come in and say, "Okay. With regard to this one question, their interest was similar," and that's all it says, "a similar interest."

MR. BRANSON: But, Buddy, the trial courts really have overall discretion, and I don't remember the two rules where they find it would be unfair to keep it out where they find it needs to be in and let it in.

MR. LOW: An unfair argument never has gotten anywhere.

MR. SPARKS (EL PASO): Oh, yes, it has.

JUDGE WOOD: Just a matter of interest: An intervenor takes a case as he finds it. He comes in and intervenes in a case after a great many expensive and elaborate depositions have been taken and much expense used in taking those depositions. Is that general rule, he comes in and accepts the case as he finds it? Maybe that's not the problem with this rule but it occurs to me because I've got a case, more or less, like that.

MR. LOW: I think the purpose is to keep from just saying,"well, I can't be bound by it even though I couldn't do anything about it, and I wouldn't want to take it again because I couldn't do any better as to avoid expense of all these people having to go to New York again, and it's got a good purpose."

JUDGE WOOD: I think you ought to be bound by it if his interests are similar to the people already in the case.

CHAIRMAN SOULES: This would put him

there.

How many in favor of Rule 207 with "an interest similar" being changed to "a similar motive to develop the testimony by direct, cross or indirect examination," making that change. And 207-1(C), and with that change, how many are in favor of the proposed change in Rules of Civil Procedure 207 and Rules of Evidence 801 and 804? Show by hands.

JUDGE WOOD: Would you clarify to say that similar interest in the testimony offered, where it is offered right after testimony?

CHAIRMAN SOULES: Well, how many are opposed? One. Approved 12 to 1.

Judge, that was not a part of it that you could pick and choose in the deposition what you were similar to.

JUDGE WOODS: I would think that's what it means.

CHAIRMAN SOULES: It may mean that. 209, the clerks want to be able to dispose of depositions.

PROFESSOR EDGAR: Well, I don't agree with that. For one thing, I don't really know what number 1 here means. Does that mean after

the clerk has entered the judgment in its records, then the depositions can be disposed of within 180 days? Or does it mean 180 days after the judgment has become final and mandate is issued?

CHAIRMAN SOULES: Sam, that's your report. What do you have on that?

MR. SPARKS (EL PASO): This comes from two different sources. Let me give you some background.

Some clerks are disposing of depositions the day you leave the courthouse when the verdict comes in. Some are never disposing of them. There's no uniformity at all. So, of course, this is obviously meant to be a final judgment, I'm sure. But mandates don't issue out of judgments not appealed, do they?

PROFESSOR EDGAR: I understand that. But in the case where you do have an appeal, though, this would authorize the destruction of the deposition 180 days after the clerk enters the judgment the judgment roll.

MR. SPARKS (EL PASO): How is it final to all parties if it's --

PROFESSOR EDGAR: I'm just simply saying in --.

JUDGE TUNKS: The trouble we've got, Sam, is the different types of final judgments. You can't appeal if it isn't a final judgment. You mean, it becomes final in that it is no longer appealable?

MR. SPARKS (EL PASO): That's, I'm sure, the intention.

MR. TINDALL: There appears to be no consensus for this proposal.

MR. SPARKS (EL PASO): Well, let me say that I think we should seriously -- this is a phase of about eight or nine other proposals we're going to be looking at in just a few minutes and that is to try to get rid of some of the paper. And even in West Texas, the district clerks are handling all of these depositions. I just think it would be good to have a rule, and whether you say it on appeal after a mandate or after a judgment becomes final as to all parties, however you want to say it, we ought to have some type of rule that we can all -- of course, we can rely on when you get the depositions.

For example, in El Paso after "X" number of weeks now, after a judgment has been entered -- and most of the judgments, of course, we're

talking about are dismissals with prejudices.

Then the clerk just calls us and says, "Do you want these depositions because we're going to get rid of them?" And nine times out of ten, of course, the defense lawyers take them because we find that sometimes there's use for them.

MR. SPARKS (SAN ANGELO): Under the new Rules of Evidence.

MR. SPARKS (EL PASO): The plaintiff's lawyers may be taking them now.

And this rule was certainly an improvement over the nothingness that we've got. I understand, for example, in Harris County they don't destroy anything and they're faced with microfilming even depositions. We're not doing that. Some of the clerks that are retaining them are retaining them, and then when you go in to find them, they don't know where they retained them.

I'm in favor of some type of rule, and I read this to be a judgment final as to all parties with a covered -- an appeal after it's filed to all parties and then a dismissal after 30 days or judgment affidavit.

JUSTICE WALLACE: This is one of the

areas where we need to guard our rear flame because these district clerks are taking some real strong moves to legislature to do something about it if we don't. And if we do something about it, it can be done our way as opposed to what might happen over on the hill.

JUDGE WOOD: You know, I think in Federal Court at home down there in Corpus, and whether or not it's a federal rule or a local rule, I'm not sure, but we don't file depositions with the clerk.

CHAIRMAN SOULES: We're going to need to change that in Texas.

MR. SPARKS (EL PASO): It's later on down in the docket.

CHAIRMAN SOULES: What if we put in there that deposition transcripts filed with the clerk of the court may be returned to the party who noticed the deposition.

SAM SPARKS (SAN ANGELO): That's better.

MR. BEARD: How about "shall be returned"?

CHAIRMAN SOULES: -- "Shall be returned to the party who noticed the deposition

after the expiration of 180 days, after a judgment is filed and all parties have been rendered in the case."

MR. BECK: Luke, the problem I have is with the time period here. 180 days, I think, is completely inadequate. And I'll tell you the reason why.

San Angelo Sam alluded earlier to the problem, presented when you have a dismissal for want of prosecution. Sometimes you may not even know that your case is dismissed. And suddenly you find out your case is dismissed, you go to the courthouse and the file has been destroyed.

I think 180 days is too short. And I think all the district clerks want is authorization that, after some reasonable period of time, they can destroy it.

CHAIRMAN SOULES: Well, what's your proposal, David?

MR. BECK: Well, I was going to say a year.

CHAIRMAN SOULES: How many favor a year over 180 days? Show by hands. Certainly, one year is favored over 180 days. Is there an alternate proposal to that?

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PROFESSOR EDGAR: As a matter of

policy, though, would you distinguish between judgments from which no appeal has been perfected and one in which an appeal has been perfected? That is to say, if the appeal has been perfected, would you want the time to be extended to the time in which the judgment does become final?

MR. BECK: If it was perfected, Hadley, wouldn't the depositions go up?

CHAIRMAN SOULES: No.

PROFESSOR EDGAR: Depositions don't ever go up.

MR. SPARKS (SAN ANGELO): But they ought to be retained.

MR. MCMAINS: It ought to be dated from the date that the mandate issues.

MR. BECK: What if mandate, though, is reversal and remand? Then it comes back and you need those depositions again.

MR. BEARD: You don't have a final judgment.

MR. BECK: So you don't have a final judgment. You want it after all appeals have been exhausted, right?

MR. MCMAINS: Well, I don't mean from any mandate.

PROFESSOR EDGAR: Well, but I'm saying, though, that we need to think about that. That's all I'm saying.

JUDGE TUNKS: I think it would solve some of those problems by adding a word after final; final in that it is no longer appealable.

CHAIRMAN SOULES: Final and nonappealable judgment.

MR. SPIVEY: I want to be the last one to get technical, but what about the case where it's reversed and remanded or is remanded and set for a new trial. I'm a little bit concerned that a clerk might just see that a mandate is issued and 180 days have passed or a year or two years and, say, you're in Houston and you haven't gotten up to trial again, or for some reason that in the county, some good reason, you haven't got the trial again.

Is there some language that could be used to identify a case that has been disposed of as opposed to just a judgment or a mandate? Because that doesn't always terminate the case. I've got a case right now involving real estate, where the trial court's judgment was changed, mandate was issued, but we're waiting on surveys. And we've

been waiting for nearly six months on the surveys but it's beyond our control.

So I'm wondering if there is some language that can be -- the triggering language is tied to a genuine final disposition as opposed to some particular event occurring.

CHAIRMAN SOULES: How about this language: "After a final judgment as to all parties has been rendered and the case is no longer pending or on appeal."

MR. SPIVEY: Or, as Hadley said, "or an order or judgment that finally disposes of" --

CHAIRMAN SOULES: Well, if it's no longer pending or on appeal, it's done. If it's been remanded, it's then still pending. That's why I was using pending. At least, from my concept, if it's pending or on appeal --

MR. BEARD: Well, citations by publication, I think, you have two years.

MR. MCMAINS: You've got two years to file motion for a new trial.

MR. TINDALL: I have special problems with family law cases that may go on for 17 years with children.

MR. MCMAINS: Because you get to try

to modify.

MR. TINDALL: Modify, change in custody.

MR. BEARD: That's where all the bills of review are filed, too, 90 percent of it.

CHAIRMAN SOULES: Where we're headed, or the legislature is going to take us there it seems, is we're not going to file depositions at all. So we're really talking about sort of like we were yesterday on these Administrative Rules. What are we going to do about the cases that are historical? Because we're going to have to provide that discovery is not filed, except, I think request for admissions should be filed.

MR. SPIVEY: Luke, I don't think any of us are opposed to a rule getting rid of the deposition and, it seems to me that returning those matters to the party that's filed them solves it.

CHAIRMAN SOULES: Well, I was just getting to the family law matter. I mean, the parties who handle the cases are going to have to retain that testimony for future use because the clerks are not going to do it. And they're going to find a way to get away from it.

MR. SPARKS (EL PASO): There's a positive aspect to this, too, because a lot of clerks aren't holding the depositions as it is. I mean, it doesn't make any difference if we continue on or not. If it's reversed and remanded, sometimes it's hard to find a deposition.

PROFESSOR EDGAR: All right. Why don't we find a middle ground here and just state that the clerk of the court shall return the depositions to the attorneys for the litigant --

CHAIRMAN SOULES: -- who noticed the deposition.

MR. MCMAINS: They're not always noticed. The party who paid for it --

PROFESSOR EDGAR: Let me get my thought out first and then we'll work on the language. But will return them to the attorneys who noticed, or whatever language we want to use, 180 days after the judgment is entered by the clerk of the court. Now, that's 180 days after the entry of the judgment by the clerk. But then the depositions are not destroyed; they're sent back to the attorneys.

If the legistlature is going to do something

with us anyhow, then maybe this is a middle ground that will satisfy the clerks and yet, in some way, maybe retain the depositions.

MR. MCMAINS: Well, sure. There are a lot of cases in which, probably, 180 days after the judgment you haven't got the statement of facts yet.

PROFESSOR EDGAR: Well, we're not concerned about that. We're just talking about trying to get the depositions out of the clerk's office.

CHAIRMAN SOULES: We've got a year concept on the table. We've all voted for a year, so it's a year. Hadley's example would be a year.

MR. MCMAINS: A year. I don't have a problem with it. I'm just saying it's --

CHAIRMAN SOULES: Now, why should they be required to -- at least, since we're involved in one practice now, which maybe will change, but in the past we retained those for a year after the judgment is final and the case is no longer pending or on appeal, because if it's been remanded, it would still be pending. And when they have got to grind through what's already on file, we may change the future. Does that get to

you're point, Hadley?

PROFESSOR EDGAR: I don't have any problem. That's all right. Just say return to the attorney who took the deposition -- taking the deposition.

CHAIRMAN SOULES: Now, we've got to decide about when they can't find the lawyers, because a lot of them are dead, law firms dissolve and what have you. But we'll get to that in a minute.

MR. MCMAINS: Shouldn't we provide that when they return it, that they give notice to the other side or notice to the other party?

MR. SPIVEY: I don't think so because we all know the rule we're practicing under. And if we want the deposition or something, we can notify the clerk and call the other parties. The idea is to get rid of depositions, not the --

MR. MCMAINS: I just figured if you had a notice requirement, it might kind of stop them from complaining about it once it happened.

MR. TINDALL: Luke, what about putting an incumbent upon the attorneys that they cannot file motion -- or upon some affirmative request of the attorney they can withdraw without leave of

court, something like that. The clerks are not going to be prepared to mail back thousands of depositions. They don't have the money or the manpower to stick them in the envelopes and chase down attorneys.

CHAIRMAN SOULES: They can get that. The Commissioner's Court will give them that. They'll give them the money to get the depositions out of the storage, at least they will in San Antonio. Tom Victor is really pushing this, and he'd rather have that courthouse space-freed up.

JUDGE THOMAS: Luke, one thing following up on what Justice Wallace said, I know that part of the legislative package from the Dallas Commissioner's Court will be all of these requirements that you folks do not file anything with them and they never deal with it again.

But whatever we do, if we get to an alternative, the lawyer can't be found or something, I think we need to safeguard that the clerk cannot destroy anything without an order from the judge. Because the quality and competency of district clerks in the various courts in Dallas would make me very uncomfortable that they're just arbitrarily going to destroy

something without a court order.

CHAIRMAN SOULES: All right. Well, we could put that in, too. We've already got, "The Court shall, by order, enter upon the minutes, specify the method of disposal of such depositions." That would mean all of them. Now, we're taking care of the ones that you find the lawyers on.

JUSTICE WALLACE: You can give the clerk the right, after whatever time you choose, to either return the depositions to the lawyers. If you cannot locate the lawyers, then send notice to the last address available of the lawyer, whether it be the address shown on the deposition or on the record or put a burden on him to find the lawyers by checking with the lawyer's home county at the time of the trial. And if there's no response, then he can destroy them on Court order.

It looks like everybody would be protected there. If the lawyer wants the depositions, he can get them. If the clerk can't find the lawyer, then the Court can tell him to destroy them, so the clerk's warehouse is cleaned out and the lawyers got the depositions if they want them, and

everybody is pretty well satisfied.

PROFESSOR EDGAR: Let me just raise another question. Why do we require that the deposition be filed with clerk?

CHAIRMAN SOULES: That's the next question.

PROFESSOR EDGAR: I mean, we talked around that and the clerks don't want them, but why do we require that they be filed to begin with?

CHAIRMAN SOULES: Because we always have.

PROFESSOR EDGAR: But is that a good reason?

CHAIRMAN SOULES: No. And there's probably not a reason to continue the practice.

PROFESSOR EDGAR: If we abolished it, then we wouldn't have problems.

JUSTICE WALLACE: Well, we won't have a problem in the future, but we still got the problem of the warehouse with the depositions.

MR. SPIVEY: And you would have a problem with the cases that have to be tried, and some of those big cases where you have a lot of depositions.

CHAIRMAN SOULES: How about the requirement that the clerk enter on the minutes the disposition made of the deposition?

MR. SPARKS (SAN ANGELO): Luke, it would seem like, to me, if the clerk returns it to the party that filed it, why wait a year?

CHAIRMAN SOULES: Because the party doesn't file it.

MR. SPARKS (SAN ANGELO): I mean the attorney --

JUSTICE WALLACE: The court reporter usually files them.

CHAIRMAN SOULES: The only way you could really identify -- you could say the parties who first asked questions and then he can look at a deposition and find it.

MR. BECK: The one who paid for it is normally --

MR. MCMAINS: The lawyer who paid for it is going to be on the fee docket.

MR. BECK: They're not going to want to do a lot of research by looking at the depositions, but they can look at their fee docket schedule and determine exactly who took it by who paid for it.

MR. MCCONNICO: Is that true? I don't think in Travis County it appears on the fee docket.

MR. MCMAINS: It doesn't in Harris County and Nueces County? I don't know about Travis.

MR. BECK: Steve, I bet you they keep a running record of the cost and how they're going to be taxed.

MR. MCCONNICO: They do, but I --

MR. BECK: That will tell you who paid for the depositions.

MR. SPIVEY: Steve, I think that was taken care of when the rule was changed to provide that the court reporter would attach that information at the end of the deposition.

CHAIRMAN SOULES: All right. This is going to take some rewrite on Sam's part, but let's see if we've got the policy down, Sam. And we're going to have to give Sam some help on this. But what we're saying is that the transcripts should be returned to the party -- can we just say who took the deposition? Who paid for the deposition.

MR. O'QUINN: The problem is, you're

not going to be able to tell, necessarily, as to who paid for the deposition, but you can certainly look at the deposition if you have to and figure out who took it.

CHAIRMAN SOULES: You can find out the party who first examined the deponent. But if you take a deposition -- "take" in the sense that we commonly use that. And I lose and have to pay the Court costs; did I pay for it or did you pay for it?

MR. MCMAINS: Good point.

MR. O'QUINN: But how are you going to find that out? That's my question.

CHAIRMAN SOULES: You can look and find out the party who first examined the deponent. And that usually is the party that starts the proceedings. Will that do? David, I'm trying to get something we can use consistently. Will that work?

MR. BECK: That's fine.

CHAIRMAN SOULES: Okay. The clerk, where they can locate the lawyers or the party, will return -- we've had some trouble with parties or their counsel, but anyway, however you want to say that -- return the deposition transcript to

the party who first examined the deponent, if he can find the lawyer.

And that will be done one year after the judgment becomes final and the case is no longer pending or on appeal. That will give us some time to figure out which ones have been appealed, anyway.

In the event the clerk cannot locate a party, then just do this number 2, "The Court shall, by order, enter it upon the minutes of the court, specify the method of disposal that account for the proceeds according to law." Apparently, there's no -- staff paper is a marketable commodity. So I guess they could actually sell the stuff.

Three, "The Court can make such notice provisions as it wishes or not." Does that get us through the wicket on depositions that have been filed and will be filed until the practice is changed, if it's changed?

PROFESSOR EDGAR: Why don't we recognize that there are three groups of cases? There are future cases, there are pending cases, and there are cases which are final and disposed of. As to future cases, we require that no

depositions will be filed with the clerk. As to pending cases and cases which are final, the Supreme Court would simply enter an order directing the clerk to dispose of them. Why should that be in the Rules of Procedure?

MR. MCMAINS: That's true.

PROFESSOR EDGAR: I mean, I don't see why we ought to have a Rule of Procedure telling clerks to do something with old cases. To me, that's a clerical thing. It's an administrative thing and really shouldn't be a part of the Rules of Procedure.

CHAIRMAN SOULES: Who can take over a committee chairmanship responsibility for the purpose of figuring out a way to deal with the stuff that's already on file? Maybe we can get that off of Sam's back and we can just deal with what are we are going to do in the future.

In other words, this 209, we wouldn't even need it as a rule. We would just get a Supreme Court order, but give them some help on our thinking about how that order should be worded.

PROFESSOR EDGAR: I'll be happy to.

CHAIRMAN SOULES: Okay. Hadley will take on how we deal with the old matters. And

actually, I think depositions are about all you can isolate. I don't know whether the clerks are going to go through and pull out interrogatories and requests for documents and all that sort of thing. They probably won't. So, Hadley, you're going to take this 209 and work that into a type of order?

PROFESSOR EDGAR: Unless you want to -- is that all right with you, Sam?

MR. SPARKS (SAN ANGELO): Yes, sir.

CHAIRMAN SOULES: And we've generally got a scheme here that we can live with.

Let's do take a break from now until 4 o'clock, about 10 minutes.

(Brief recess.

CHAIRMAN SOULES: Well, I think we can probably take 215 pretty quick. Isn't that subsuming the rule already, that the burden of the party trying to offer evidence, if he didn't supplement, the burden is on the offeror?

MR. MCCONNICO: I think it probably is. The problem is that there's nothing in the rules showing that it must be shown in the

record. And that all those cases are going up on appeal, and there's no record of it.

MR. MCCONNICO: I move that we adopt the addition.

JUSTICE WALLACE: In other words, that gives the Appellate Court something to determine if that's an abuse in discretion.

MR. MCCONNICO: Right.

CHAIRMAN SOULES: Okay. Peeples says that in a whole lot of words, but it doesn't say it that succinctly. Is there any opposition to adding this sentence to Rule 215-5? Those in favor show by hands. Opposed?

JUDGE WOOD: I don't oppose; I've just got my hand up.

CHAIRMAN SOULES: That's unanimous to adopt. And when I say "adopt," obviously, I mean recommend the adoption to the Court.

We're going to add a new order. That would be simply to order that the discovery be made which would be less of a sanction than any others, if that's a sanction.

MR. MCCONNICO: My only problem is, I don't think that's a sanction. And I don't think we should put it under what are sanctions and make

it part of the list, because we spent all those years trying to say that, first of all, you didn't have to get an order before you could get a sanction. And I don't think we should be confusing the order compelling discovery with sanctions.

CHAIRMAN SOULES: Let's see, Rule 215, doesn't it talk about an order compelling someplace else anyway?

MR. MCCONNICO: It says now you don't have to have an order to get a sanction. In other words, you can have somebody not giving the discovery requested, and then you could automatically ask for a sanction without first getting an order compelling the discovery.

CHAIRMAN SOULES: Yes. Number one, a party may apply for sanctions or an order compelling discovery; so those are disjunctive. So compelling discovery is something that the lead paragraph disjoins from sanctions.

Does anyone feel that this is needed in the sanctions part of the rule? Those who believe that this recommendation should be rejected show hands. Those who believe it should be adopted show hands. Okay. It's rejected unanimously.

PROFESSOR EDGAR: Should it be somewhere else, though?

CHAIRMAN SOULES: Well, it says right at the first that party may apply for sanctions or an order compelling discovery. That's in 215, first paragraph, Hadley; and that may get it or it may not.

PROFESSOR EDGAR: Yes. I think that's 215-1(B).

CHAIRMAN SOULES: Doesn't that kind of get it?

PROFESSOR EDGAR: Yes, I think so.

CHAIRMAN SOULES: All right. 239-A.

PROFESSOR EDGAR: This is just providing for first class mail instead of a postcard. Rusty?

MR. MCMAINS: Yes.

PROFESSOR EDGAR: I don't think that the last sentence that they want to delete on 239-A really is designed -- I don't think that was in anyway conflicting with Rule 306-A. It simply means that a party led the execution on the judgment. It doesn't affect its finality.

MR. MCMAINS: Right.

PROFESSOR EDGAR: You see, the reason

given for deleting the last sentence here is because they say it will conform with the '84 306-A, the 90-day rule we talked about earlier but I don't think they're --

MR. MCMAINS: There's really not a conflict. This rule requires them to send notice of an interlocutory appeal. Rule 306-A requires no notice of anything but an appealable order or a final judgment.

PROFESSOR EDGAR: No, this pertains to final judgments, too.

MR. MCMAINS: It does both. But 306a believes only the final judgments or appealable order.

PROFESSOR EDGAR: Right.

MR. MCMAINS: All I'm saying is this is a notice rule that is broader, but I don't think if conflicts anywhere. It doesn't hurt anything to take it out because I think the failure to give notice will affect the finality of the judgment. It never affects the finality of the judgment, it is merely appealability of the appeal time periods.

CHAIRMAN SOULES: Do we need to make these -- the clerks are used to sending post

cards. Is there any problem with post cards? They get there so it seems. They say they want to have first class mail and take out post cards. I guess post card is first class.

MR. MCCONNICO: Post cards have never presented a problem with my practice at all.

CHAIRMAN SOULES: Do we need either of these changes?

MR. MCMAINS: Well, there is more conformity, I guess, in 306a with first class, although there is also a provision over here for something else. I mean, the next rule is on trying to substitute registered to certified mail. I don't think the courts can afford certified, to be perfectly honest with you.

MR. BECK: I don't either.

CHAIRMAN SOULES: Aren't these rules okay the way they are? Does anyone feel that we need to change either 239a or 306a(3) as shown on 174 and 175? Consensus then is there is unanimity that both of these be rejected.

MR. MCMAINS: I don't know whose it is. Is this in your section, 306a?

MR. SPARKS (EL PASO): Yes. I don't know exactly how it got there.

CHAIRMAN SOULES: We've sent everything to Sam that we can't find somebody else to take care of it.

MR. MCMAINS: I have one suggestion that may alleviate some of these problems if they want to consider them.

Since the failure to give notice of the entry of the judgment affects, obviously, primarily, the people who are wanting the judgment to be enforced in some manner and wanting the appeal to get on the line, if we want to insure better notice of them, we ought to impose obligations on the party who gets the judgment to give notice and certify that to the Court, which is more likely to get done. It's something that counsel ought to be doing anyway if they want to protect their right to take an orderly appeal.

CHAIRMAN SOULES: Why don't you propose something like that in writing?

MR. MCMAINS: I'm just saying, that may be a better way to do it than to impose the obligations just on the clerks. Clerks for one thing, don't know, necessarily, what an appealable order is. There are temporary injunctions and stuff like that that a lot of courts do not

automatically just send out.

CHAIRMAN SOULES: Let's move. If you would like to submit like that, Rusty, I think it would be a good idea. Why don't you work on it and submit it to -- I guess, that goes to Franklin Jones; I'd have to check.

Now, that gets us to the filing aspects and we've got an hour to work before we have drinks, which will be served out in the hallway in the corridor.

PROFESSOR EDGAR: 316 to 314.

CHAIRMAN SOULES: So that would go to Franklin Jones. Rusty, are you suggesting you have on that 306a?

PROFESSOR EDGAR: 239a, wasn't it?

MR. MCMAINS: I don't think there's a problem with 239, although you could do it the same way, I guess. That requires the party against the default to send the notice.

PROFESSOR EDGAR: That's what I'd do.

CHAIRMAN SOULES: If you'll do that, combine them both and send them to Franklin Jones; part of it is in his bailiwick. Sam has got enough to do, obviously.

The next series of rules, they may go faster

than an hour. But they deal with how to to contend with the need to cut down on the paper filing in the district clerks's office, same thing we've been talking about.

Philosophically, I think they all bear the same spirit and maybe the same consequence, except, in my own mind, requests to admit are different, just because of way the rule operates. I mean, they are admissions and they bind and they're hard to get out of once they have been filed. They're hard to amend and a lot of other difficulties with them.

MR. LOW: They are part of the record without even introducing them as distinguishing that from interrogatories. They're automatically a part of the record.

CHAIRMAN SOULES: And the judge can take judicial notice of those. He can't take judicial notice of something that's outside his file. Well, they can in some things; but he can take judicial notice for what is in his file. We'll state it in the affirmative.

MR. BECK: I have some philosophical concern about this Section 5, "Certificate Filed in Lieu of Documents." I don't know what that

really does.

If our purpose is to somehow save the clerks space and, therefore, we not file a request or responses, what is the benefit of filing a certificate? It's not mandatory. If you're going to file a motion to compel or something, you're going to have to come up with proof of certain things anyway, so what do we accomplish by that?

MR. BEARD: Nothing.

CHAIRMAN SOULES: I think that's a good point.

MR. SPARKS (EL PASO): I can speak to the reason that Tom put that in there. And that is, it was primarily so that when another party that is involved in the lawsuit, they can go down to the clerk's office and see what they might need to do. If nothing was filed --

MR. BECK: But a party doesn't have to file it, though.

MR. SPARKS (EL PASO): I understand that.

MR. BECK: So if they look at the records at the courthouse, they're still not going to know whether they've got everything.

MR. SPARKS (EL PASO): One of the

folks that supported this wanted a certificate filed for that reason, so that if you got in late, you could go to the clerk's office and see what all they were to do. But I'm not advocating it; I'm saying that's the reason for it.

One thing on the request for admissions that these rules were trying to address particularly, in cases like the DES cases, asbestos cases, the Dalcon Shield cases, those kinds of cases, what we've been getting is -- the situation is, you get a request for admissions as to the genuineness of documents and the request is 400 to 500 pages long with the attachments of the exhibits. And that is something that ought to be considered when we talk about whether we're going to file them or not.

MR. LOW: Luke, couldn't you put in there, even if you marked it out -- put in there that nothing here shall change the law with regard to those being of the record and be the burden of -- you know, in the event the case is tried or appealed or something, then it would have to be filed, or made a part of the record. Because now, as you said, the Court takes judicial knowledge of them whether you ever offer them into evidence during the trial or not.

MR. BEARD: What does a newly-joined party -- how does he go about getting all the copies; does he have to have discovery?

MR. LOW: You just have to call some lawyer.

CHAIRMAN SOULES: Right now we're on the request for admission issue, and we'll get to the broader one in a minute. Could we provide that the matters that are admitted are deemed admitted be filed?

MR. MCMAINS: Luke, I don't think that the -- of course, the true concern they have is the genuineness of the document, which may be that you could distinguish in the request for admissions rule between the ordinary request for admissions fact as distinguishes the genuineness of documents which were attached, if that's what your troublesome part was.

But I'm like you. The request for admissions -- for one thing, if you don't ever file anything, it's your word against theirs as to whether you served them and what they were when you served them. And you might wind up with some unscrupulous lawyers, heaven forbid, which would serve requests for admissions that they could

readily admit, and then claim they served set two which were very damaging. And didn't file answers to them because they didn't need to; it's no big deal. And they're different. I mean, you might get into a dispute as to what the requests are.

CHAIRMAN SOULES: Sanctions and consequences raised by the requests to admit almost compel that they be file marked and made a part of clerk's record.

MR. ADAMS: What's the problem with the filing request for admissions?

CHAIRMAN SOULES: Sam was just talking about, you know, you may get one this thick.

MR. ADAMS: Well, you may, but that's an exceptional type case. I don't know if we can solve all the problems, but we're doing a lot for the district clerk as it is by getting in all the depositions.

CHAIRMAN SOULES: Shouldn't be hard to live with not having the request -- we're talking about, Sam, the consequences that come to a party in connection with the request to admit. In other words, I say, "This is what I served," and Rusty said maybe some unscrupulous lawyer says, "I served these," and I never got a response.

MR. SPARKS (EL PASO): Well, I'm for filing requests for admissions in responses. I just wanted to point out --

CHAIRMAN SOULES: Is there any disagreement that we should file 169 discovery both ways? There's no disagreement on that? Okay. The filing requirements under Rule 169 will not be deleted; they will be preserved. So the suggested changes to 169 will be rejected, and is that unanimous? Show by hands. Opposed? Okay. That will be rejected unanimously.

MR. BECK: Now, Luke, what about 167 and 168?

CHAIRMAN SOULES: We're going to get to depositions, interrogatories and requests for production now. And looking at what the commissioners courts are doing to us and all forward from whenever these are effective, is there any special reason why these need to be filed? We had a special reason on 169, and then we'll just get to whether we want to recommend these changes. Is there something that sets apart interrogatories requests for production or depositions?

MR. LOW: We don't do that in the

Federal Court in Beaumont and it's worked very well. Now, I don't know of a problem we've had with it, do you, Gilbert?

MR. ADAMS: I don't know.

CHAIRMAN SOULES: We don't in San Antonio either.

PROFESSOR EDGAR: Not here.

CHAIRMAN SOULES: All right. Now, anyone who wants to speak the need to file in general, since we're not setting any of them out specially, the floor is open to you.

MR. MCMAINS: What about objections?

MR. MCCONNICO: Objections could be made in the response the way I read it.

CHAIRMAN SOULES: You would file a motion and I suppose as evidence --

MR. MCMAINS: Certainly you have to file something when you decide to get any of this heard.

PROFESSOR EDGAR: Well, look at Paragraph 3, Rusty. As I understand it, this envisions that if -- the Rule 167 on Page 176 -- that if a party is going to object to a request, then it's done by filing a motion, and then at that point the request and response become a part

of the record, then it's filed, only if there's some argument about it.

CHAIRMAN SOULES: That practice differs from what I think is necessary. I think whenever you file a motion to compel under Rule 215-A, Rule 215, or wherever it comes, you can attach enough of the discovery information, the interrogatory and the question, or you can just say, "I served interrogatories and never got a response." Then you don't have to attach anything into the clerk's office. You can offer your interrogatories wherever you have the hearing.

If you're going to submit without a hearing, you probably need to send them to the judge. If we pass that rule we don't have to have a hearing, because he's got to have a record there. But if you're going to file a motion, you can just put your interrogatories into evidence or show them to the judge when you have a hearing.

But if you need to attach depositions, some Q and A, or certain questions that have been answered and you feel you're entitled to more worth, or a certain request for production that you got a response to that you feel you're entitled to relief about, you can always attach

that to your motion and put it before the judge that way, can't you, or submit it at the hearing separate and apart from that as an exhibit, and then withdraw it and take it back with you if the judge permits you to?

MR. BEARD: Isn't this the place where we should hear on motions and all, we shouldn't actually have a hearing?

MR. MCCONNICO: Unless requested.

MR. BEARD: Like you do in federal court, they respond or don't respond and the Court enters an order.

CHAIRMAN SOULES: That's what Harry is going to work on; how we do that. This is kind of getting to what David raised initially. Why file or be permitted to file anything, unless it deals with a motion where your seeking relief, either a motion for protective order or a motion to compel or for sanctions?

MR. MCMAINS: The only question I have is: Physically, let's suppose that I send some interrogatories out and they send me some answers back. And I'm satisfied with the answers that I have, and I stick them in my file.

And then we march down to the courthouse on

the day of trial. And on the day of trial they say "Well, that wasn't the question you asked." I mean, you know, if there's some dispute arising at some point there, is all I'm getting at, about the content of them or the sufficiency of them or authenticity, or for that matter, what happens if they just aren't ever filed, do we just kind of ignore them, pretend they didn't exist in the first place?

CHAIRMAN SOULES: Served. Now, you're talking about served, not filed right?

MR. MCMAINS: Yes, I know they're served. I'm just saying, you have them in your own little bailiwick there and I'm just concerned like -- a lot of times I get some back that are unsigned.

MR. ADAMS: They get into the record when you read it into the record. That's how they get into the record. You don't need to file them.

CHAIRMAN SOULES: But they're not signed. You can file a motion to compel --

MR. MCMAINS: -- one that's not signed and he calls me back and he says, "Don't worry about it; I won't object." But, you know, all of that is just kind of handled and then you run into

a dispute over there.

CHAIRMAN SOULES: Then you've got a problem under agreement of counsel. You've got to get back to that early on -- 14 -- you got to get that in writing.

MR. BECK: Can't that same problem arise under the present rules?

MR. MCMAINS: Not 12. I don't think I have any doubt what a judge is going to do.

CHAIRMAN SOULES: If you don't have a signature, you should move to compel it. And if he says, "I won't object," you should get that in writing under the rules. I mean, we're going to have to protect the record, other than by filing in a district clerk's office.

MR. SPIVEY: All you're saying is file something else.

CHAIRMAN SOULES: But not a bulky set of documents like discovery documents get to be.

MR. SPARKS (SAN ANGELO): Luke, there is, to me, one reason for filing. And as I understand the current situation, it doesn't apply very much in the state. But some judges do read all that stuff and they know what the case is about and what's going on before it gets to trial,

you know.

MR. LOW: That's rare.

MR. SPARKS (SAN ANGELO): And with the current Task Force recommendations, it looks like not many trial judges do it, but some do. I don't know if that's worthy of a reason for filing them or not.

CHAIRMAN SOULES: Well, that's a point.

MR. ADAMS: Do we have provisions either -- I don't see them in these amendments, but somewhere else -- that provide for sending a copy of the cover letter to the district clerk? And also, do we have a requirement that the original be maintained by the lawyer who originated the document? I think we need to address those two aspects.

MR. NIX: It's certainly a good idea, especially if we're not going to file the original.

MR. ADAMS: That's the way we do it in Federal Court. We send a copy of the cover letter that encloses the answers to interrogatories to the district clerk. So there is a record in the district clerk's office that there were

interrogatories that were sent out and then answers when they come in, they copy the district clerk with regard to the answers being made.

But there also needs to be a provision that the original be maintained by the lawyer who -- and it should be available for inspection at reasonable times and places by the opposing counsel.

CHAIRMAN SOULES: By the lawyer that receives the original. Pat, did you have something you wanted to say?

MR. BEARD: In Federal Court, we don't send these letters to the court.

MR. ADAMS: You don't copy the district clerk with the interrogatories.

MR. BEARD: No.

CHAIRMAN SOULES: I think the requirement that the original be kept by the lawyer that receives it --

MR. ADAMS: Well, the original is kept by the lawyer who generated the document. And the other side gets a copy, because the original needs to be available for inspection and should be maintained. There should be a requirement that the lawyer maintain the original for inspection.

CHAIRMAN SOULES: You don't serve the original set of interrogatories?

MR. LOW: No. Because the person that has the duty, that would ordinarily file, sent that to the clerk. The people become the custodian for the clerk. You know, ordinarily the one responding would send the original of this and the interrogatories or answers or what, and he becomes a custodian for the clerk; that's the way we look at it.

MR. ADAMS: That's the way it's done in Federal Court.

MR. LOW: And then what Gilbert suggests, if they mail a letter like that, the lawyer would have trouble in saying, "Well, wait a minute; they weren't signed," or something and then you say, "Fine, they weren't signed. Strike Rule 215, strike all your stuff. You haven't even answered; that's good." You know, he's got to come up with something.

MR. BECK: I have three specific amendments I'd like to make of this Rule 167. Under Subparagraph 3, the underlined addition, it starts out, "by filing a motion," I would amend that to read as follows: "By filing an

appropriate motion setting forth," and then I would strike "separately" and put, "in detail the nature of the dispute, period," and strike the rest of that sentence.

And the reason I put "an appropriate motion" is because you may get a motion to compel, you may get a motion to quash. So either party may be filing a motion addressed to that discovery dispute. And I think "setting forth in detail" will probably catch or allow the Court to get sufficient information to hear that thing on the motion if the Court so desires, rather than having to have an oral appearance.

CHAIRMAN SOULES: Those in favor show hands.

MR. ADAMS: Well, you need a response to the motion.

PROFESSOR EDGAR: I want to write it down.

MR. MCCONNICO: May I say something? I think what we need to do there is to get the language of Peeples and make this consistent with that decision. Because we need to say in all these responses, if they're making objections, they're setting out the specific legal objections

that the Court can see, because that's what the Supreme Court has said in the recent decisions.

They said if you're going to make an objection to a request for production or anything else, you've got to set out the specific legal objection. And we should go ahead and use that language in the rule.

MR. BECK: That's agreeable; that's fine. That's all right.

JUSTICE WALLACE: What was his amendment now?

PROFESSOR EDGAR: All right. Where are we now? You're superimposing a recommendation over David, Steve?

MR. MCCONNICO: I guess I'm adding to it. All I'd say is "by filing a motion setting forth separately each request and response and any objection should be a specific legal objection," something to that effect, because that's what Peeples states and that's what every other decision they've been writing lately --

MR. BECK: But there can be more than just a specific legal objection, though.

MR. MCCONNICO: There can be.

MR. BECK: But burdensome, that's not

really a legal objection.

MR. MCCONNICO: The Supreme Court, though, in the opinions is saying, "You've got to set forth a specific legal objection to a request for production or you have waived your objection."

MR. BECK: No. But 3 speaks -- it says "if" objection is made. And really what this is speaking to is how you get a hearing. See, 3 comes into play after the request is filed, after the response is filed, and now you're at the stage, what do we do now?

And what I'm suggesting is that we just simply say "by filing an appropriate motion setting forth in detail the nature of the dispute." And I'm not webbed to that last language, but all I'm saying is the motion can be a motion to compel, a motion to quash, or motion to limit. There are various motions that can be filed. And I want to make sure that the Court can be in a situation where it can rule and resolve the dispute by simply looking at the motion which was filed and any response to the motion which may be filed.

CHAIRMAN SOULES: How about "setting

forth the nature of the dispute," and not "in detail." We've stricken that kind of language from time to time, even from what we require of the opinions of the Court, because whether they add or don't add is not -- anyway, that's just my thought.

MR. BECK: Luke, it's probably going to have to go farther than that, because if we're not going to file the request and we're not going to file the response, I think good practice would dictate that if you're going to file a motion to compel, you attach both the request and the response, or at least relevant portions thereof.

MR. MCCONNICO: I don't have any problem with that. And I think -- why don't we put here in Paragraph 2 "the response to any request made under this rule and specific legal objections, if any"? Put that language in right up there, "shall be served within 30 days after service of the request."

CHAIRMAN SOULES: That's more than Peeples requires. Peeples requires that it be done at the submission of the motion but not at the time of the objection.

MR. MCCONNICO: I don't know if that's

right.

CHAIRMAN SOULES: I don't know either for sure. Here's another alternative, though. We can follow David's suggestion to say "by filing an appropriate motion setting forth in detail the nature of the dispute" and add, "and the grounds for relief sought."

MR. BECK: That's fine.

CHAIRMAN SOULES: Protective order would be assertion of privilege.

PROFESSOR EDGAR: The nature of the dispute and what?

MR. ADAMS: Don't you want to file the responses too?

CHAIRMAN SOULES: Well, that would be encompassed, as David perceives it, in "setting forth in detail." You can set forth by attachments or --

MR. BECK: You can do it one of two ways; either attach the requested response as exhibits, or you may just want to retype the relevant portions in your motion.

MR. ADAMS: No. I'm talking about the response to the motion. Because I think most lawyers, with good draftmanship, in accordance

with the rules, you're going to set out the interrogatory, you're going to set out the answer, you're going to set out the request for production, and then what they attached are -- your problem with it, their response. So the court can quickly look at the request, quickly look at the response and consider it with regard to the rest of your motion.

MR. BEARD: If we're going to go to a motion practice without a hearing, you ought to change it to "either party may move for certain relief." Because on most of these matters we don't need hearings.

JUDGE WOOD: You know, there's a large number of district judges on the state courts that need help on that, when they get that kind of a document, by way of oral presentation of your motion. I think, knowing a lot of them that I do, some of them can handle it fine without a hearing. But others simply wouldn't be in position to do it, I don't think.

MR. ADAMS: Under the Federal practice in our area, and I'm sure it's probably getting pretty universal, the lawyers are charged with the responsibility of communicating with each other.

If you have a complaint to an answer to interrogatory or request for production, before you even present a motion to the Court, you've got to certify that you've made a genuine effort with opposing counsel to get that resolved. And I think that that is something that is progressive enough that it ought to be included in our state practice.

JUDGE WOOD: I would have no objection to that at all. But I just feel like that there's some judges that aren't able to cope with that kind of thing, because it's pretty complex, without some oral help by way oral presentation from the lawyers.

MR. ADAMS: I'm talking about before you have that, they have made a genuine effort to get it resolved among themselves and then that aids the Court, too in --

MR. BEARD: Well, the Court can always have an oral hearing. Federal Courts occasionally have oral arguments on motions; not often, but they do.

So I think it ought to be, you know, you move and the Court can have a hearing if he wants one, but not if he doesn't. Because I find that most

of the refusals to answer interrogatories are frivolous, as far as I'm concerned, and they end up being compelled to answer.

CHAIRMAN SOULES: Well, let's see.

JUDGE WOOD: I think it's all right to leave it optional with the Court whether or not to have an oral hearing on it. If he feels like he's in position to pass on it and wants to without argument, that's all right. But I think a good many of them would kind of like to hear the lawyers.

MR. MCCONNICO: I think Harris County is working well where they only have oral hearings on motions to compel if one of the attorneys request it. I think most of the frivolous motions to compel are already worked out and they never have a hearing on them.

That's the only state district court in Texas that I'm familiar with where they're not having oral hearings on motion to compel.

CHAIRMAN SOULES: Okay. We've got the motions described in 166-B(4), that's protective orders, and 215-1, which is motions to compel. And then you talk about responses; I'm not sure whether we need responses.

What about, David, just "by saying filing a motion pursuant to Rule 166-B or 215"?

MR. BECK: Just a minute; let me refer to those.

CHAIRMAN SOULES: The protective orders are in 166-B, and all the other motions are in 215, compelled and sanctions and all that.

MR. MCCONNICO: Where would we place that?

CHAIRMAN SOULES: It would be "by filing a motion," and strike all the balance of the underscored language that we've been talking about.

MR. BEARD: I don't think we ought to tell the lawyers what they ought to put in that motion. If they don't know what they've got to put in there, they aren't going to get any relief anyway.

CHAIRMAN SOULES: Pursuant to Rule 166-B. You know, we've tried to keep things in one place.

PROFESSOR EDGAR: "By filing a motion pursuant to Rule 166-B or 215."

CHAIRMAN SOULES: Or 215. And let it go at that. That talks about hearings, and then

we'd only have to deal with how the motions are conducted on discovery in those rules, if we want to change those rules.

MR. MCCONNICO: And then just leaving out at all that "setting forth separately to request and response" and setting out the nature of the dispute.

CHAIRMAN SOULES: What the Court can order, all that?

MR. MCCONNICO: Just leave it all out.

CHAIRMAN SOULES: All that's controlled by the rules.

MR. MCCONNICO: In other words, that would be the end of that paragraph.

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: Wouldn't you keep the rest of that paragraph in there?

CHAIRMAN SOULES: No. Because what the Court can do is also governed by those other rules.

PROFESSOR EDGAR: Yes. Okay.

MR. MCCONNICO: 166-B takes care of that last sentence.

PROFESSOR EDGAR: Right.

CHAIRMAN SOULES: Or 215 if it's the

sanctions or motion for compelling.

MR. SPARKS (EL PASO): Luke, do you want to read that, what you've got?

CHAIRMAN SOULES: It would just be 167-3. I want to get back to the original rule so I can look at it a minute. 167-3, well, I guess we can't take out the last sentence.

MR. BECK: Where are we, Luke?

CHAIRMAN SOULES: Why do we need to change 3 at all? It looks to me like it gets the job done whether something is filed or not filed.

MR. BECK: Are you talking about in its present form?

CHAIRMAN SOULES: Just leave it like it is.

MR. SPARKS (SAN ANGELO): You've got the "filed with the Court" part that you need to strike out.

PROFESSOR EDGAR: Now, with respect to 167, what are you going to do to number 3?

CHAIRMAN SOULES: I'm saying, I don't think we need to do anything to it; I think it's okay the way it is.

MR. BECK: The problem it presents Luke is, if neither the request nor the response

was filed at the courthouse and somebody picks up the phone and says, "I want a hearing," what does the judge have before him?

MR. ADAMS: You've got to file a motion.

MR. BECK: No. You don't have to file a motion.

MR. ADAMS: You request a hearing by filing a motion.

MR. BECK: No. But it doesn't say that. The present rule just says "either party may request a hearing."

CHAIRMAN SOULES: Oh, I see. "Either party may," insert, "file a motion."

MR. BECK: I think that's what this addition does. See, the reason the present rules just say you can request a hearing is because the Court has both the request and response before him now; they're filed of record.

CHAIRMAN SOULES: Okay. The only thing we would add there would be "request a hearing" and insert "by filing a motion pursuant to Rule 166b or 215."

MR. LOW: But Pat's saying and we might want to call it to the Court's attention,

for determination without a hearing, that's the question here.

MR. BEARD: Well, I'd like to move to that practice if we can, where the Court can rule right quickly on this thing.

CHAIRMAN SOULES: Harry is going to have that for us in September.

MR. BECK: But the suggestion that was just made really allows the option of either having a hearing or not having a hearing.

MR. LOW: But it says "may request a hearing by filing."

CHAIRMAN SOULES: You could take out "request a hearing" either party may file a motion pursuant to. That's probably the best way to do it. We're not talking about hearings, because we can deal then with whether or not we have hearings when we redo 215 and 166b; then we cover it.

MR. MCCONNICO: That's right.

CHAIRMAN SOULES: Just say "if objection is made to a request or to a response, either party may file a motion pursuant to 166b or 215." And then what happens after that is covered by 166 and 215.

MR. BECK: That takes care of it.

CHAIRMAN SOULES: And then, really, that second sentence is redundant in 3. The last one may not be because I'm not sure that it says designate a place and all that over here. Let's see if it's in 215.

MR. MCCONNICO: It's in 166-B, I think. As to land, that's 166b, Section 2, Part 2-C.

CHAIRMAN SOULES: To designate the place is really not -- I guess that last sentence needs to be kept.

MR. LOW: 166 doesn't talk about the Court ordering there; it's just talking about what's permissible. That last sentence, I think, is just dovetailing "the Court may order."

MR. MCCONNICO: It is only as to land as it's specified in 166b. It's not specified as to anything else, the last sentence of 167(3), so you need it.

CHAIRMAN SOULES: Okay. So we could go to this 167. Where we are with this is, it would be amended to -- we're talking about 167(3) would be amended to take out the words "request a hearing" in the second line and put in "file a motion pursuant to Rule 166-B or 215." And leave

all the rest of it and just leave the rest of the rule as it is.

MR. MCCONNICO: How would it read now, Section 3?

CHAIRMAN SOULES: All right. "If objection is made to a request or to a response, either party may file a motion pursuant to Rule 166b or 215. Then the Court may order or deny production within the scope of discovery as provided in Rule 166b."

MR. MCCONNICO: But to get back --

CHAIRMAN SOULES: That's not right either "or 215," because 215 orders it be made. 166b has protective orders in it.

MR. BECK: Why do you need that second sentence if you've added "pursuant to Rule 166-B"?

CHAIRMAN SOULES: I think you do not.

MR. LOW: It might not, though, talk about what the -- 215 talks about what the Court can do. But 166 doesn't really talk about the power of the court, and maybe you don't need it.

CHAIRMAN SOULES: Yes, it does.

MR. LOW: Where.

CHAIRMAN SOULES: In 4, where we're

really focusing, Buddy, as 166b(4), protective orders. But I don't want to isolate that; there might be other parts.

MR. LOW: But, see, there are just a few things in there, though. That doesn't talk about the protective order. It talks about, you know, the limiting it and so forth. It's not all encompassing.

CHAIRMAN SOULES: But this says "order or deny discovery," in what we're looking at in 167.

MR. MCCONNICO: Luke, can I read that first sentence to see if I have it right?

CHAIRMAN SOULES: Okay.

MR. MCCONNICO: "If objection is made to a request or to a response, either party may file a motion pursuant to 166b or 215 then do you eliminate setting forth separately each request in response to controversy or do you eliminate that." Then do you eliminate "setting forth separately each request and response in controversy"?

CHAIRMAN SOULES: Right.

MR. MCCONNICO: You eliminate that?

CHAIRMAN SOULES: Just follow the

rules. And if we want to set out what any kind of a motion has to have, we'll do it where the motions are spoken to in the rules in 166b or 215, so that we don't have requirements for motions scattered through the rules.

MR. MCCONNICO: Okay.

CHAIRMAN SOULES: Which is what we, of course, tried to consolidate things last time around. And then the only part of the next sentence that may not be spoken to elsewhere is "the Court may order or deny production." And I guess that's really --

MR. BECK: I don't know why it's necessary because in the preceding sentence you've added the phrase "pursuant to Rule 166b or Rule 215." And those rules prescribe the scope of discovery and what sanctions are available. Why do you need to say it twice?

CHAIRMAN SOULES: It's in 215 anyway. It says, "If a party fails to file a response to do anything else the Court may order production in accordance with the request."

PROFESSOR EDGAR: Why don't you say "may file a motion and obtain relief pursuant to Rule 166b and 215"? Because the first part of

this talks about you file a motion pursuant to it, but you also get relief pursuant to it, do you not?

CHAIRMAN SOULES: El Paso Sam, where we are with this would be on 167(3), "If objection is made to a request or to a response, either party may." This would be the only insert. "File a motion and obtain relief pursuant to Rule 166b or 215." Then you would delete the second sentence in the existing Rule 167(3) and retain the third and final sentence of Rule 167(3).

Let's see show of hands. How many are willing to recommend this with those changes? Opposed? That's unanimous to recommend.

Then certificate in lieu of documents, do we want to reject that? How many feel that should be rejected?

MR. BECK: I move we strike that second sentence under 167(5). I think the whole purpose of this is to avoid the necessity of filing things at the courthouse and to save space for the clerk. It makes no sense to me to file a certificate particularly when it's not mandatory.

CHAIRMAN SOULES: Those in favor of adopting the first sentence of proposed 5 and

deleting the balance of the proposal --

MR. BECK: Luke, I think we ought to leave that last sentence in there because there may be some situations where the Court, upon motion, might want those things to be filed.

CHAIRMAN SOULES: Okay. Those in favor of adopting the first sentence of proposed 5, striking the second sentence and retaining the last sentence.

PROFESSOR EDGAR: I've got a question.

MR. MCCONNICO: We're going to have to change the title.

MR. MCMAINS: The title doesn't fit either.

MR. ADAMS: Would this be an appropriate place to have that the original be maintained and available for inspection.

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Why don't we say "custody of originals"?

MR. BECK: Luke, I've got a suggestion.

CHAIRMAN SOULES: Yes, sir, David. Go ahead.

MR. BECK: The suggestion I had written down was, "the originals of such request or response shall be maintained by the party receiving same and shall be available for copying and inspection by other parties to the suit."

What that allows is a subsequently brought-in party to go to one of the other parties and say, "Look, I want copies of everything." And that way, they've got a right under the rules to get it.

CHAIRMAN SOULES: I think that ought to be the lead in sentence and this ought to be entitled "Custody of Originals." And then say, "A party serving shall not file," and then say, "The court may upon motion of good cause permit filing." And that all deals with custody of the originals what you do and don't do.

MR. LOW: The party that originates the originals, does he maintain it or does he mail it to somebody else? Isn't it better that a party who originates the original of the document would maintain it because ordinarily right now we just send copies certified mail? You know, we don't send the originals to the other party. Do we want to start now sending the originals to the other

party since we're not filing, or do we want to have the person who originates the document be the custodian of the original? It doesn't make any difference?

CHAIRMAN SOULES: Strangely enough, the rules are inconsistent. There are some of these rules that require that you serve the opponent and file a copy, and others that you are to file the original and serve a copy. And I've forgotten which it is, but the request to admit and the interrogatories differ on that. But, now, of course, that's going to be changed because they're not having any filing.

David, is it your view that the party receiving the discovery --

MR. BECK: You can do it either way. Traditionally, in state practice, we've always filed an original with the Court. And, you know, I know I always go into cardiac arrest when I see an original of the document, a discovery document, in my file.

So the way I've proposed it is, just the original be served on your opposition, and they have the obligation to maintain it, but you can do it either way.

MR. MCCONNICO: I think since the party answering it is the party you're filing it with, they should have the original, just as clerical. They are the party that's going to be responding to it, answering it, putting their signature on it, interrogatories or requests for --

PROFESSOR EDGAR: That would be the party originating it then, Steve.

CHAIRMAN SOULES: See the last sentence of Rule 169-1 says "a copy is filed with the clerk." A copy of request to admit are filed with the clerk. You see, that's the point. The last sentence of Rule 169-1 says that "a copy of the request to admit is filed with the clerk."

PROFESSOR EDGAR: I'd change that.

CHAIRMAN SOULES: We just didn't get that last time around. Of course, we're not going to file anything with the clerk so that takes care of it.

PROFESSOR EDGAR: You are on admissions.

CHAIRMAN SOULES: So the original request for admissions should be filed with the clerk.

PROFESSOR EDGAR: That's what I'd do; that's what I'd say.

JUDGE THOMAS: Luke, may I suggest, just so there would be no question, that the language also, instead of leaving this in two separate sentences as we presently have, "A request or response under this rule shall not be filed with the clerk of the court unless the Court upon motion and for good cause permits the filing of such request response."

The way we have it broken out now one place it says, "You shall not do it," and then it immediately says, "the Court may." And so we know what we intend, but just so there's no question.

CHAIRMAN SOULES: Okay. How would you say that now?

JUDGE THOMAS: "A request or response under this rule shall not be filed with the clerk of the court unless the Court upon motion and for good cause permits the filing."

PROFESSOR EDGAR: "Permits the same to be filed."

JUDGE THOMAS: Yes.

CHAIRMAN SOULES: Okay. I see. That makes sense.

PROFESSOR EDGAR: I have a question about this. Shouldn't Paragraph Number 5 actually become Paragraph Number 3, and then 3 become 4, and 4 become 5? Because we have a rule here and we talk about the time for the request and the response. Then we should say that it's not to be filed unless the Court permits it to be filed. Then we talk about if an objection is made to the request response.

It seems to me that's the order in which it should be placed. Because the way we presently have it constructed, we've got an objection over here before we talk about whether it's to be filed or not. And I think it would be smoother if we move 5 over with Number 3.

CHAIRMAN SOULES: 5 would be 3.

PROFESSOR EDGAR: Right.

CHAIRMAN SOULES: 3 would be what?

PROFESSOR EDGAR: 4. And 4 would be 5. And I think that would make more sense or be a little more orderly.

CHAIRMAN SOULES: David, give me your custody point again.

MR. BECK: The sentence I have is, "The original of such request or response shall be

maintained by the party receiving same and shall be available for copying and inspection by other parties to the suit."

CHAIRMAN SOULES: All right. Picking up from there then, the balance of what we would renumber to 3 would be, "A party serving a request under this rule shall not file such a request or response with the clerk of the court unless the Court upon motion and for good cause permits the filing."

PROFESSOR EDGAR: "Permits the same to be filed."

CHAIRMAN SOULES: "Permits the same to be filed." And the title of this would be "Custody of Originals by Parties."

MR. SPARKS (EL PASO): I have one change on Dave's recommendation and that is. If we say "The original of such request and response shall be maintained by the," and then say, "party receiving the response." That way, you've got the same party who receives the response; he keeps the original and has both the originals.

MR. MCCONNICO: But he doesn't receive the request.

MR. SPARKS (EL PASO): I mean receives

the request, yes.

MR. LOW: Let me raise one point. In Federal Courts, other places, what are you doing? Like here in Austin in Federal Court, do you mail the original to them or are you maintaining the original document, the one that creates the document? What's happening?

Because, see, I know, we don't have to be like federal court but this makes it a little more difficult. Secretaries say, "Okay. Now, here in this case, this is Federal Court, I'm supposed to keep this copy. But in State Court the original is supposed to go there."

And I don't know what they're doing, and it's not a big deal; it just makes it more complicated. If we could do the same thing they're ordinarily doing in Federal Court, it would just make it simpler. But I don't know what the other Federal Courts are doing. What about Dallas, Frank?

MR. BRANSON: Buddy, I don't know either.

MR. SPARKS (EL PASO): Some people send originals and some people send copies.

MR. LOW: Uniformly in Beaumont, our

rules in the eastern district is that if you originate the document, you are the creator, you are the keeper. I don't care what the document is. If you created it, you keep it. And you better keep custody of it.

MR. BEARD: Don't you have duplicate originals as a practical matter?

MR. LOW: We hope that every copy is like, you know, they're all certified and everything. But I'm saying, we have standing instructions, we mark one --

CHAIRMAN SOULES: How about this? "Originals of the request and response will be retained by the parties."

PROFESSOR EDGAR: "Of the originator."

MR. MCCONNICO: Or "drafter."

CHAIRMAN SOULES: "Originating and receiving the same."

MR. MCCONNICO: No, just put "originate." I don't think it matters; we're just going to have to be consistent.

CHAIRMAN SOULES: My concern is whether we ought to do it at all. We're getting it into -- there are going to be plenty of copies. Can't copies be used?

MR. LOW: They will be used. And I don't know what difference that it makes, except --

MR. ADAMS: A party could have say, some original document, a will, or any instrument that is an original, that another party has requested. But he wants to maintain that original.

MR. LOW: Rather than mail it.

MR. ADAMS: Instead of mailing it out and taking a chance of it getting lost or whatever it is, they want to keep that original. And in federal practice, the person who originates whatever document keeps the original of it. And I think that's a better practice.

MR. MORRIS: I do to.

MR. MCCONNICO: The benefit I see of it is, it tells it shall be available for copying and inspection by other parties to the suit. And if you have multiple parties, then maybe some of that discovery never went to a third party or fourth party defendant. They know who to go to to get a copy of it; it says in the rule.

CHAIRMAN SOULES: Try this one. "True copies shall be retained by the party

originating."

MR. BECK: Or just put a duplicate original.

CHAIRMAN SOULES: Except what if it doesn't have a signature? You know, I'm concerned about telling my young lawyers, "Boy, you better keep something that's got a signature on it in your file." I don't know whether I can -- I don't have as many lawyers as you do, David, but can I get them all to keep originals in the files?

MR. MCMAINS: We're going to start meeting clerks -- we better start maintaining files that we are responsible for.

CHAIRMAN SOULES: Well, it's one thing, though, to keep a machine-made, true copy in the file, and that we all do that; that's already done. That's my concern.

MR. BRANSON: You run into some situations where the copy is not going to do you much good. For example, you've got a set of nurse's notes with time changes and different colored inks. That original document tells you an awful lot that a xerox copy doesn't.

MR. LOW: And when you get ready to mail that, you'd rather, since it was yours, have

a better copy than the opposition.

MR. BRANSON: Sure.

MR. LOW: Or if it's your client's will attached to it, you'd rather keep that original rather than mailing it to somebody else.

CHAIRMAN SOULES: This is a response and a request; this is not source records.

MR. SPARKS (SAN ANGELO): But you don't want one rule for the response and one rule for the documents. To me, it's more consistent just to leave all of the originals with the party that has it.

PROFESSOR EDGAR: I think that's right.

MR. SPARKS (SAN ANGELO): It's just very consistent and easy for your clerical help to keep up with.

PROFESSOR EDGAR: It makes sense, Luke. It just sounds logical.

CHAIRMAN SOULES: It seems illogical for me to serve you with interrogatories that I don't even have a signature on, just a copy. But maybe my logic is just not working right today. If I serve you with interrogatories, I serve you and have a statement of service on it too.

MR. ADAMS: But, Luke, that's what you do now. You serve the opposing counsel a copy. That's what you send them. All your secretaries always copy -- they send the original to the clerk at the courthouse and you send opposing counsel a copy. Now, you're just going to keep that original and if it ever has to be filed --

CHAIRMAN SOULES: Well, this is much ado about nothing, I guess. I guess anyway we do it is fine. I'm just concerned about whether or not the party who's charged with custody, what happens when he shows up in court with a document that doesn't have an inked signature on it, all it's got is a photocopy of the original. All he's got is a machine copy. And he does not have a inked signed copy. It's not on bond; it's just a machine copy. Does that preclude the use since he can't produce the original?

MR. ADAMS: What if you went down to the courthouse right now and you opened up the district clerk's file and it wasn't signed?

CHAIRMAN SOULES: That's the clerk's problem, not the party's problem.

MR. ADAMS: They've got to file it.

PROFESSOR EDGAR: A copy that you

didn't sign, that's not the clerk's fault.

MR. LOW: That's right. The clerk doesn't check to see if it's signed. And you sent that other -- you better have sent that other lawyer a copy that's signed.

CHAIRMAN SOULES: I'm not talking about not -- where a photocopy doesn't show a signature.

MR. LOW: I understand.

PROFESSOR EDGAR: Well, this problem is only going to arise in the event there's some disparity between what was sent and what was received. You see, if all of them jive, then there's no problem about having to produce an original. It's only when there's some discrepancy, and you damn well better have that original.

MR. MCCONNICO: But I think Luke is saying the problem is -- we're just saying you have to keep the original, the person that originated it; you've got to keep the original in your file. So what happens when you lose the original and all you have is a copy?

PROFESSOR EDGAR: Well, if there's no disparity between the copies that are floating

around, then nothing is going to happen because it doesn't become material, whether or not you have the copy or not. That's the way I'd solve it.

MR. MCCONNICO: Okay.

CHAIRMAN SOULES: Okay. We're going to require more than the retention of a true copy. This committee is going to have a rule that requires more than the retention of a true copy. Is that the consensus?

PROFESSOR EDGAR: The retention of the original.

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: Yes. That's right. The originator retains the original.

CHAIRMAN SOULES: I'm just trying to get whether we want a policy that requires more than a true copy to be kept. Because we are now saying that an original has to be kept and a true copy is not enough.

PROFESSOR EDGAR: No. We now say that the original is filed with the clerk, where we are in this clerical filing. So now we're going to be the clerks.

MR. MCCONNICO: That's what we don't like.

PROFESSOR EDGAR: I understand. But that's the inevitable result.

CHAIRMAN SOULES: Well, not necessarily. If a true copy is kept and that's enough, then that gets it.

MR. LOW: I have one file that just has originals, and then I keep my own copies just like I would have if I'd mailed those to the clerk. I just keep originals because I'm the custodian. If a deposition is taken, they take my client's deposition, I don't even have that original, you know, but I keep originals.

CHAIRMAN SOULES: I object to your reading the interrogatories in evidence because you don't have an original in your file.

MR. LOW: What rule is that?

PROFESSOR EDGAR: I'd overrule your objection.

MR. MCCONNICO: I didn't hear the objection.

CHAIRMAN SOULES: My objection is he can't read the interrogatories because he can't produce the original, if we're in trial.

MR. MCMAINS: If they're your answers, you had to repeat it on yours, so whatever --

MR. LOW: You can't introduce your own answers to an interrogatory.

MR. BECK: Isn't that where the best evidence rule comes in?

CHAIRMAN SOULES: Okay. I hear what you're saying. If that's what we want to do, that's fine.

MR. MCCONNICO: What's the problem of just saying "a true copy of such request" and substituting that for "the original." What problem would that cause?

MR. ADAMS: The same thing. What you would ordinarily file with the district clerk, you keep.

PROFESSOR EDGAR: That's right.

MR. ADAMS: In readiness to be filed.

CHAIRMAN SOULES: That's not addressed to Bill's quiestion. Does somebody want to answers Bill's question? What's the problem with just requiring true copies?

PROFESSOR EDGAR: Because if there's ever any question between the validity of the copies that the lawyers have, what you do now is go look through what the clerk has got on file. And the clerk's copy is going to control. So you

need to have that original some place. And the policy being voiced here is that that should be the responsibility of the originator of the document. That's why.

MR. LOW: Well, you've got to do something with the original; you're just not going to throw it away.

CHAIRMAN SOULES: Buddy, I'm concerned about what happens if it gets misplaced.

MR. LOW: I'll tell you what will happen. You get with another lawyer and you say, "Look" -- I think this is what a lawyer would do if his secretary misplaced one. You would get with the lawyer and you say, "Look, I can't find my answers to interrogatories I gave you. Would you give me a copy?" He'll give you a copy and you go on and you don't talk about originals.

CHAIRMAN SOULES: Okay. Let's just see hands. Who keeps them, the party receiving or the party originating? I want a show of hands, which way because we've passed it out?

MR. SPIVEY: I vote "yes."

CHAIRMAN SOULES: How many feel that the originating attorney should keep the original? Okay. How many feel otherwise? All

right. So it is 10 to 1 that the originals be kept by the originating attorney.

MR. ADAMS: It's going to be available for inspection.

CHAIRMAN SOULES: And available.

MR. SPARKS (EL PASO): We haven't spoken to Gilbert's suggestion that I like, and you-all may not. But I like in the rule, like they have in the federal rules that practice in, that you have the requirement of a good faith attempt to eliminate problems before you file a motion.

Can you say "either party after" -- I'm looking at what used to be 3 and is now 4, on amendment. It says, "if objection is made to a request or to a response either party," and then insert there "may after good faith effort to resolve a dispute may file a motion."

CHAIRMAN SOULES: If we're going to do that, I think we ought to do it in the requisites of motion and it should require certification that that's been done. And we would need to put it in 166b and 215 if we're going to do it.

How many feel that that should be made a part of 166-B and 215? Those opposed? That's

unanimous.

Okay. As far as our filing, our preservation of originals and availability and not filing except on good cause, will that apply to all the rest except for the special problems with depositions since they --

MR. MCMAINS: Do you mean requests for admissions?

CHAIRMAN SOULES: Well, we've already covered the requests for admissions. But depositions, the original is really in the hands of the court reporter, and it goes to the witness, and we have to deal with copies. So we have some special problems to address. I mean it's just a matter of mechanics how do we deal with it.

But as far as interrogatories and requests for documents, what we've decided here to be uniform is that the consensus? Anyone opposed to that? Okay.

PROFESSOR EDGAR: Well, now, I'm going to do this thing on Rule 209 about depositions. And is it the consensus of the committee that, perhaps, the original of depositions should be maintained by the party originating those depositions?

CHAIRMAN SOULES: Should be maintained by the party first examining the deponent.

PROFESSOR EDGAR: Well, try to carry that into that.

Mr. Sparks (SAN ANGELO): It's still the same thing, the party originated. Yes, the party who paid for it.

CHAIRMAN SOULES: The court reporter would return -- however it goes.

MR. ADAMS: Whoever bought it.

MR. MCMAINS: Whoever paid for the original.

CHAIRMAN SOULES: By the party first examining the deponent.

MR. BRANSON: You want the party that originates the deposition, not necessarily the first party examining. Because occasionally you'll get into a situation -- you get multiple defendants, taking plaintiff's deposition, you may not have the person originating the deposition to be the one who --

CHAIRMAN SOULES: What if we get into a fight over who originates?

MR. BRANSON: Well, it's pretty easy; somebody sets it up and pays for it.

MR. SPARKS (SAN ANGELO): Well, I'm deposing your expert on a products case and I'm originating it. How am I going to get your expert to sign it?

MR. LOW: Say, we've got five defendants, and we all get together and say "Okay. We're going to take old Frank's experts," and say "Fine, okay." Well, we all five pay the -- you know, we split the cost of the original between the five of us. How are we going to say which one? We'll just let the first lawyer that questioned --

MR. BRANSON: How about when more than one party originates a deposition, they have to designate the custodian.

CHAIRMAN SOULES: I'd rather have an arbitrary rule that says only the person examining the deponent keeps the original. That's of record. It's of record everywhere.

MR. SPARKS (SAN ANGELO): But, Luke, I'm the first one taking a discovery deposition of an expert. You send it to me. How am I going to get that guy up in Detroit to sign it?

PROFESSOR EDGAR: It's after it's signed, Sam. After it's signed, who has the

responsibility for maintaining the custody of the original? And I think Luke is right.

CHAIRMAN SOULES: Any party may use a copy if the witness doesn't return it to the party first examining it. The court reporter can just look inside the transcript if it comes back and say, "Okay. It goes there," and notify all the other parties that's where it went.

MR. MCMAINS: If it's not filed, what are we doing with our rule that we argued about on objections?

CHAIRMAN SOULES: Any party may use a copy if the original is not signed by the witness and delivered to the --

MR. MCMAINS: We've got a section of rules we didn't change which talks about if it's filed in more than one day. Is that what you're going to do?

PROFESSOR EDGAR: Well, I'm going to have to deal with that too.

MR. MCMAINS: I know, but that wasn't part of your original charge.

PROFESSOR EDGAR: But it's got to be, though. I've got to look at all that stuff.

MR. MCMAINS: It says if it's filed in

more than one day ahead of time, then you've waived all objections.

CHAIRMAN SOULES: There is a pretty good provision in this 206 on 185. Since the court reporter is involved in this process, this requires that a certificate be filed by the court reporter that they have delivered the original to whoever we say. To me that makes sense. That would go to the clerk, the certificate that delivery of the original has been made, or a certificate that 20 days has expired and it has not been with notice to all parties. And then that makes a copy useable.

MR. LOW: That's the same as if filed.

CHAIRMAN SOULES: That triggers it. That would work, wouldn't it, Hadley?

PROFESSOR EDGAR: I don't know; I'm making notes right quick. What did you just say?

CHAIRMAN SOULES: The depositions, then, at the expiration of 20 days, if it's not signed, the court reporter would certify that they have not received a signed original back. That would go to the Court and all parties. That makes a copy useable. Or a certificate that it has been

received and delivered to the first party examining the deponent, and that would take care of that.

And is that a way to handle that problem? And then the one-day notice on objections to form -- objections to form go to notice and that sort of thing, don't they?

MR. BEARD: Is there a provision to extend the 20 days? You know, you don't know when the deposition is coming in and your client is in Europe for three weeks.

CHAIRMAN SOULES: Well, the 20 days can be changed. That's something we can do. And also, questions as to form, Rusty's -- objections as to the form of the deposition used to would have to do that because it was on file one day headed for trial to make your objections that day, I guess. You had to have them before the trial started.

Should we set a period of some number of days after the certificate goes to the Court from the court reporter with notice of all parties that objections to form have to be made?

MR. MCMAINS: The problem is, the purpose of that rule is not just limited to the

people who were at the deposition. There were people that were added afterwards who may want to object to something because, you know, a deposition is there that they didn't know was there. Or, you know, that there's something wrong form-wise with the deposition, parties at the time didn't know that it was there at the time that they usually raise that issue.

CHAIRMAN SOULES: Well, just say, objections to the form of the depositions have to be filed at least some number of days prior to trial, and one is not realistic.

MR. MCCONNICO: Let's say 7, 10; give a little bit more time.

CHAIRMAN SOULES: How about 30?

MR. McCONNICO: No. We're adding third-party defendants so late and it's so much more difficult for those third-party defendants to get a continuance.

CHAIRMAN SOULES: How many days ahead of trial should we require that objections to form be made? One day is not realisitc.

MR. BEARD: Some depositions are not taken until a few days before the trial.

CHAIRMAN SOULES: Well, but maybe you

have to make those on the record.

MR. BRANSON: You know what happens in all candor. Everybody, until a short time before the trial, really doesn't sit down and deal with things as often as they should. So what happens, no matter how much you want to, the average lawyer gets out there and realizes, probably the Thursday or Friday before his trial on Monday, that the problem with the form should have been addressed. If you make it any sooner than that, nobody will get to it.

CHAIRMAN SOULES: I've tried many cases, but I have never had anybody object to the form of a deposition. Maybe you-all have had a lot of it, but I haven't seen it.

MR. BECK: Isn't the purpose of the notice requirement and the time limit to give the opposing party an opportunity to correct the potential problem? And if so, you can argue all day long about whether it will be one day, three days, five days. I mean, don't we have to be a little bit more general than that? Like "reasonable time," something like that.

CHAIRMAN SOULES: Reasonable time not less than seven days.

MR. BECK: Yes. Something like that.

CHAIRMAN SOULES: Okay. Everbody agree to that? Any opposition to that? Reasonable time not less than seven days we have to have objections to form --

PROFESSOR EDGAR: That will be Page 189.

CHAIRMAN SOULES: Yes. I'm really not giving you page numbers, but that would be --

PROFESSOR EDGAR: That's where it is.

CHAIRMAN SOULES: Okay. Now, does anybody see any other problems that we can encounter?

PROFESSOR EDGAR: Yes. What are you-all going to do when somebody takes a deposition on Thursday before trial on Monday?

MR. SPARKS (SAN ANGELO): Or how about Tuesday during the trial?

MR. BRANSON: I think there's a reason for having one day, and I'm not really in favor of changing it.

PROFESSOR EDGAR: No less than seven days prior to trial; is that what you said?

CHAIRMAN SOULES: "A reasonable time not less than seven days." There's some feeling

on that.

MR. SPARKS (SAN ANGELO): No. There's no feeling. I'm just saying there is a potential problem there.

CHAIRMAN SOULES: Well, some of them get filed during the trial. All kinds of problems come up that get dealt with.

MR. BRANSON: How about where feasible, not less than seven days? Because there are going to be instances where it's not feasible. That covers the problem. All right. "Except for good cause shown not less than seven days.

CHAIRMAN SOULES: Yes. I guess that will be "Except for good cause shown, objections as to form shall be made at a reasonable time not less than seven days prior to trial."

Or how about just "Except for good cause shown, objections as to form shall be made not less than seven days"? We don't need reasonable and good both in there.

MR. McCONNICO: That's good.

PROFESSOR EDGAR: We're dealing now with something that's already in place. Here, take look at Page 189.

CHAIRMAN SOULES: Okay. Thank you for calling my attention to that.

PROFESSOR EDGAR: 207-3, Motion to Suppress, Page 189. "The deposition shall have been delivered in accordance with Rule 206." And I said "and reasonable notice given no less than seven days prior to trial, errors and irregularity," so and so and so forth.

CHAIRMAN SOULES: Okay. What we're saying here, and I don't know exactly what the language would be, but where it would fit, it says "when a deposition shall have been delivered in accordance with the Rule 206 and notice given" --

MR. EDGAR: And reasonable notice. Didn't you want reasonable notice?

CHAIRMAN SOULES: No. -- "notice given, then objections as to the form of the deposition, except for good cause shown, shall be made not less than seven days prior to trial."

PROFESSOR EDGAR: Shouldn't it be "made no less than seven days prior to trial"?

CHAIRMAN SOULES: Except for good causes shown. And those same concepts with the extent they apply -- well, I guess you'd have both sides of that on depositions, on written

interrogatories.

CHAIRMAN SOULES: We've done 18-A. I'm trying to, now, pinpoint where we're going to start tomorrow. Sam, is there more of yours? I don't know if we've gotten to the end of it yet.

MR. SPARKS (EL PASO): I don't know. I've been so lost for five minutes.

CHAIRMAN SOULES: Judge Phillips has got a point on 215. Where is that? Let me see if I can find it.

We'll finish here tomorrow with Judge Phillips' request on 215, which is Page 383. That's out of line, Sam. And then we'll start with the rest of our agenda. And thank you-all so much for your indulgence.

(End of proceeding.

STATE OF TEXAS ><

COUNTY OF TRAVIS ><

We Elizabeth Tello and Chavela V. Bates, Certified Shorthand Reporters 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 our shorthand notes of the proceedings taken upon the occasion set forth in the caption hereof, as reduced to typewriting by computer-aided transcription under our direction.

WITNESS OUR HANDS AND SEAL OF THIS OFFICE, this the 3rd day of June, 1986

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