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SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
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September 12, 1986

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I N D E X

TEXAS SUPREME COURT

ADVISORY BOARD MEETING

September 12, 1986

CHAIRMAN SOULES: I want to thank each and every one of you for being here today for our meeting. And I know how difficult it is for each of you to arrange schedules to come here for a two-day meeting. And we've had -- I believe, this is the fourth one now in a little over a year. So, we've taken an awful lot of your time. I think it's been very productive.

We've submitted many rules to the Supreme Court. We've given a lot of other rules, many more rules, careful consideration. The transcripts have been produced. The persons who have proposed rules changes or asked us to look at problems that they saw in the rules -- those being people, judges, lawyers, interest groups like process servers -- have all been in each case where we have passed on a rule either to recommend it be rejected or recommend that it be approved with some change or approved as submitted -- each of those individuals that sought our review has been written to and the copy of the transcript

pages that contain the debate on that suggestion have been sent out to them.

So the public of the state and particularly the judiciary and the lawyers who have sought our review know the extent to which we have taken our time to look at those things, and you have taken your time to look at their suggestions. And that's very important and thank you for all your work up to now.

Justice Wallace, did you have anything you wanted to say to the group assembled here as we convene?

JUSTICE WALLACE: Just one thing. I'd like to introduce Roxanne Cofer, the young lady there with her back to the wall. We have started an intern program with the various law schools around the state. Roxanne is from Texas Southern. We have another young man from UT who is going to be working with my office.

We have four four-drawer file cabinets over in our library containing all the records of this committee since it first started in 1941 and those records are in various orders of array and disarray.

We had a young man from Pepperdine who worked

one summer, then Guy Allison's son worked with us one summer. And we have had two young ladies from UT who worked here in the summer, and now we have these two this semester.

What we're trying to do is get all of those records in form in which they can be copied and forwarded to every branch of the state library around the state. I understand there's roughly 20 of them. The requests that come to my office are really a full-time job almost.

I explain to the lawyers we just don't have time to do research on the history of these rules for them. And as soon as we can get these rules in the form that it can be useful to the lawyers and judges, then we're going to attempt to get them copied and distributed around the state where most of the lawyers will have access to the complete history of these rules and they can do their research themselves.

And so I just wanted you to meet Roxanne, and I asked her to come over and sit in on the committee a while and see how all that stuff is generated that she's going to be working with.

CHAIRMAN SOULES: Thank you, Judge. First order of business, I guess, is to review the

minutes that were mailed out. The minutes that are on pages 2 through 11, I believe, of this material.

Does everyone have a booklet of materials? They're in boxes. If anyone doesn't have one, if you'll raise your hand, I'll get one for you. Okay. I did receive from Newell some suggestion for changes, and as always, he was exactly right. We needed to make those changes, and I think they're in here. Are there any other changes to the minutes of the May 15, 16 and 17 meeting?

MR. SPIVEY: Can you give me just a second?

CHAIRMAN SOULES: Pardon?

MR. SPIVEY: Just a second.

CHAIRMAN SOULES: Yes, sir.

MR. SPIVEY: Luke, I don't see in there a reference to the final vote on the advisory rules. Is it in there? Is that reference in that --

CHAIRMAN SOULES: The Administrative Rules?

MR. SPIVEY: Yes.

PROFESSOR EDGAR: It's at the top of page 7, I believe.

MR. SPIVEY: No.

CHAIRMAN SOULES: It would be after the first day.

MR. SPIVEY: It was at the end of the meeting is when I recollect the vote was taken on that. There was a motion early on and it was called --

JUDGE THOMAS: At the top of page 6.

PROFESSOR EDGAR: At the top of page 7, 007.

CHAIRMAN SOULES: Oh, it is. It's at the top of page 7 in these materials, which is page 6 of the minutes, and that's why I wasn't being able to follow. Page 6 of the minutes is on page 7 of these materials.

MR. BRANSON: It looks like some of the language was abbreviated, but it got the point across.

MR. SPIVEY: If Mr. Branson will accept it, it's all right with me.

MR. BRANSON: I accept it.

CHAIRMAN SOULES: Well, the remarks are in the record I assure you. They're in the transcript of the record verbatim. Is there a motion to accept the minutes, approve the minutes

as they are submitted here?

MR. BRANSON: So moved.

CHAIRMAN SOULES: Second?

PROFESSOR BLAKELY: Second.

CHAIRMAN SOULES: All in favor, say "I." Opposed? They're approved.

Some of the most important work we'll do at this session is to take a look at the charge rules, but I certainly want to wait until David Beck is here, if at all possible, but I do want to do that this morning.

And, Chief Justice Pope, I'm certainly pleased that you were able to be here with us today particularly because of your interest in the Court's charge rules and then just generally because your presence always helps us so much. But we will do that sometime this morning.

(Off the record discussion ensued.

CHAIRMAN SOULES: So, we'll postpone that at least until a little bit later in the morning to give David Beck a chance to get here. He is the one that has led the reporting on that up to now.

Broadus, how do we stand on the Supreme Court facilities work?

MR. SPIVEY: I need to defer to Harry Reasoner on that.

MR. REASONER: Well, I need to defer to somebody else, Broadus, if you have somebody in mind.

MR. SPIVEY: We did meet and I had a proxy there. I was informed about the meeting and I think, Harry, if I'm correct in summing this up, that it was the belief that it would not be in the best interest of the Supreme Court with the legislative meeting at the time it is to try to make a recommendation that might incur more financial involvement. I don't have that correspondence with me and I'll get that later and give you a report on it.

CHAIRMAN SOULES: Okay. Thank you, Broadus.

Judge Thomas, you had some rules that -- rule changes that you brought in, and I think you've distributed those, have you, to the group or have they been passed around?

JUDGE THOMAS: The ones that were here; some may not have the copies. I think you

have plenty of copies up there.

CHAIRMAN SOULES: Let me just pass these around. They start out with Rule 8.

PROFESSOR EDGAR: I'll pass them out. Does Judge Wallace have one?

CHAIRMAN SOULES: Let me give him one.

JUSTICE WALLACE: Thank you.

JUDGE THOMAS: Luke, according to what I perceive to be the instructions of the committee in May, the Rule 8 has been rewritten and will become a rule called "attorney-in-charge." And I tried to be as specific as I could about designation of the attorney in charge, who would designate and what would happen if no one did.

CHAIRMAN SOULES: Well, the whole Rule 8 is awkward language. This is -- I believe this -- Judge, as I read it, this pretty much follows what the committee sought to do or giving you direction to do, does it not?

JUDGE THOMAS: Yes. I think that I -- frankly, I did go a little further when I added -- the language that I had taken down from the committee really did not say who would do the designation and so I threw in that "designated in

writing by such party and filed with the Court." And that was not language which we had talked about at the May meeting.

MR. REASONER: Do you contemplate that the client would actually sign something?

JUDGE THOMAS: No. What I wanted to make sure is that someone on behalf of the client could designate the lead attorney.

CHAIRMAN SOULES: Let's see. What Harry is concerned about is it's designated in writing by such party.

JUDGE THOMAS: Yes.

CHAIRMAN SOULES: You're concerned that that might be construed as meaning that the party has to sign a designation.

MR. REASONER: (Nod affirmative). Isn't that taken care of with the last sentence, though?

CHAIRMAN SOULES: The last sentence helps with that.

MR. BRANSON: Luke, could you refresh our recollection of what we're trying to cure with this?

CHAIRMAN SOULES: We're going at the problems raised by Ray Hardy, and they're on page

13 of the materials here.

JUDGE THOMAS: Who do you notify; and who is responsible; and who is in charge; and where do notices get sent?

MR. BRANSON: But this rule would be relative solely to mail, not such things as when a case is called for trial, what lawyer shows up to try it, or would it?

MR. SPIVEY: I think it would help me if I knew a little bit more about that, specifically, what the change in Rule 8 is trying to address. I don't get a clarification from Mr. Hardy's letter to Judge Wallace what his specific problems are.

CHAIRMAN SOULES: Well, of course, the first one is that it says, "The attorney first employed shall manage the case." How do we know who is first employed?

MR. SPIVEY: Yes, but --

CHAIRMAN SOULES: Or how does Ray Hardy or a judge know who is first employed? The way this rule would operate, that Judge Thomas has proposed, is that the attorney that first signs the pleading for a party is the lead counsel.

MR. SPIVEY: I don't have any problem,

let me make myself clear, with the wording. It seems all right. I've got a couple questions. But I'm just wondering, if you're going to change the rule, what are the specific problems that have been experienced under the rule? Why do you need to know who is going to be --

JUDGE THOMAS: Okay. As I understand it, it has to do strictly with notice and who gets a notice of what, whether it be a -- one of those magic little "if you don't do something, we're going to dismiss it for want of prosecution" and so forth, and exactly to whom are those notices sent?

MR. SPIVEY: I think I understand what his problem is. Let me verbalize it, then. Is it Mr. Hardy does not want to send notices to all counsel of record, simply to each party, and that being to the attorney in charge for each party?

CHAIRMAN SOULES: Judge Thomas?

JUDGE THOMAS: That's the way I understand it.

MR. SPIVEY: But what I'm really concerned about, what I don't find in his letter, is some statement about what kind of a problem that is, because we may create more of a problem

by addressing Mr. Hardy's problem in the sense that everybody, I think, nowadays is involved in multiple-party cases where you have multiple attorneys for a client, and one of the things that saves some of us poor practitioners from malpractice is the fact that our co-counsel gets notice and instead of searching through all of our hands, that one of them catches it.

CHAIRMAN SOULES: Are you suggesting, then, that every counsel for every party be served?

MR. BRANSON: What's the down side of this?

CHAIRMAN SOULES: Well, just the paperwork.

MR. MCMAINS: Expense, I imagine.

CHAIRMAN SOULES: Yes.

MR. SPIVEY: Well, you know, we see -- I'd like to hear from Harry or somebody on the defense side because I would gamble that they experience some of the same problems that we do, and if the clerks really have an overwhelming problem, maybe we ought to make a change to accommodate them.

I personally prefer that everybody get

notice, every counsel whose name appears of record, but if that's just an overwhelming -- if it really is an overwhelming problem, I've got a problem with addressing it.

CHAIRMAN SOULES: Every counsel of record would include every lawyer in a law firm who ever signed anything that went of record because they are then counsel of record. In other words, if 10 of the lawyers in my law firm at one point or another signed a notice to take a deposition, another one signs a different notice to take a deposition, another one sends out interrogatories, every time those are filed, they're counsel of record, and I don't need 10 copies in my office.

MR. SPIVEY: I agree with you, and I think we ought to address that problem.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, Bill.

PROFESSOR DORSANEO: Related to that problem, many firms have gotten into the habit of having the firm sign and have the attorneys sign underneath in some sort of a representative capacity. I've always wondered whether there was any authorization for that at all or whether that

signifies anything at all. It's part of the same problem, especially when lawyers go from one firm to another firm during the time period that the case is pending. What happens under those circumstances? I think we really do need to deal with that.

MR. BRANSON: You know, Luke, along that line, though, it's not bad sometimes to have notices to one or two lawyers who in the same firm are working on the trial because it's pretty easy within a firm to file -- to kind of be in limbo between one or two lawyers who are working on it and each think the other is taking care of the problem. I see that more in defense firms than I do in plaintiffs firms. But I've sure given some notices to some lawyers that things didn't get done because they thought one of their associates was handling it.

CHAIRMAN SOULES: Is there a response? I mean, where does that responsibility lie? Does it lie with Frank who should send multiple copies to the defense? Does it lie with the clerk for him to straighten out those failures to communicate? Or where do -- how does that -- how should that be handled? Harry?

MR. REASONER: Well, you know, just reading Ray Hardy's letter -- and I don't know whether there's been any discussion with him or not -- he doesn't suggest an admininstrative or cost burden in sending a notice to one lawyer. We have long had in the Federal Courts in the Southern District of Texas an attorney-in-charge rule, which I'm afraid I can't recall verbatim but I think it's somewhat different than that -- but I had understood the purpose of it, Broadus, was not -- I think that they continue to give notice to all firms that appear in a matter, but they use the attorney-in-charge concept so that if there are any immediate hearings or something that there is one person that the Court can discharge his responsibility by calling and saying we're going to have a restraining order, sanctions, et cetera. But as far as written notices, I think they mail them to all attorneys of record.

Now, the Southern District does not permit the discretion -- it seems to me the last sentence of this rule may cause more of a problem, Judge, than ameliorate anything. You know, we frequently get pleadings signed by multiple lawyers and -- you know, I mean, it's not uncommon to have three

or four lawyers sign pleadings. So, the way it's presently written, I think that we wouldn't be advancing the ball.

But I think in the Southern District, you are simply required to file a designation of attorney in charge when you answer and when you file a petition. I've not known it to cause any problems.

JUDGE THOMAS: I remember -- or my notes indicated from the May meeting there was some concern by the committee of what would happen if no one designated.

MR. REASONER: I don't really think it's a real world -- I mean, I've never heard of anybody having a problem because of that. I mean, you might be reprimanded by somebody for not complying. But at least in the Southern District of Texas, they give notice to the people -- at least one notice to each firm on the pleadings, as far as I know.

PROFESSOR EDGAR: Luke, in looking at -- in kind of picking up on what Harry was saying in somewhat a different light, Rule 8, as it is now cast, is directed to the problem that you mention. That is, if the Court needs a hearing,

who is going to be the lead counsel, who can the Court contact, that type of thing, because it says, "the attorney first employed shall be considered leading counsel in the case and, if present, shall have control and management of the case unless a change is made by the party."

Whereas, this proposed Rule 8 seems more directed to whom the clerk should direct information as distinguished from lead counsel. It seems to me like they might have two different purposes, and I'm not sure that Rule 8 as it's now proposed really covers the -- even if we wanted to use it, really covers the situation that is now covered by the current rule.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: Hadley, how would you envision under the proposed amendment, the following problem to be handled? Let's say Harry has a case come in and he turns it over to one of his associates but he intends to try it, and his associate is virtually in charge of discovery, and he is designated the attorney-in-charge. As the case approaches trial, Harry is out of pocket, the associate is available for trial. Would that be handled the way it is under the current Rule 8 or

would this affect that in any manner?

PROFESSOR EDGAR: Well, it seems to me that the attorney -- as this now reads, Linda, and I think it was your intention, was it not, that the attorney that apparently signed the original pleading -- I presume that's the same person that engaged in the discovery process -- would be the attorney in charge until a subsequent designation was made. That's the way I would read the proposed rule.

MR. BRANSON: Can there be more than one attorney in charge?

MR. REASONER: Not the way it operates in the Southern District of Texas.

CHAIRMAN SOULES: Broadus.

MR. SPIVEY: The problem I think this does address is the problem of multiple attorneys for one client. For instance, most recent -- I can think of three cases where a single defendant has had three attorneys who appeared of record, all different firms. I can see where a notice to a single firm would be adequate, but it just seems to me that if you have three different firms representing a party, you would want representation.

Same thing with the plaintiffs, it's not unusual to have multiple plaintiffs all file under the same petition. And I guess you would -- designated as one-party plaintiffs and would only get six strikes, usually, but certainly each of those attorneys are handling perhaps different aspects of the case.

MR. REASONER: But I think in that latter case, Broadus, this rule wouldn't affect you. Each of you would be an attorney-in-charge for your party.

MR. BRANSON: So you can't have more than one attorney-in-charge.

MR. REASONER: Not per party. I thought you had said six different plaintiffs.

MR. SPIVEY: Well, that's one instance, and then the more -- you know, the other instance, as I said, is where a defendant answers, and then later on another lawyer answers also. And as I mentioned, we recently had one where they had three and had legitimate reasons, had a primary and excess and then the fellow had an individual lawyer, and each of them had a burning interest in the case. I'd just assume, of course, only one of them get the notice. But it seems to

be fair that they all three get a notice.

CHIEF JUSTICE POPE: Mr. Chairman?

CHAIRMAN SOULES: Justice Pope.

CHIEF JUSTICE POPE: Does anybody in the world have any trouble with this other than Ray Hardy? Is this a problem out in the law practice? What this means is that every time you file a petition, you've got to file some more paperwork, just more paperwork. And Ray Hardy's concept really is to have an 11-story building full of 11 stories of electronic equipment. But he's got more equipment and more people and you get less information out of that office than anywhere. And I just wonder if this is a problem. We're trying to keep things simple.

MR. BRANSON: Justice Pope, they speak of little else in Paducah.

CHIEF JUSTICE POPE: What?

MR. BRANSON: They speak of little else in Paducah.

JUDGE THOMAS: Luke, you know, I agree with Justice Pope. What we had before us in May was a recommendation, and if you recall, what we did was -- that was the one that threw in all of that language about "the attorney so designated

would attend or send a fully authorized representative to all hearings, conferences and so forth in the trial," and we struck all of that language.

CHAIRMAN SOULES: That's on page 17 of the materials.

JUDGE THOMAS: We never really addressed -- you know, what we started doing was destroying the -- what they had proposed, but never really discussed philosophically whether or not we needed to do anything.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: As I see it, we have two separate problems from the discussion, though. We have the question of who should get a notice. And the other question is the question of who should be lead counsel for other purposes.

For example, if we required -- within a firm when there are multiple signatures on the original petition or one of the lawyers to be designated as the lead counsel, that could have certain consequences when the case is called for trial, the availability of that counsel might be an important thing.

If we don't have someone designated lead counsel, presumably, those matters are up in the air and I guess it would be -- any of those lawyers would be subject to being called down to trial. I don't know if I'm making the point clearly, but there are other purposes for having one of the lawyers be designated as the chief --

MR. SPIVEY: Are you saying --

PROFESSOR DORSANEO: -- than notice, and I don't -- for notice purposes, my view is that all the lawyers ought to get notice. But for other lead counsel purposes, there is more involved and our rules don't address that, I don't think.

MR. SPIVEY: Are you saying that if you designate a lead counsel, then he would be the one put to trial? I mean, as I understand it, the judge can put you to trial even if you're in -- like in another trial, if there is anybody else in your firm to try it or another counsel of record to try it.

PROFESSOR DORSANEO: In our part of the world, that may happen now, kind of a noncombatant more often than not, these days. But that didn't used to be the way it was. Do we need

that protection, I guess, is what I'm getting across? Do we need to be protected when we have four or five lawyers working on a case and one of them is a brand new lawyer whose function is to do a few things rather than be totally responsible for the case from top to bottom?

MR. SPIVEY: But mightn't we be affecting a substitive change in the procedural law? Because as I understand the case law, if I'm in trial and I go over and need to file a motion for continuance and the Court says, well, aren't there other lawyers in your firm? Aren't they competent? Yes. They go to trial. And that's the means -- one of the only means the Court has got of moving the case along.

PROFESSOR DORSANEO: But how are those people -- did those people sign the pleading?

MR. SPIVEY: No.

PROFESSOR DORSANEO: Well, how are they even counsel of record?

MR. SPIVEY: I've been put to trial on cases -- I can remember West Texas when I was a young associate, very wet behind the ears, that a senior lawyer with the firm had filed. I just went to docket call and the next thing I knew I

was picking the jury. It seems to me that's unfair.

PROFESSOR DORSANEO: We don't -- we haven't thought about it enough, I believe, because the firm is not licensed to practice law to begin with. Only the lawyers are licensed to practice law.

MR. SPIVEY: Yes. But it seems to me like you're flying in the face of some law that's been created over a period of years and you're taking away from the trial judge the flexibility of making a determination discretion. That's a discretionary matter. And it seems to me if he feels that under the circumstances the clients are entitled to that particular lawyer, all right. But if there's another lawyer available, I mean, whether it's plaintiff or defense --

PROFESSOR DORSANEO: If you take one of these 300-man law firms, I don't think anybody would say that the law is that the judge can insist that that case go to trial if one of the tax lawyers is available.

MR. SPIVEY: Mr. McMains can give you the citation on the case because I know he was involved in it where that precise thing happened.

And I think they agree with the rule of law of the rules as laid down by that court. Otherwise, you know, I'll go on vacation or I'm in another trial, I've got two cases; I want to try one and I don't want to try the other; I'd like to have the discretion. But why should I have the discretion to control the different courts?

MR. BRANSON: Bill, if you don't do it that way, the real abuse comes where you've got a single partner in a large firm handling all of the say medical negligence cases signing on the pleadings. Someone else does the discovery and that individual can never be put to trial on your case. I mean, if you can get it to the top of the docket, it can never be tried, and we've all seen that occur over and over again.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Well, similarly, there's a problem of sometimes it's accidental, sometimes it's intentional. If you have a rule like this, you may have a switching of attorneys in charge, in essence, to avoid trial settings which is, I think, something, obviously, that you don't want to happen.

We've only got four partners in our firm so

-- and six lawyers altogether, so I don't have that many choices to switch to. But if you get 300, you could probably find somebody to occupy that. I just don't -- I think that's going to create potential for abuse anyway.

CHAIRMAN SOULES: I think it's a San Antonio Court of Appeals case where a party was put to trial with the named counsel of record in another trial at the same time and the court said you --

MR. MCMAINS: Well, it's a Corpus Christi opinion, too.

CHAIRMAN SOULES: Is it?

MR. MCMAINS: There is a Corpus Christi opinion.

CHAIRMAN SOULES: Did it arise in San Antonio?

MR. MCMAINS: I was involved in it belatedly, but there is a Corpus Christi opinion. Of course, the Corpus Christi practice, which I think is not unlike a lot of practices in West Texas and some of the other counties other than Harris County, they set trials rather substantially in advance.

You've got 11, 10, 12 in West Texas probably,

at least four or five months, to know that you're going, if you're set number one. And, basically, that's an agreed order under the pretrial order practice. And they just don't recognize any excuses on the -- for not being able to make arrangements because of some kind of inconvenience of counsel.

CHIEF JUSTICE POPE: I raise the question again, is there any great problem about people not getting notices? They don't hit the appellate courts.

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS (SAN ANGELO): Luke, in the discussion we had last time when this rule came up, some of the Houston lawyers specifically stated that they wanted to have some way to direct Ray Hardy to -- they'd go in for subpoenas or service and they would say you're not listed as lead counsel. That was part of the problem, was the opposite of what we're talking about. Ray Hardy was just -- he was up there in his 11-story building with all the instruments he's got.

CHAIRMAN SOULES: He could be a problem, no question about it. Here's another thought and I -- we just, I think, want to discuss

this fully before it goes away or we act on it, however that may be. In complicated litigation, I know several counsels here have actually had a service list prepared and the court enter an order that these people are to be notified -- are to be served with everything in the case until there's a change. And then actually the record is clear who has to be served.

If anyone is not served who is listed, then they have all the rights of a party who is not served. It limits the number of services that have to be made. It may be several because there may be several firms or there may be several lawyers within a firm who are on that. But it's essentially done by agreement and that takes care of the complicated case.

And the lawyers can usually get together and decide who in antitrust and who in trade secrets, or whatever the sections are, need to get these notices within a single firm. And since usually they're big firms on both sides and maybe 20 lawyers on each side, they can pair it down tightly because what's good for the goose is good for the gander in terms of having to generate paperwork.

But how does the every day case work where there is supposed to be someone who is to get the notice? The rule says it's the attorney first employed. The clerk can't know who that is. The adverse lawyer may not know who that is.

I think that was one of the problems that Ray Hardy was addressing, is that the rule has just got a term there that you can't figure out for the record unless we say and everyone understands that the attorney first employed means the attorney who first appears for a party. Maybe that's what it means. If it does mean that, and it's been working the dwell since 1941, maybe we don't need to change that to say what it means, the attorney that first appears unless there is otherwise a designation.

On Rule 10 and then this -- see, they go together. And then, Frank, I'll get right to you. Rule 10, essentially, spells out how you withdraw from a case or how you substitute counsel in a case. I think it pretty much states how it's done, generally. But it does put into the rule what our practice is. And the only thing I see there, Judge Thomas, I think -- don't these rules pretty much go hand in glove, if we change 8, we

change 10, or should we take them separately?

JUDGE THOMAS: Well, 10 as we discussed in May -- are you talking about the new 10?

CHAIRMAN SOULES: Yes, the new 10.

JUDGE THOMAS: -- was a part of -- and, you know, we started playing with it in conjunction with 8.

CHAIRMAN SOULES: That's right. Anyway, some of the work we've done on the rules has been to bring the language more current and to make the language say what really the words don't say in the old rules. If we want to do that, we can go on with this effort on Rule 8 and 10. I don't think that Rules 8 and 10, as proposed, although they may need some minor tuning, are really different from the present practice. Do they -- do you feel that they differ from what is the present practice in an every day lawsuit, the 75 percent lawsuit?

PROFESSOR EDGAR: Well, Luke, it seems to me that proposed Rule 8 really is directed to notice. Whereas, current Rule 8 is talking about who has responsibility for the case, which are really two different -- can be two different

concepts. And I come back to what Judge Pope said earlier, if what we are now doing isn't causing any problems, I would suggest that we leave current Rule 8 and 10 exactly as they are and that we pick up and include what is proposed Rule 10, "Withdrawal of Counsel," as a separate rule because that's -- I think that's a totally different subject entirely, and I would so move, sir.

MR. RAGLAND: Second.

MR. BRANSON: Wouldn't we need to strike "the attorney also becomes the attorney in charge," since I don't think attorney in charge is any place in the rules?

MR. SPIVEY: I've got a suggestion on meeting that. I think it could be solved a little easier. Instead of saying, "the attorney employed first," how about substituting, "the attorney first signing pleadings for a party shall be considered lead," not "leading counsel," and strike "if present," "shall have control and the management of that party's interest of the cause," unless change was made.

MR. BRANSON: Why mess with Rule 8?

CHAIRMAN SOULES: Well, Hadley, let's

take them one at a time. Hadley has moved that we reject the suggestion to change Rule 8. Is that right? Can I take your --

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: -- motion one at a time? Is there a second to that?

MR. RAGLAND: Second.

CHAIRMAN SOULES: That's moved and seconded. Any further discussion on that point? Broadus, did you want to talk about that?

MR. SPIVEY: Well, my only complaint with that rule is it's awkward. I don't have any quarrel with designating a lead counsel. I'm not sure it totally determines the outcome of the case. But if you're going to have it, it seems to me it ought to be simplified and instead of saying "the attorney first employed" -- because Ray Hardy and the courts have a problem on who is first employed. I've been employed as the second or third attorney in a case before the suit was filed.

How about just saying "the attorney first signing the pleadings for a party shall be considered lead counsel and shall have control of the management of that party's interest in the

cause"? I'm making that as a suggestion not as an amendment because it might be simpler just to not mess with it.

PROFESSOR EDGAR: My only concern about that, Broadus, let's just assume that a case comes in and you're hired and Paul signs the pleading because you're gone. Now, Paul is not lead counsel. And then you're going to have to go through some paperwork to get Paul removed as lead counsel.

So, what I'm saying is that any way you draft it, there are going to be some problems with it. And as long as what we're now doing isn't causing a problem, why change the wording because then somebody is going to say, my God, they've changed the wording, so we've now changed the rules.

MR. SPIVEY: You're right.

PROFESSOR EDGAR: And it's a fairly simple approach to just leave it like it is, I think.

CHAIRMAN SOULES: Are we ready to vote?

PROFESSOR DORSANEO: No. I want to say something.

CHAIRMAN SOULES: Okay, Bill Dorsaneo.

PROFESSOR DORSANEO: This Rule 8, I think, we're assuming what the purpose of it is -- it looks to me like it gives the lawyer who was first employed kind of an ownership in it. He has control of the management of the cause, not necessarily responsibility, first responsibility vis-a-vis the Court. And I don't think that the concept of leading counsel or lead counsel means anything in all rules, particularly. So, I would leave it alone unless we're going to take on the whole problem.

PROFESSOR EDGAR: Just leave it alone.

CHAIRMAN SOULES: Okay. Are we ready to vote? Those in favor of Hadley's motion that the suggestion to Rule 8 be rejected, show by hands. Those opposed to that? Okay. That is unanimously rejected. Now, we'll go to 10.

MR. BRANSON: Would it be possible for this committee to recommend to Ray Hardy that he notify all attorneys of record?

PROFESSOR DORSANEO: That's what the rules provide for.

MR. BRANSON: Well, but since he's not doing it, do you think it would hurt to remind him that that's what the rules provide?

CHAIRMAN SOULES: He will be reminded when he gets a copy of this transcript in connection with this.

MR. SPIVEY: I move that we give Mr. Branson a badge to identify him as a member of this committee and send him down there.

CHAIRMAN SOULES: We have a motion to reject proposed Rule 10 as -- and this in no way reflects on Judge Thomas' committee's work because she was asked to draw something closer to what our concerns were so that we could have this discussion today and give Ray Hardy and the proponents of this a full hearing. And we appreciate that, Judge. She's done that. We've discussed it to some extent. Is there any other discussion on -- well, is there a second with regard to the motion to reject proposed Rule 10?

MR. MORRIS: Second.

CHAIRMAN SOULES: All right. It's been moved by Hadley Edgar and seconded by -- who is that, Lefty Morris?

PROFESSOR EDGAR: I didn't move to reject Rule 10.

CHAIRMAN SOULES: Oh, you did not?

PROFESSOR EDGAR: No, I did not. I

was rejecting Rule 8 because I think Rule 10 is something that has not yet been addressed.

CHAIRMAN SOULES: All right. Well, we don't have a motion on Rule 10, then. Discussion on Rule 10, who wants to speak to it? Harry Reasoner.

MR. REASONER: Well, I guess I would like to ask Judge Thomas, is withdrawal covered elsewhere in the rules?

CHAIRMAN SOULES: It is mentioned in -- in Rule 10, it says that a lawyer, once he appears, is in the case to the conclusion -- That's all down to the last phrase -- unless there is something appearing to the contrary in the record. Now, that's all there really is on substitution or withdrawal. Well, it's between 8 and 10, you see, substitution and withdrawal.

PROFESSOR EDGAR: You have to read them both together.

CHAIRMAN SOULES: You have to read them both together. Under Rule 8, if a party wants to change lawyers, all a party has to do is sign a pleading and say this is my lead lawyer. That lawyer then has management of the case under Rule 8. And the lawyer that used to be lead

lawyer is not any longer lead lawyer.

Whether the party and the old lead lawyer agree or not, the party absolutely controls that decision under Rule 8. There doesn't have to be a withdrawal even, but that old lead lawyer or any other lawyer of record will stay attorney of record unless, quote, "Something appearing to the contrary appears to the contrary in the record."

CHIEF JUSTICE POPE: Luke, look at Rule 402.

CHAIRMAN SOULES: All right. The Judge is going to catch me.

CHIEF JUSTICE POPE: 402-A.

MR. SPIVEY: Could we have the same explanation on this Rule 10 proposal of a specific problem that this is intended to address?

CHAIRMAN SOULES: Yes. Let's look at 402-A, though, for a moment because Judge Pope has directed us there.

MR. TINDALL: That's all been repealed.

CHIEF JUSTICE POPE: 402-A?

MR. TINDALL: Yes.

CHIEF JUSTICE POPE: The new rule was effective April 1, '84.

MR. TINDALL: No, that was repealed.

PROFESSOR EDGAR: That's now the appellate rules, isn't it?

CHIEF JUSTICE POPE: Okay. I stand corrected.

CHAIRMAN SOULES: It's still probably going to be there, though, in some.

PROFESSOR DORSANEO: It would be in the general appellate rules.

MR. SPARKS (SAN ANGELO): Is there a cross index?

MR. MCMAINS: Should be.

PROFESSOR DORSANEO: Rule 7 of the Rules of Appellate Procedure in the new book, page 388, the New West book. But that's -- I think, as far as the trial court, there isn't anything like that.

CHAIRMAN SOULES: Broadus, in response to your query, the Rule 10, it seems to me, just codifies or states what is done out there in the every day world and the District Clerk's office and practicing lawyers. It's really not addressed how do you substitute or how do you withdraw, but it's something that is being taken care of every day without specifics.

MR. REASONER: You know, Luke, but Rule 7 is very different from -- Appellate Rule 7 is very different in that it does not appear to require a showing of good cause.

PROFESSOR DORSANEO: And that was specifically decided that it shouldn't have that in it because of what the provisions of professional responsibility rules provide and also on a policy basis concerning the role of the Court in this decision-making process of who should continue as a lawyer.

CHAIRMAN SOULES: Now, that's right. Good cause, of course, is in Rule 10. Of course, the real interest of adverse counsel to withdraw in many cases is to have something of record saying where and under what circumstances service can be made on that party, whose lawyer is now gone and which party you can't find because you can't serve -- in other words, you just lose the ability to serve.

For example, request to admit, you're trying to get your case finished and you can't. You're perhaps a plaintiff and you can't move your case because you can't get any service. You have to serve whatever you serve by publication. So,

there really is a need, I think, for there to be some sort of a motion to permit a counsel to withdraw unless another counsel is being substituted.

MR. LOW: Don't the judges take care of that now? Everytime I've seen withdrawal, they're given so many days to get a lawyer, and up until that time, they state where they served the person, you know, and the person serve them.

CHAIRMAN SOULES: That's not uniform.

MR. BRANSON: I sure have never seen any major problem with the functioning of the rules. The appellate judges have and I think we ought to address it, but from a practitioner's standpoint, it hasn't created any problems for us.

CHAIRMAN SOULES: Well, it does in representing -- in the collection practice, it could be a problem.

MR. SPIVEY: Don't you have a problem where you have to show good cause? I've had a number of times, more with a defendant than a plaintiff, but sometimes a party just decides they want a different lawyer. That may or may not be good cause but it seems to me that it's sure as

good a reason as you could ever get.

CHAIRMAN SOULES: I don't think good cause should be a part of this rule. I'm not speaking to that. I'm speaking to when you have a motion.

MR. REASONER: Your problem is taken care of by B, Broadus, if you've got another lawyer. The problem is when you want to get out.

MR. SPIVEY: Well, sometimes you have a client -- I've never had one, but I've known of lawyers who had clients that wouldn't pay a fee, and a judge may not feel that's good cause. The average practitioner would feel that was good cause, and the fact issue would be resolved in the favor of the Court, I'm afraid.

MR. LOW: The judge has got to have some discretion. Try to withdraw right there at trial or something, you know, the judge has got to decide what's good cause.

MR. BRANSON: The way it is now, it's totally discretionary.

MR. LOW: Let somebody withdraw and then continue the case. The judge needs some discretion. He needs something to hang his hat on when he can and when he can't. He's right there

and he can see when he ought to let it be done, and good cause gives him something to hang his hat on. Anything can be good cause. You don't get a fee if the judge wants to consider it. But he's got to weigh certain equities. We can't tell the trial judge every time what ought to be an equity.

CHAIRMAN SOULES: Mr. Dorsaneo points out that there are local rules in the Dallas courts.

JUSTICE WALLACE: We reversed a district judge in El Paso within the past two or three months because he permitted an attorney to withdraw three days before trial and then wouldn't give the client a continuance and we reversed him on it. So, the discretion for trial judge is not unlimited.

CHIEF JUSTICE POPE: Rule 7 looks pretty good to me at the trial level.

PROFESSOR DORSANEO: Yes.

CHIEF JUSTICE POPE: "Counsel shall be permitted to withdraw or other counsel may be substituted upon such terms and conditions as may be deemed appropriate by the Court," this says appellate court.

"The motion for leave to withdraw as counsel shall be accompanied by either a showing that a copy of the motion has been furnished to the party with a notice advising the party of any ensuing deadlines and settings of the cause or written acceptance of the employment by new counsel indicated." That looks pretty good to me.

We've got to protect the client, too. And this was aimed apparently toward protecting the client, letting him have notice, and it's on such terms as may be deemed appropriate by the Court.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: I move that we do not adopt Rule 10 and in solace to Judge Thomas would offer unlimited use of my badge.

CHAIRMAN SOULES: A motion has been made to reject the suggestion to change Rule 10.

MR. JONES: Second the motion.

CHAIRMAN SOULES: Okay. Moved and seconded by Franklin Jones. Any further discussion?

PROFESSOR EDGAR: Do we want to substitute -- are we simply going to reject any further discussion of withdrawal, or are we just simply going to -- are we just directed to the

wording of this particular rule?

CHAIRMAN SOULES: As I understand it, at this point we're just talking about Ray Hardy's suggestion by letter -- of whether to accept Ray Hardy's suggestion in his letter of September 15th, 1983, as updated and worked on by Judge Thomas and her subcommittee and before us in a form of proposed Rule 10. That's all we're disposing of here; is that right?

MR. BRANSON: That's the basis of our motion.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Second the motion, if it hadn't been.

CHAIRMAN SOULES: It's been seconded. Any further discussion? All in favor, show by hands. Opposed, same sign. That's unanimously rejected, then, Rule 10.

PROFESSOR DORSANEO: Mr. Chairman, I move the adoption of a separate rule, without regard to what its number would be, that for the trial courts that is comparable to Texas Rule of Appellate Procedure 7 substituting the word "trial" for "appellate" as appropriated in the context of the language.

CHAIRMAN SOULES: That's the language that Judge Pope just read into the record?

PROFESSOR DORSANEO: Yes.

MR. TINDALL: I'll second that.

CHAIRMAN SOULES: It's been moved and seconded. Is there any further discussion on that?

MR. REASONER: Well, Mr. Chairman, if you're going to have somebody modify Appellate Rule 7, I would suggest that they also look at Rule 8 because I agree with Broadus. It is at best a clumsy rule and not clear to me what it means and I suppose could actually be of significance in something like a malpractice case, if you've got an argument that some lawyer was first employed and had responsibility for the case because no change had been entered by the party himself even though some other lawyer actually tried to handle the case.

So, I would like to see people look at Rule 8 and 10 when they put in a clear withdrawal procedure to see if they shouldn't be cleaned up a little. It's unclear to me that the rules have any significance the way they're now written. But it seems to me they might do some damage in some

cases.

CHAIRMAN SOULES: Okay. Let me take those two different ways. You're suggesting, Bill, aren't you, that this committee right now adopt the language that Judge Pope read into the record --

MR. BRANSON: Would you reread it?

CHAIRMAN SOULES: -- in connection with -- can that not just be appended to Rule 10 the way it's --

MR. REASONER: It's certainly where it belongs. I mean, you need to modify Rule 10.

CHAIRMAN SOULES: Can't that just be added?

PROFESSOR DORSANEO: I don't think -- there are multiple purposes involved here. As I see Rule 10 now, it really principally is a notice rule, too, as to who -- attorneys of record are the persons who are entitled to get notice. Under Rule 21-A, notice is provided by the rules. And Rule 10 really isn't about as, I think, we've discussed withdrawal of counsel. It just indicates that you're an attorney of record until you're not -- until the record shows you're not. So, I see this as a separate thing that ought to

be treated separately.

Maybe we will at some point in time decide to have one overall rule that covers all of these separate issues: counsel of record, who is the chief; what does that mean from the standpoint of management control and the responsibility; and how do firms fit into this overall picture. They obviously weren't contemplated by whoever drafted these rules back many, many years ago.

But for now, I would say, let's just leave what we can't fix at this meeting alone, Rule 8, and leave Rule 10 alone as is and put in a rule that will be a workable withdrawal of counsel rule that quite frankly would require a lot less than the withdrawal of counsel rule that's applicable in Dallas County, Rule 1.25 of the Dallas local rules, which requires a lot of rigmarole, if I could just describe it that way, in lieu of the simple and clean procedure that the Supreme Court has adopted for appellate practice.

MR. REASONER: You really don't affect the local rule at all. I mean, under Appellate Rule 7, the Dallas judges do whatever they want to including continue to impose their local rule.

PROFESSOR DORSANEO: Maybe.

MR. SPIVEY: Luke, that allows each district court to address problems in their own particular court.

MR. REASONER: I agree.

MR. SPARKS (SAN ANGELO): I'll second his motion.

CHAIRMAN SOULES: Okay. I think that what I want to be clear in my mind is I've heard discussions in two ways. Bill, I think, is proposing that we adopt a new rule today that's verbatim Rule 7 out of the Appellate Rules except that we change --

PROFESSOR EDGAR: Appellate court to trial court.

CHAIRMAN SOULES: -- appellate court to trial court. Harry's discussion, though, seemed to be to contemplate further subcommittee study, and if we're going to, of course, work on Rule 8, that would need further subcommittee study. What is the consensus?

CHIEF JUSTICE POPE: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, Judge Pope.

CHIEF JUSTICE POPE: There has been no second as yet. Mr. Chairman, I move that Rule 8

of the present rule which reads, "The attorney first employed shall be considered leading counsel in the case, and, if present, shall have the control in the management," and so forth. Now, that is as is the way we now stand.

I move that there be added a separate paragraph to Rule 8 and as a part of Rule 8 the wording of Rule 7 of appellate procedures except that the word "appellate" be stricken out and the word "trial" be added. That would take care of the trial court's substitution of counsel.

CHAIRMAN SOULES: Is there a second?

MR. SPIVEY: Second.

CHAIRMAN SOULES: Broadus Spivey seconded it. Further discussion?

PROFESSOR EDGAR: Judge Pope, I don't have the rule in front of me, but what you would be doing, then, you would be having withdrawal as a part of a rule that is entitled, "Leading Counsel Defined."

CHIEF JUSTICE POPE: This is right.

PROFESSOR EDGAR: Might that not create some problem, though, because they're really dealing with two different subject matters? Shouldn't there be a separate rule

entitled, "Withdrawal of Counsel," is what I'm asking?

MR. LOW: You could have lead counsel and withdrawal thereof or whatever, you know.

MR. MCMAINS: Why don't you just retitle it "Appearance and Withdrawal of Counsel"? I mean, it ought to be -- it ought to probably be in one rule anyway.

PROFESSOR DORSANEO: Mr. Chairman, could I read the Dallas leading counsel rule so that people can see that these are separate things or at least see what I've been unable to make clear to anybody.

CHAIRMAN SOULES: Yes, sir.

PROFESSOR DORSANEO: "Rule 1.26, Leading Counsel: Whenever a party is represented by more than one lawyer or a firm of lawyers, one lawyer shall be designated as leading counsel in charge of the case. An unavailability of any other lawyer shall not be grounds for postponement of the trial or any other proceedings unless the Court finds that more than one counsel is reasonably required."

"In the absence of any other designation, the individual lawyer who signs the first pleading

filed for any party, shall be deemed the leading counsel and if more than one lawyer signs the first pleading, the Court may deem either lawyer who may be available as leading counsel. No designation of a new leading counsel will be permitted at such time as to delay the trial."

That rule is designed to do a management thing from the Court's perspective. And withdrawal is a separate question. Withdrawal is when you cease to be an attorney of record. And the leading counsel designation has a separate function in the overall handling of the case, Court management-wise.

So, I would think if we were going to make withdrawal part of anything, it would be withdrawal as attorney of record, but I would really prefer to just leave it as a separate thing for now until we can get the rest of this worked out.

CHAIRMAN SOULES: Judge Pope, since --

CHIEF JUSTICE POPE: Mr. Chairman, I am convinced.

CHAIRMAN SOULES: All right.

CHIEF JUSTICE POPE: With consent, I would withdraw my motion. It should be a part of

Rule 7. "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court." I think that Rule 7 of the appellate rules should be made a part of that rule and not the leading counsel.

CHAIRMAN SOULES: Okay. There's a substitute motion, then, that the language that Justice Pope has prepared -- or proposed for withdrawing and substitution of counsel be put at Rule 7 instead of Rule 8. And that's the only change in your motion, isn't it, Judge? Is there a second to that?

MR. REASONER: I second that.

CHAIRMAN SOULES: Harry Reasoner seconds it.

PROFESSOR EDGAR: May I move to amend the motion by changing the caption of Rule 7 to read "Appearance and Withdrawal of Counsel"?

CHIEF JUSTICE POPE: I accept it.

CHAIRMAN SOULES: All right. That proposal has been accepted. Any further discussion on the amended motion?

PROFESSOR EDGAR: Or maybe "of attorney" because the rule talks about attorney. Maybe we should say "Appearance and withdrawal of

the attorney" or something like that.

CHAIRMAN SOULES: Okay. Those in favor, show by hands. Opposed, same sign. Okay. That proposal by Judge Pope is unanimously recommended to the Supreme Court.

Judge Thomas, what is this on 18-A? Is this just to get the citations? Well, tell me what this is.

JUDGE THOMAS: Okay.

CHAIRMAN SOULES: I'm not sure I understand.

MR. MCMAINS: Can I have a point of clarification?

CHAIRMAN SOULES: Yes, sir. Rusty McMains.

MR. MCMAINS: What have we done with existing Rule 8?

CHAIRMAN SOULES: Nothing, left it alone.

MR. MCMAINS: We just left that one alone. What have we done with existing Rule 10? Left it alone?

CHAIRMAN SOULES: Nothing.

MR. MCMAINS: Doesn't existing Rule 10 deal in some respect to the withdrawal that we

just passed in Rule 7?

CHAIRMAN SOULES: Well, it says unless there is something appearing to the contrary in the record and, I guess, something would be -- one of the things that could be something would be what we put on Rule 7.

MR. MCMAINS: Okay. I just didn't know what the function of the rule -- I don't have the rules in front of me, but I don't understand when the function of Rule 10, as it now reads in the rules, is once we've done what we did in Rule 7.

CHAIRMAN SOULES: It defines attorney of record, and that's the caption of it, really.

PROFESSOR DORSANEO: Attorneys of record are the ones who are entitled to get notice.

PROFESSOR EDGAR: It's to whom notice is directed.

MR. MCMAINS: Oh, okay.

JUDGE THOMAS: All right, Luke, we --

CHAIRMAN SOULES: Judge Thomas, will you -- I'll send you this transcript. Will you then rewrite Rule 7 --

JUDGE THOMAS: Sure.

CHAIRMAN SOULES: -- like it should be with this change and send it to me so that I can forward it to the Court since this is on your subcommittee's section?

JUDGE THOMAS: Okay.

CHAIRMAN SOULES: And if I can help you in any way with that, just call me and I would be happy to.

We're going to rename Rule 7 and we're going to add to it the terms from Appellate Rule 7. I guess before we leave that, I need to ask Harry Reasoner -- what is your suggestion, Harry, that we do now about Rule 8?

MR. REASONER: Well, let me say, to me the way Rule 8 is now written is clumsy, awkward, doesn't make any sense and probably is never utilized. But I guess if it's not doing any affirmative damage that anybody sees, maybe we ought to just leave it alone.

PROFESSOR DORSANEO: Well, the only other point on that since you raised it, it's pretty clear to me from the long-time-ago days a "who's the boss" rule rather than "who is responsible" rule. Now, the Dallas leading counsel rule is a rule that the courts can use for

case management purposes. Our current Rule 8 doesn't appear to be about that. It's not only clumsy; it doesn't address that. And I would suggest that we consider a rule like the Dallas local rule which may not make the right policy choices on issues of availability and unavailability of the person who is lead counsel and put this matter back on the agenda to try to address that issue that is addressed by local rules and, as you mentioned, by local rules at the Federal level, too.

I suggest we go on but to come back to this at the next meeting by looking at leading counsel rules that have been thought out in other contexts.

MR. BRANSON: Did the committee not express its opinion just before I left on that?

CHAIRMAN SOULES: Well, we keep circling back, Frank, to the fact that Rule 7 -- Rule 8 is awkwardly worded and there are some local rules that are coming up under it there to try to show it up, perhaps, or to mean something maybe completely different. And there is a pretty good deal of feeling here that Rule 8 needs some work even though -- not this that was proposed and

that it should go back to Judge Thomas for consideration and bring something back at our next meeting, whenever that is. I don't know how long that's going to be.

MR. BRANSON: I based my motion earlier, I thought, from Judge Pope's suggestion that in the vernacular that I grew up in which was, basically, she may not be a pretty lady but she dances well.

PROFESSOR DORSANEO: Well, we know that Ray Hardy has used the rule to tell lawyers that they are not entitled to notice even though other rules say so. So that at best the rule is misleading and has caused mischief.

CHAIRMAN SOULES: Okay. How many feel that it would be appropriate to have the subcommittee give this some more study pursuant to our next meeting? Show by hands. Okay. How many feel that that's not necessary? Well, it's pretty evenly divided, so why don't we -- I'd rather air in favor of getting something thoroughly hashed out.

And if you would do that, please, Judge, and I think maybe you're in the best location really to work on that, too, because you have rules on

both withdrawal and substitution and leading counsel and the local Dallas rules. Maybe you can get some history on how those have worked and practiced there.

JUDGE THOMAS: Before we do it, I'd like some clarification on exactly -- are we going to address the notice? Are we going to address who's boss? Are we going to address who can be put to trial? I don't have a feel for exactly what problems we want to address.

PROFESSOR EDGAR: All three.

MR. LOW: You have one -- who has authority to act. Ray Hardy won't let you act unless you've got authority. Who has got authority? Everybody that's on the pleadings. Who is the boss? Who can you put to trial? Who gets notice?

The problem is we do not know where all the words "attorney of record" is used in these other rules, where "lead counsel" is used. These are definitions to be tied into other sections, and I haven't heard anybody say where they're used. Like on discovery, they may use "attorney of record," so I'd suggest the subcommittee go back and look at where the terms "attorney of record,"

here in your package indicates changes to A and B of the rule. Have I got the right material?

JUDGE THOMAS: Yes, sir. And what it is -- B would be a whole new B and the old B would become C and so forth.

CHIEF JUSTICE POPE: I have a question.

CHAIRMAN SOULES: Judge Pope.

CHIEF JUSTICE POPE: Judge, I like what you have here. But the last sentence of the B part, I wonder if that's necessary. The reason I ask that, there may be something out there in the code of judicial conduct or just out in the common law but may be good reasons -- I can't think of it -- as to why a judge shouldn't sit in the case for recusal purposes, not disqualification.

This rule is -- we talk about recusal, but there may be some reasons out there. He may be desperately ill and I don't believe that's covered by the statute or any of these. I was just thinking that kind of limits the reasons that we ought to get rid of a judge.

CHAIRMAN SOULES: What it really boils down to, then, if we were to accept Judge Pope's

thought there, I guess, that the last sentence is not needed, whether we need to state in Rule 18-A that the motion is to give particulars and be verified. Is that needed?

MR. BRANSON: Why do we want the motion verified?

CHAIRMAN SOULES: What?

MR. BRANSON: Why do we want the motion verified?

JUDGE THOMAS: This gets back to -- it has become a deal -- motions to recuse have become the alternative for motions for continuance in the other counties. And, for instance, it is not a problem in Dallas County because I get Judge Gibbs upstairs to hear mine and I hear his.

But it is a problem when you have the case set and you overrule their motion for continuance and the next thing you get is a motion to recuse. It has to be forwarded over and so forth and the particular judge that wrote this request was indicating that he thought that a lot of these frivolous motions could be done away with, that lawyers wouldn't file them if they have to swear to, with particularity, why they want the judge off the case.

CHIEF JUSTICE POPE: I'd kind of like to see it sworn to. You know, I've sat through a trial, opinion goes down, I'm on the minority side on rehearing, no question about my capacity to sit. On a motion for rehearing, I sign an opinion for the majority of the Court and then that lawyer on motion for rehearing files an unsworn motion that I should recuse myself because I'm corrupt. I'm corrupt because I wound up with a majority, and that's what she said. I would like for her to swear to that the next time she files that motion.

CHAIRMAN SOULES: Judge, would we accomplish what we're after if we just took the first sentence of B and added it to A?

CHIEF JUSTICE POPE: That's what I would think.

JUDGE THOMAS: I have no problem with that. Frankly, the reason that I put in the last sentence, Luke, was to try to define what should be in there. But certainly I agree with Justice Pope that there can be other reasons that may not specifically be set out in our present ones.

MR. MCMAINS: You could put the word "ordinarily" in front of it.

CHAIRMAN SOULES: Could we just add the first sentence of the B paragraph in the proposal to what is now the A part of 18-A? That would make -- it says, "The grounds may include any disability of the judge to sit in the case," and then the motion to recuse shall be verified, must state with particularity the grounds of why the Judge before whom the case is pending should be recused. Harry Reasoner.

MR. REASONER: If I might just ask, Judge, shouldn't it be the motion to disqualify or recuse? Aren't they somewhat different concepts?

MR. BRANSON: Is the term "verified" broad enough to include affirmation by information of belief or based on information of belief?

PROFESSOR DORSANEO: Nobody knows.

CHAIRMAN SOULES: Nobody knows, but "verified" is used throughout the rules.

MR. BRANSON: Well, I understand that. But let's assume for a moment that the lawyer mistaken, albeit, had belief that a member of the court was corrupt. You make her swear it's a fact in her motion to recuse, and I'm not sure she necessarily can prove that. But as a lawyer representing a client, if she had that belief, she

may have a duty to present it, whether it would be right or wrong.

CHIEF JUSTICE POPE: I believe that a thing that's verified subjects one to perjury. Information of belief does not.

MR. BRANSON: That's why I'm wondering. Certainly, the example you gave is an extreme one, Your Honor, but there are closer gray calls at a trial level that -- I think the burden should be no more than information of belief on behalf of lawyer, because there is a hearing that follows in which the lawyer has to produce evidence to meet their burden. But to make the lawyer prior to the evidentiary hearing subject themselves to perjury, charges -- particularly when the Judge gets rather angry if it's filed and overruled.

I don't know about other members of this committee but I did spend one morning in a jailhouse in Hunt County on charges that were later dismissed against me because the trial judge got angry. And unless you make it information of belief, I think you could create some more problems than you're solving with the verification.

JUDGE THOMAS: Going to what you said, I think it does need to be motion to recuse or disqualify.

MR. MCMAINS: Yes, because you left out the disqualify.

JUDGE THOMAS: Yes. And then the next sentence could be said, "Motion shall be" and then whatever we decide about verification.

CHAIRMAN SOULES: Why don't we just take out "to recuse" because the rule says, "a motion." Rule A just says "a motion." It doesn't say what it is, stating grounds why the Judge should not sit. If we just say "the motion shall be verified" --

Canon 3-C is about to be divided into two parts. One that says disqualification. That part of Canon 3-C, Texas Canon 3-C, will be -- will contain constitutional disqualifications of a judge to sit. Part 2 of Canon -- of Texas Canon 3-C will be the ABA concept of recusal that we adopted in Texas when we brought the Texas Code of Judicial Conduct into the Texas law. But it's never been separated and that, of course, has created -- that's the same thing we talked about last time that's on our recommendation. So we

don't really need to say in here after the title "recusal or disqualification of judges" what kind of motion, it's just the motion. Is that okay with you, Judge Thomas?

JUDGE THOMAS: Sure.

CHAIRMAN SOULES: Then we could add, "The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should be recused." To me, I don't know whether that's needed. Judge Pope feels that it is.

Frank, your -- have you got a rule book down there somewhere that you could look at for a minute? In the ancillary writ rules, if you look at the very last sentence of Rule 696, because of Federal due process problems with extraordinary writ exparte property seizing, we had to put in some kinds of protection for what kind of information a trial judge could act on after party, and we use this, "the application in any affidavits the motion or" --

MR. BRANSON: Where are you now?

CHAIRMAN SOULES: It's the very last sentence of Rule 696 where it says --

MR. BRANSON: What paragraph?

CHAIRMAN SOULES: I'm sorry, the last sentence of the first paragraph, that's right. "Made on personal knowledge and set forth the facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief were specifically stated."

My concern is that we're going to get this recusal practice to the point where it's highly technical. I think it's settling down the number of these that are being filed for delay only. We have discussed in this very committee and in the COAJ and otherwise that not many lawyers are really going to file frivolous recusal motions because you've got to go back and practice before that judge some more, that they have certain -- There's a resistance to filing the motion anyway unless there's substance to it except among a very few.

And we can make this as complicated and detailed as we wish or what -- I'm just trying to go back through some of the history that brought us where we are with the rule. Judge Thomas and then Rusty McMains.

JUDGE THOMAS: Luke, my only comment

is, from talking to the judges at various conferences and so forth, I think that it is a tremendous problem and I don't think it's settling down --

CHAIRMAN SOULES: All right.

JUDGE THOMAS: -- or Dallas is just extremely unique. And it is, well, I kiddingly say it's not a problem in the sense that I can always find somebody to hear it. It is a practice which is used in connection constantly with motions for continuance. And, you know, I can admire their courage and question their judgment because you're right, they have to come back, but that doesn't seem to be stopping them.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: I'm not sure that these changes particularly address it. I would agree with Judge Thomas that it is not something that is decided and particularly in those cases apart from just continuances and trial settings where the Supreme Court and the Courts of Appeals now are more recognizing the availability and utilizing sanctions in the discovery process.

Once a party gets sanctioned by a particular judge, the odds of that party, especially if it's

a severe sanction, filing a motion for recusal in order to try to have the issue reheard by a different judge are very high in my experience. And usually their grounds are, well, obviously this judge is biased or else he wouldn't enter these sanctions against me.

And that's -- I see that more and more as an effort in part to discourage the use of the sanction practice. It's an end run. But I'm not sure that verification alone is going to solve that problem.

MR. BRANSON: Well, let me ask you a question along those lines, Rusty. There are instances, and I haven't seen them in many years, but early in my practice, I would go before judges who, for example, did not believe the worker's compensation law of Texas was a fair law. And as a result, they would ignore it. And you'd go up on appeal and they would reverse the case and send it back to the same judge, and the same judge would find another way to take advantage of the injured party. And that happened not once but several times. And there's really nothing in these rules that I know of that addresses that set of circumstances.

Is there any way for us to allow the appellate courts to really review whether or not a retrial in the same forum is reasonable?

MR. MCMAINS: Well, the Canon 3-C, as it currently reads, says any time that a judge's impartiality may be reasonably questioned, and then it says including but not limited to -- you know, I don't have as much problem as some people did about the requirement that it be one of these grounds because as far as I can tell, there aren't any other grounds.

CHAIRMAN SOULES: Let me see if we can get --

MR. MCMAINS: I mean, if you aren't disqualified statutorily or constitutionally and your impartiality can't be reasonably questioned, I don't think there is any other grounds. So, I don't consider that to be a burdensome aspect of it. It may also be helpful because there are an awful lot of practitioners around who don't know the source of the disqualification rules or the recusal rules, which if they went to those it might actually be helpful to direct it.

CHAIRMAN SOULES: Let me break this down into about three parts and see if we can get

a consensus. How many feel that -- what we're adding, we'll be adding a piece at a time, if we add anything to this. I'm not trying to exclude anything at this point, just start adding things. To 18-A, subparagraph A, how many feel that we should add -- and this is -- I'm going to get to Frank's point about information of belief in a moment -- but should add the sentence, "The motion shall be verified and must state with particularity the grounds why the Judge before whom the case is pending should not sit." How many feel that should be added to subparagraph A? Show by hands, please. How many feel it should not be added? Okay. That's unanimous.

PROFESSOR DORSANEO: No, it isn't.

CHAIRMAN SOULES: No, it isn't.

PROFESSOR EDGAR: We had 11 ham sandwiches and one bail of hay.

CHAIRMAN SOULES: Did you vote? You voted against it. I'm sorry, let me see those for or against because I need to record the vote. Nine for, and how many against? One against. All right.

Then, as well as that sentence, how many feel that we should add this: "The motion shall be

made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated based on information and belief if the grounds of such belief are specifically stated." How many feel that should also be added?

PROFESSOR EDGAR: Well, what you're doing is essentially defining the term "verification." You just said it has to be verified.

CHAIRMAN SOULES: I'm not defining verification. I'm saying what the motion can be based on.

PROFESSOR EDGAR: Okay. Now -- Okay. I see. Go ahead.

MR. BRANSON: You voted on section A, didn't you? You didn't add verification to A, did you?

CHAIRMAN SOULES: Yes. We just did that nine to one.

MR. BRANSON: Well, it's nine to two.

CHAIRMAN SOULES: Okay, it's nine to two.

MR. BRANSON: I didn't understand that you had verification.

CHAIRMAN SOULES: Okay. It's nine to two.

MR. MCMAINS: Eight to two. He didn't get to vote both ways.

CHAIRMAN SOULES: I didn't know whether he had voted last time; some did not.

MR. REASONER: Let me say, Luke, I voted for it, verification, but I agree completely with Frank that it needs to be clear that information and belief is sufficient. I mean, it seems to me, Hadley has put it correctly that what we're really saying is what is the type of verification that the rule calls for.

MR. SPARKS (SAN ANGELO): You're swearing that your information of belief is true.

MR. REASONER: You're swearing that you believe it.

MR. BRANSON: Why not just say "The motion must be sworn to based on information and belief," period.

CHAIRMAN SOULES: Is that enough? That's -- well, I mean, that's not getting to --

MR. BRANSON: It says something different than saying it's verified one time and the next time on information of belief.

CHAIRMAN SOULES: We have -- in the entire spectrum of extraordinary writ remedies, every application has to be verified; that concept is there. Every application has to be verified. But the application and the affidavits -- they will -- they shall be made on personal knowledge and set forth such facts as would be admissible in evidence provided that facts may be stated based upon information and belief, if the grounds of such belief are specifically stated.

Now, maybe that sentence is in conflict with the requirement that they be verified, but it works. Everybody understands that a verified petition for writ of sequestration, garnishment or what have you, can contain information and belief if you say what you base it on.

For example, I can't swear that someone is about to move their property because they're not moving it. But I know that they've -- I find out that they've leased a moving van who is supposed to be at their house at 8 o'clock on Saturday morning. I don't know why, but on information and belief that tells me that they're about to secret their property away. And I've got to say that they've got to secret their property away in order

to get a writ. That was, you know, the basis for this.

But anyway it's working, these concepts, and that's why I'm suggesting that we may be able to move them over here, get the requirement of verification and to the recusal motion but at the same time, leave room for explaining information and belief as to items where you just really can't have personal knowledge on some of those kinds of things.

MR. BRANSON: But there are others where they abandon verification and talk about how you have to do it. Some of your affirmative defenses, for example. Notice in a workers compensation case, I think, is one of them.

CHAIRMAN SOULES: I'm not understanding that.

MR. REASONER: But it seems to me, Frank, that that solves your problem, doesn't it, the language that he suggested?

MR. LOW: You state in there, Frank, that my neighbor told me that the Judge said he's going to get me. Well, you don't know that. You state what's your information and belief and you swear that your information and belief is

competent.

MR. BRANSON: Why is it necessary -- I guess my question is, why is it necessary to have to swear where the information came from in your motion? You're going to have to prove the truth of your motion or it's not going to be granted. Why make the lawyer say, my neighbor who happens to play gin rummy with the Judge told me that this is the way the Judge felt about something?

CHAIRMAN SOULES: Well, let me just get a quick consensus. How many feel that the motion should be verified? We just took a vote on that, but if enough have changed their minds, we'll go back. How many feel it should be verified? It's essentially the same vote.

PROFESSOR DORSANEO: You don't -- I have a little --

CHAIRMAN SOULES: So, it's going to be verified. We're going to recommend that it be verified.

Now, the question is, are we going to permit the -- are we going to open that slightly by adding the language that we've used in the extraordinary writ rules to permit the verification to verify information and belief if

you explain the basis for your information and belief?

MR. REASONER: I move we do that.

MR. BRANSON: My question is why do we have to limit it that much? Why not just say based on information and belief is sufficient? The motion must be sworn to based on information and belief.

CHAIRMAN SOULES: Do you have a motion, Harry?

MR. REASONER: No. I support what you suggested and the reason I did do so, Frank, is that I think that whenever we can take a concept that worked somewhere and has some meaning and people know how to do it rather than inventing something new, I know that's desirable. And it seems to me that Luke's suggestion solves your problem and we, basically, all know what it is that he's talking about.

CHAIRMAN SOULES: Frank doesn't want to verify anything. He wants to be able to just say on information and belief the Judge is biased and prejudiced against my client and verify it.

MR. BRANSON: Now, that's verification. You've got -- you've made a motion,

you've got to come in and prove that motion and you're swearing you believe. Now, I don't know about you but where I came from if people accuse you of not doing that, you fight with them.

MR. REASONER: The only difference in Luke's suggestion, as I understand it, is you're forced to particularize why it is your swearing to it. And I think that's a healthy thing if you're going to move to disqualify a judge.

MR. BRANSON: But if you don't do it in the hearing, you don't get your way.

MR. REASONER: I know, but by the time you've got the hearing, if your primary purpose is delay, you've now accomplished it, you know, if you're willing to swear to something.

CHAIRMAN SOULES: Tom. Oh, I'm sorry, excuse me, Harry. I didn't mean to interrupt you.

MR. REASONER: No, I apologize.

CHAIRMAN SOULES: Tom.

MR. RAGLAND: It seems like the purpose of this rule, we're overlooking another party as opposed to having discovery motion something like that whereas plaintiff versus defendant or vice versa. Here we've got a judge who is required under subsection C of this rule to

look at the motion and decide if he's going to voluntarily recuse himself. It seems like to me it would only be fair to put enough in there for him to make a decision about it. He may say, well, you know, that's right I haven't thought about that and check out.

CHAIRMAN SOULES: That was a part of the discussion historically in 18-A is how much do you have to say about the Judge in your motion in order to get the issue before the Court.

MR. RAGLAND: It occurs to me that if you're going to say the Judge ought not to rule in this case, you ought to have hair on your chest to go ahead and say it.

MR. BRANSON: Can you do it supplementary; let me try this one and if it doesn't work, I'll go with the next one.

CHAIRMAN SOULES: Well, I think you can file a soft one and amend it before hearing, certainly.

CHAIRMAN SOULES: Newell.

PROFESSOR BLAKELY: I move that we adopt the rule that you read a moment ago.

CHAIRMAN SOULES: Okay. Is there a second that we also add that to subparagraph A?

PROFESSOR DORSANEO: Second.

MR. BRANSON: Would you read it again, Luke?

CHAIRMAN SOULES: All right. It would be, "The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated." The motion has been made and seconded by Dorsaneo. Any further discussion? Rusty.

MR. MCMAINS: This is really more -- is much directed, I guess, to all of the rules that we've got on that and probably to Dean Blaton (phonetic) in relation to the rules of evidence. It seems a little incongruous to me for us to be talking about requirement on verification based on personal knowledge when we now start recognizing hearsay as being admissible in evidence. I just raise that question. I don't know what -- I'm not suggesting we can massively do anything about it, but it does seem incongruous to be limiting how you get into court and then once you get there, you've got a much broader spectrum.

CHAIRMAN SOULES: Any further

discussion? Okay. Those in favor of adding that sentence to subparagraph A of 18-A, show by hands. Ten. Opposed? Okay. That's unanimous.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: And then finally the last matter is the -- I heard Rusty -- I've heard some discussion both ways about whether we use this last sentence -- the proposal that says "the grounds are limited to." Judge Pope and, I think, Harry and Rusty have spoken about that. Is there any motion that we include that?

CHIEF JUSTICE POPE: I move that that be dropped.

CHAIRMAN SOULES: Okay. Well there's no motion to include it. Okay. That dies for lack of a motion then. So, we'll add those two sentences we talked about, subparagraph A of Rule 18-A and do no more at this time. Let me see a show of hands that that's correct at this point; is it? All right. Does anyone have any question about that?

PROFESSOR DORSANEO: I have one minor technical point.

CHAIRMAN SOULES: All right. What is that?

PROFESSOR DORSANEO: This concept of verification, our rules -- we use the term "verified." Our rules sometimes use the term "verified," more normally, it says verified by affidavit or supported by affidavit. And other -- I think we're pretty sloppy about saying, oh, that's all the same kind of thing and it may well be. But Rule 93 uses the term "verified by affidavit." And it doesn't -- it hasn't been construed to mean a separate affidavit. You know, do we want to mess with that or just leave this problem which exists altogether?

CHAIRMAN SOULES: No, no.

PROFESSOR DORSANEO: The rules that you talk about, for example, are not verified applications. They're supported by affidavit.

CHAIRMAN SOULES: Supported by affidavit, that's right. Exactly.

PROFESSOR DORSANEO: If you don't want to mess with it, that's fine with me.

CHAIRMAN SOULES: All right. Judge Thomas, we're moving right along now. Rule 14-B -- it's very straight forward, it's exactly what we've asked her to do at the last meeting. Those in favor show by hands, please. It just gives the

Supreme Court the power to make whatever rules it wants to to direct how exhibits are retained or disposed of in trial courts. Those in favor show by hands. Opposed? That's unanimously approved.

PROFESSOR EDGAR: Now, that did not include the order attached thereto, I assume.

CHAIRMAN SOULES: Now, in connection with the order, are there suggestions in the order?

PROFESSOR EDGAR: I've just got a question for Linda. With respect to the reduction of the exhibits to the second paragraph of the order, should you also include something about who is to withdraw it, the person that introduced it in evidence? Who has the responsibility -- which party has the responsibility for reducing the exhibit to manageable size?

JUDGE THOMAS: We could insert -- what I was anticipating, Hadley, is the party introducing or offering and we could --

PROFESSOR EDGAR: I think that should be made clear, don't you?

JUDGE THOMAS: Yes.

PROFESSOR EDGAR: And I suppose a model exhibit would be withdrawn by the party that

offered the same.

JUDGE THOMAS: Yes.

MR. BRANSON: Just out of curiosity, what happens now when exhibits are not withdrawn?

PROFESSOR EDGAR: They're in rooms in the courthouse.

CHAIRMAN SOULES: The courthouse is full of them.

PROFESSOR EDGAR: Stacked and stacked and stacked.

MR. MCMAINS: Some place.

PROFESSOR EDGAR: It's terrible.

JUDGE THOMAS: I have exhibits -- these beautiful charts from hearings in 1979. You know, we have called -- technically, that's a district clerk problem. These things are so huge they're in my evidence room and I can't get anyone to come get them.

CHAIRMAN SOULES: Okay. Other than --

MR. BRANSON: Why don't we let them auction those and use the money for -- why don't we let the Supreme Court auction those and use the money for computers?

CHAIRMAN SOULES: In each case where the term "will be withdrawn" is used, the

suggestion is that we add "by the offering party" to make it clear who has to withdraw it. Rusty.

MR. MCMAINS: My problem on some of the things in the rules is it assumes it's basically over, I mean, on the order. Are we talking about the order now?

CHAIRMAN SOULES: Yes, sir.

MR. MCMAINS: It assumes that in six months it's all going to be over. Of course, that's not really true under our rules. There are different types of lawsuits that -- the case is not necessarily over in six months. The expiration of time for a bill of -- first of all, six months isn't even necessarily the time for an publication for writ of error because you've got notice problems under 306-A, and you've got a possible 90-day extension over that period. And then you've got the bill of review procedures which may be a lot longer. And then you've got defaults by publication which specifically provides for a much longer period of time.

CHAIRMAN SOULES: Rusty, how do those -- if a party is trying to protect himself from those kinds of tacks, though, later --

PROFESSOR EDGAR: It seems to me that

that really does not present the problem. They've got to preserve it.

CHAIRMAN SOULES: Where is the burden of preserving it? Isn't it on the offering party or --

MR. MCMAINS: I'm not disagreeing with you. I'm saying, though, that you say that it's withdrawn by the party who offers it.

PROFESSOR EDGAR: Well, it is, but you see on -- in those nunc pro tunc situations and bills of review and appeals by writ of error, the party that offered it out of a matter of self-preservation is going to have to protect it.

CHAIRMAN SOULES: Storage is going to go back to the lawyers instead of the court reporters and district clerks.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: And the judges.

PROFESSOR EDGAR: That's right. Well, it seems to me that just simply a matter of proper representation would require that you keep it, but the burden is going to be on you rather than on the clerk.

CHIEF JUSTICE POPE: Well, a question again, and I hate to make a nuisance of this, but

what is the problem with the present 14-B? On motion they can be destroyed or they can be returned.

CHAIRMAN SOULES: This is to force it, Judge. This is to -- the courthouses want to force the exhibits out.

CHIEF JUSTICE POPE: Well, we had a whole room full of stuff. We kept them up there because they were interesting. We had two great big boxes of pornographic material. We finally ordered that it be burned. But can't a judge do what he wants to now, and on motion, can't all of these things be taken care of? Where is the problem?

PROFESSOR EDGAR: Judge, as we understood it at our last meeting, the procedure by the various clerks vary tremendously. Some of them are disposing of it the day after trial to the point that some of them have never disposed of it. And we were trying to meet -- to try and adopt some uniform procedure so that the rule would make clear -- so that the Supreme Court clearly could delineate to the clerks a proper uniform disposition procedure. Now, that was what we were trying to accomplish.

CHIEF JUSTICE POPE: Okay. That answers my question.

CHAIRMAN SOULES: Okay. Those in favor, then, of the proposed order except that we add "by the offering party" after the words "will be withdrawn," as those words appear, show by hands. Opposed? Okay. Then, that is also unanimously --

MR. MCMAINS: Is there any provision in there for the cost of reproduction? Is that supposed to be born by the offering party, as well?

CHAIRMAN SOULES: I guess so. He's got to provide them.

MR. MCMAINS: Well, I'm just saying it's not in the order. I mean, what you're doing is saying that if somebody offers something that is costly to reproduce, that not only does he got to offer it, he's got to reproduce it and put it back in there. He might have lost.

PROFESSOR EDGAR: You might ought to add a sentence just to make it clear that --

MR. MCMAINS: And it ought to be -- you know, in the event of an appeal, the cost of the reproduction ought to be taxable cost, as

well, in my judgment.

PROFESSOR EDGAR: Well, this really wouldn't be something that would be taxed. It would simply have to be an expense that would have to be born by the -- well, what I'm saying is, Rusty, assume that you withdraw some exhibits that would have to be reproduced or you have to reproduce them and substitute the reduced reproduction, and there will be no -- well, okay, you're saying, then -- I see what you're saying, yes. Okay, you're right.

MR. MCMAINS: You're imposing the burden.

PROFESSOR EDGAR: You're right.

MR. MCMAINS: You're offering the party to incur an expense for the benefit of the clerk and that's all. I mean, you may have already incurred an enormous expense to build the damned model or blueprints or diagrams, or whatever.

CHAIRMAN SOULES: Well --

MR. MCMAINS: Then they have to go through the expense of reproducing it, and if ultimately you win -- if the other side decides to appeal, if you won there or if you win,

eventually, it seems to me it ought to be taxed as cost.

CHAIRMAN SOULES: Well, you've got -- they say exhibits, unmanageable size, such as charts, diagrams and posters. I guess, this is sort of a rhetorical question. What's wrong with asking a party who has used charts, diagrams and posters as exhibits, big ones, for demonstrative purposes, to be required to also have them in smaller versions for purposes of the appellate record? Why shouldn't that be on that party? And there's usually not -- I mean, that's not a great expense, as a general rule. The expense is getting the little ones made big, not going the other way.

MR. MCMAINS: Well, you've got other things like the mechanical stuff. You've got models and all kinds of other things in here that is dealt with.

CHIEF JUSTICE POPE: Logs. We had one case where there was a log, a big log, from East Texas.

PROFESSOR EDGAR: You mean a wooden log?

CHIEF JUSTICE POPE: Yes.

CHAIRMAN SOULES: Well, they're trying to distinguish between, I think, Judge, that sort of thing and charts. Because the second one talks about model exhibits and what do you do with those. You withdraw them unless the Judge orders otherwise. I don't know how to -- to me -- and maybe it needs to be better stated -- the two sentences in the second paragraph, the first one deals with enlarged documents or charts. The second deals with logs and models and tires and what have you, but it may be that this is not as clear as it should be.

MR. MCMAINS: That's not really what it says because it talks about model exhibits in the second sentence. The first sentence is not limited to paper exhibits. There is nothing in here that talks specifically about demonstrative exhibits. I mean, the thing that broke, the whole car -- we've had people bring in an entire car cut in half --

CHAIRMAN SOULES: Right.

MR. MCMAINS: -- is not anywhere in here, unless it's in the first sentence because that's not a model exhibit. Frequently, that is the car. And it is definitely among manageable

size. And I don't know what a reduced reproduction of a car looks like, unless you photograph it.

MR. RAGLAND: It looks to me like the last phrase of this paragraph one says, "unless otherwise ordered," but the Judge ought to take care of those unique situations. I don't think we can sit here and anticipate every conceivable situation that is going to come up in the trial of a case.

MR. MCMAINS: I'm not suggesting that. What I'm saying is, when you're sitting there trying to get a record and you've got witnesses testifying about something that is physically in the courtroom and this rule orders, unless the Judge orders otherwise, that it be withdrawn, it's gone somewhere. And my question is, what are you going to do when you're the other party who has lost, trying to get something before the appellate court to show what this damn testimony is about.

And I just don't -- I mean, what you're saying is, well, we just put the burden on the offering party and that seems to me that we're doing once again -- we're creating a lot of cracks

for the unweary. If they take the thing and don't have any place to put it and it gets destroyed, that's the same thing, it seems to me, as basically an inability to get a complete record, and they're liable to get a new trial on the thing.

CHIEF JUSTICE POPE: The present rule looks toward disposition of these exhibits after the appeal is exhausted.

MR. MCMAINS: This one doesn't, though.

CHIEF JUSTICE POPE: I certainly think that things should be kept intact until the judgment becomes final. Sometimes an exhibit will be over in the Court of Appeals and it's not sent over. We send for it. We want to look at it, feel it. But surely the record should not be tampered with until the judgment becomes final, not the trial. And I would certainly --

MR. MCMAINS: But that's my concern.

PROFESSOR EDGAR: Well, doesn't the second paragraph -- or the third -- rather the third paragraph cover that situation, Judge Pope?

MR. MCMAINS: That assumes that the Judge will give you -- well, certainly, the Judge

may say -- may very well say, I'm not going to do anything for you because I don't want it in my court, in which case, under this rule, that party is obliged to withdraw it.

PROFESSOR EDGAR: No, we're talking about two different things. We're talking about -- Judge Pope was, I thought, talking about a time requirement disposition, and you're talking about how to handle exhibits other than those which are perfectly capable of reproduction, such as paper exhibits and model exhibits. That does not cover other types of exhibits which might be extremely relevant. But those are really two different things, it seems to me.

CHIEF JUSTICE POPE: But, Hadley, look at paragraph 2. It talks about after trial, and until that trial -- until that case -- the record is made, and I don't think anybody ought to be changing that record until the final disposition of the case even by the substitution of smaller documents.

Now, they can do that if they've got some sense in their application for writ of error and their answer. But this talks about upon the completion of the trial and reduced reproduction

substituted therefor.

JUSTICE WALLACE: And if you've got a question involving altered documents, that reproduction just won't cut the bill. You've got to have the original up in your appellate record.

CHIEF JUSTICE POPE: I think until that case is over with, that appeal is on the record and the exhibits.

CHAIRMAN SOULES: Judge Thomas.

JUDGE THOMAS: Why don't we just omit paragraph 2, period, and everything stays as is until you jump down in that third paragraph which talks -- what Justice Pope was talking about.

And, Hadley, the third paragraph and the fourth paragraph will be language that is identical to what Hadley is going to present on dispositions of depositions and so forth and what we were trying to do is make disposition of exhibits, depositions by written questions and so forth all the same.

JUSTICE WALLACE: Well, some of these things can't be mailed.

CHAIRMAN SOULES: That's right.

JUDGE THOMAS: Yes.

MR. MCMAINS: No question about that.

Mailing a log might be expensive.

CHAIRMAN SOULES: Shouldn't the final paragraph envision notification to the counsel for the party that offered the exhibit that the exhibit can be picked up within a period of time. If not, they will be destroyed -- and in failing some response, the exhibits will be destroyed.

This -- I started to mark this up -- the clerk shall mail or deliver the exhibits to the attorney introducing, but who is going to bear the cost of that? It just seems to me like it ought to be a notice to the party, come get your things or they're going to be disposed of in 30 days. If they don't come, then the clerk may make a disposition of them. Is that acceptable with your committee, Judge Thomas?

JUDGE THOMAS: Sure.

PROFESSOR EDGAR: What are you doing now?

CHAIRMAN SOULES: It would delete that bottom paragraph and just change it to -- the concept that the clerk would give notice to the party who offered the exhibits.

PROFESSOR EDGAR: Why don't you say "the clerk shall notify the attorney introducing

or offering the exhibit," something to the effect of pick it up but --

CHAIRMAN SOULES: That's what we're talking about.

PROFESSOR EDGAR: Yes. But I'm just talking about how to word it.

CHAIRMAN SOULES: I'm going to ask Judge Thomas to write something that gets that done and then send it back to me and we'll call it adopted. But we're talking about just the clerk is going to give notice to the party who offered the exhibit to come and get it within a period of time, what, 30 days. Is there anyone that thinks the time ought to be different than 30 days? Okay, that will be it. And then failing --

JUDGE THOMAS: I think that we definitely need to insert because of the Hardy letter and what he is suggesting is -- it would be my position that it needs to be written notice.

PROFESSOR EDGAR: Yes, written notice.

CHAIRMAN SOULES: Yes.

JUDGE THOMAS: And it might be well to -- you know, what Hardy wanted to do was give notice by telephone and then tax the cost for destruction against the party. And my question

would be, do we want to address who pays the cost if they decide to dispose of it?

CHAIRMAN SOULES: You're just talking about alternate costs, whether he stores them or destroys them, essentially.

JUDGE THOMAS: Oh, I agree.

CHAIRMAN SOULES: And I don't think the clerk is going to hesitate to destroy exhibits against the cost of storage. At least that's what's going on in San Antonio. They're destroying them and putting them on microfilm and I guess that's what they're doing everywhere.

MR. MCMAINS: I have a problem with the district clerks assessing cost after a case is over anyway.

CHAIRMAN SOULES: Especially to whom.

MR. MCMAINS: It ought to happen at some time, if you don't like what they charged you.

CHAIRMAN SOULES: Then the consensus that the clerk ought to bear the cost -- and I guess, keep the proceeds of any dispositions.

MR. MCMAINS: Sure.

CHAIRMAN SOULES: It may be that the disposition generates proceeds. I guess it's

conceiveable if there could be something of value involved, usually not.

JUDGE THOMAS: My question is, do we want to address that? Do we want to be specific and say, okay, you pay the cost and you get any you get proceeds, if any?

CHAIRMAN SOULES: Let's just leave it to the clerk to destroy it.

PROFESSOR EDGAR: I would suggest and just say that the clerk may dispose of the same, period, and just leave it at that.

JUSTICE WALLACE: Question, Rusty. In your automobile case where they brought the body in --

CHAIRMAN SOULES: Car body.

JUSTICE WALLACE: Yes. Do you know where that was stored and at whose expense during the appellate process?

MR. MCMAINS: Well, actually in that particular case, it was stored in a warehouse and the parties agreed to split the expenses, but it was mailed to the clerk who had the warehouse procedure.

PROFESSOR DORSANEO: Send it to Islam. There's a lot of room up there.

CHAIRMAN SOULES: Okay. Are we now ready to consider this in total?

PROFESSOR DORSANEO: You've got to take out -- Rule 356 has been repealed in that third paragraph.

CHAIRMAN SOULES: What should it be?

PROFESSOR DORSANEO: It doesn't mention a number.

CHAIRMAN SOULES: Okay. As I understand the status of this now, we would -- the Supreme Court order relating to retention and disposition of exhibits, the suggested order that we would recommend to the Court in connection with the proposed Rule 14-B, we would retain all of the first paragraph, delete all the of the next paragraph, retain the third paragraph, except strike the words "as provided by Rule 356." There's no Rule 356 and we really don't need a rule reference. And the final paragraph, the fourth paragraph, would be changed so that the clerk would give written notice to a party to withdraw the exhibits within 30 days or they would be destroyed, and then authorize the clerk to dispose or -- to destroy or dispose of -- authorize the clerk to make disposition of any

that are not picked up. Those in favor show by hands. Opposed?

MR. RAGLAND: I have a question after the fact, Luke. I may not be reading the same thing but I'm looking at page 17 of the hand out here.

CHAIRMAN SOULES: This is a separate thing that Judge Thomas sent us, Tom. Is it the same? Is it the same thing? No, it's a different thing, Tom. Let me see if I can get you one.

MR. RAGLAND: I'm looking at Sam's here.

CHAIRMAN SOULES: No opposition. That will be recommended. Tom, if you find something there you want to resurrect, let us know. We need to move with our agenda, though. Did you have something else?

PROFESSOR DORSANEO: Just one clarification. Are you going to use the term "party" in this order, or "attorney" or deal with that issue?

PROFESSOR EDGAR: It should be mailed to the attorney.

PROFESSOR DORSANEO: Should it be mailed to the attorney or to the party or what's

the deal? Some attorneys may not have offered something and then they may not represent anymore. I don't know if we need to deal with that now but somebody needs to deal with to whom is it actually going to be sent.

PROFESSOR EDGAR: Well, I think it needs to go to the attorney because the clerk will probably have -- knows how to locate the attorney and may not know how to locate the client.

MR. MCMAINS: Yes, but it also may be a pro se individual.

CHAIRMAN SOULES: Let's say, "shall give notice" -- use the words "shall give notice to the party," and then we've got the benefit of 21-A.

PROFESSOR EDGAR: Okay.

PROFESSOR DORSANEO: I think party would be better.

CHAIRMAN SOULES: Give notice to the party if he's got an attorney of record, that's the same as notice to the party under 21-A. Tom Ragland.

MR. RAGLAND: Luke, it's a minor thing, but in the interest of consistency, I've noticed that in all these rules changes when it's

speaking of the Judge in the old rule, it's changed to the Court. Is that -- in this proposal here, it refers to the Judge. I don't know whether it makes any difference or not, the consistency with the other changes.

CHAIRMAN SOULES: Where is that, Tom?

MR. RAGLAND: The last word of the first paragraph.

PROFESSOR EDGAR: We're going to eliminate that paragraph, though, Tom. Aren't we going to eliminate that paragraph?

CHAIRMAN SOULES: Second paragraph is out and the fourth paragraph is out with something substituted for it.

MR. RAGLAND: Okay. I guess I'm still not looking at the right thing.

CHAIRMAN SOULES: Let's turn our attention now to the --

PROFESSOR EDGAR: Just one question.

CHAIRMAN SOULES: All right.

PROFESSOR EDGAR: In what is now the second paragraph, reference is made to a perfection of appeal as provided by Rule 356.

CHAIRMAN SOULES: Delete "as provided by Rule 356."

PROFESSOR EDGAR: Why don't you just substitute Appellate Rule 4 -- 40. Now, the reason I say that is because clerks aren't going to know who appeals are perfected unless you give them some point of reference, and that's why -- when I --

CHAIRMAN SOULES: We've got a division of the house on that. Dorsaneo says leave the rule out and you say put it in.

PROFESSOR EDGAR: Well, the reason I put it in on our -- Rule 209 is because for the reason I just stated. Clerks don't know what that is.

CHAIRMAN SOULES: What do you think, Bill?

PROFESSOR DORSANEO: No, put it in. I can make an argument here.

CHAIRMAN SOULES: If there's any difference about it, we can take a vote, otherwise -- Okay, so we're going to add -- put in as provided by what, Hadley?

PROFESSOR EDGAR: Appellate Rule 40. Rules of Appellate Procedure Rule 40.

CHAIRMAN SOULES: 40. Okay. Okay, let's turn our attention now to rules 277, 8 and 9

while we've got the benefit of Judge -- certainly, we have the benefit of Judge Pope here. There at page 145 --

PROFESSOR DORSANEO: Rule 41.

CHAIRMAN SOULES: Rule 41?

PROFESSOR EDGAR: Rule 40 is how it's perfected and Rule 41 is when it's perfected and it's the time that we want.

MR. REASONER: Well, what about 42?

PROFESSOR DORSANEO: That's why I want to leave it out, see.

MR. REASONER: You know, and you can get -- you could also get into extraordinary writ and things. I really question that.

PROFESSOR EDGAR: Well, I guess you're right. I hadn't thought of that. Maybe the thing to do is just leave it out.

CHAIRMAN SOULES: Any further discussion? Okay. We'll leave out the rule reference in what will now be the second paragraph.

Okay. Now, we'll turn to page 145 of the materials and this is David Beck's letter but it was a committee that, I believe, Franklin was on. I know, Edgar, you were on it and you-all worked

on this -- done a lot of work on this 277, 278, 279 and forward. Who should make the report on that?

PROFESSOR EDGAR: Is David here?

MR. MCMAINS: No.

MR. JONES: Mr. Chairman, this was my subcommittee, but I have no report to make other than that I missed the April meeting -- not April, but the May meeting. The meeting before that somebody refreshed my recollection that the date of that meeting -- we met over here in the courtroom.

My recollection was that this rule was debated -- or that this other rule was debated, Judge Pope was there and there was a lot of compromising done and the rules were passed. And apparently something happened at the May meeting which I'm unfamiliar with. And then as I observed from the chair this week, I got your letter of August 27th which raises an entirely new set of questions about the rules, and although reading through your letter, I don't find anything in there earthshaking or anything that I fundamentally disagree with.

I have this concern, and that is that we've

been working on Rule 277 and the related rules for over a year, and I would like to see the matter resolved at this meeting so that we can -- this committee has voted on at least two occasions overwhelmingly to simplify the submission of jury issues in civil cases. We have not gone as far in my judgment as the Chief Justice has asked us to go.

There's been a great deal of sentiment demonstrated on the committee to go further than the compromises which were made last -- the meeting before last. And whereas, I certainly don't want to run a rush job over the chair on what may be very valid questions about the rule. I think it's time for us to get this thing passed, one way or the other. Now, that's where I'm coming from, and that's the extent of my report.

MR. BRANSON: Did we not pass something the meeting before last, Luke, because my recollection is the same as Franklin's in that regard? Remember we met in the Court's chambers and had a big hoopla and blood bath.

CHAIRMAN SOULES: Right. My memory of that was that we met, that there were many things discussed and that David Beck's committee was to

write up what it felt were the results of that meeting and this is the write-up of that, you know, two-times-ago consensus. It was a clear consensus. No question about that, Franklin. But in terms of passing on language for 277, 278 and 279 as such, it's never been done.

MR. BRANSON: Is David Beck's committee the one Franklin chairs?

PROFESSOR DORSANEO: Yes.

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: Well, really, there was -- the committee that was comprised of Franklin and others was a larger committee than the draftsmanship committee which --

PROFESSOR EDGAR: No.

CHAIRMAN SOULES: Is that not right?

PROFESSOR EDGAR: That's really not right, Luke. There were five or six of us that were on Franklin's committee and we met a number of times. David was a member of that committee, and we submitted a proposed rules when we met in the Supreme Court courtroom.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: And at that time we adopted Rule 277.

CHAIRMAN SOULES: Just like it is here.

PROFESSOR EDGAR: Yes. Except for one change which I want to disclose in just a minute.

MR. SPIVEY: Could you talk just a little bit louder? I can't hear you.

PROFESSOR EDGAR: Well, I can't talk any louder than this.

MR. SPIVEY: Well, I'm trying to listen to Mr. Branson, too.

PROFESSOR EDGAR: I said in the Supreme Court courtroom, we adopted Rule 277 as it now appears here except for one change which I'll refer to in just a minute. At that time, we -- on -- the meeting between the Friday night -- conclusion of our Friday night meeting and Saturday morning, we did some further work on Rules 278 and 279. Those, however, have not been fully discussed by this committee. The 277 except for one change has been, and that was adopted at that meeting.

And at some point in time, I would like to address first that one change that I refer you to -- that I will refer you to and then we can get into 278 and 279. But I think that was the

chronological process by which Rule 277 has currently -- as it currently appears before you.

CHAIRMAN SOULES: Thank you, Hadley. What is the change that was made in Rule 277?

PROFESSOR EDGAR: All right. If you will look down about the second -- maybe it's the second sentence. I don't have my glasses. It says something, unless required by the substantive law. I don't know where that is, "Only if required by the substantive law."

JUSTICE WALLACE: 146?

CHAIRMAN SOULES: 146, yes, Judge.

PROFESSOR EDGAR: It dawned on me that we really need to have some type of escape valve because there might be some kind of case lurking out there where you might need to submit a question to the jury in a more distinct, specific, concrete form than would otherwise be provided by a broad form submission.

For example, an issue on a confession and avoidance, theoretically, might need to be submitted, specifically. And I've talked to the drafters of the people who are working on volume 2 of the pattern jury charges, worker's compensation. And because of the legislative

requirements of that law, it would be extremely difficult to prepare a charge on broad form or one containing a combination of elements or something like this.

So, I suggest that we -- only if the substantive law requires it, would you be -- would you be allowed to submit something, specifically. Otherwise, you've got to submit it as we approved it at the meeting in the Supreme Court courtroom. Now, that's the only change in Rule 277, and I think we've got to have some type of escape valve on that.

MR. JONES: Mr. Chairman, I move -- as chairman of the subcommittee who submitted Rule 277, I move that that change be adopted.

CHAIRMAN SOULES: Is there a second?

MR. BRANSON: Second.

CHAIRMAN SOULES: Who seconded it? I'm sorry, I didn't see.

MR. BRANSON: I did.

CHAIRMAN SOULES: Frank Branson seconded it. Franklin Jones made the motion. Discussion? Rusty McMains.

MR. MCMAINS: I've got two questions. One is the language question, Hadley.

PROFESSOR EDGAR: Okay.

MR. MCMAINS: It currently reads "Only if required by the substantive law such as worker's compensation is the submission of separate questions submitted."

PROFESSOR EDGAR: Permitted. It should be permitted.

MR. MCMAINS: Permitted.

PROFESSOR EDGAR: Yes. And I've changed it on my copy. That was a typo, pardon me.

MR. MCMAINS: I assumed that.

PROFESSOR EDGAR: Pardon me. Thank you.

MR. MCMAINS: Secondly, I'm not sure what -- and I guess this was an observation, perhaps, made in Luke's letter, and I don't know if it was directed to this change, or whatever, but it says, "the submission of separate questions." Now, if you contrast that with broad form -- I mean, we talk up here of broad form questions, which assumes that more than one question could be asked, then down here when we talk about only if the substantive law requires may separate questions -- I don't know what --

PROFESSOR EDGAR: Meaning more than one.

MR. MCMAINS: I don't think that's a perfect parallel between broad form questions and separate questions.

PROFESSOR EDGAR: Should we then say "specific questions"? I mean, I don't know what term to use but we all know what we're trying to say. My language is somewhat imperfect.

MR. MCMAINS: My concern is that the Courts may sit there and figure out that what this means is we're supposed to submit every case on one question.

PROFESSOR EDGAR: What would you say --

MR. MCMAINS: I don't think that's really what is intended. We're just talking about that they ought not to be separate and distinct. I mean, our old concept is separate and distinct when we were dealing with issues.

PROFESSOR EDGAR: What would you say, separate and distinct?

CHIEF JUSTICE POPE: No.

PROFESSOR EDGAR: But you see, this is -- there are just some kind of cases where you

have to submit specific -- or separate and distinct questions; they just have to. And I don't like that use of the term but -- and I'm certainly amenable to any proper term that would convey --

MR. MCMAINS: But in a general sense, of course, we specifically provide that on good cause you can do it these other ways.

PROFESSOR EDGAR: Well, but --

MR. MCMAINS: And is there not -- I mean, I'm just -- I'm not sure even in a comp context that you can't submit broad form questions with limiting instructions. I don't think that -- I don't -- I mean, I just don't see that as being a separate and distinct problem.

CHAIRMAN SOULES: Chief Justice Pope.

CHIEF JUSTICE POPE: I recognize that there may be this type of thing out here and it should be taken care of. Every time we use that word "separate" or everytime we use that word "distinct," we're rersurrecting General Drilling Company and Fox Hotel Company. And I hope that we don't have another 12 years of saying, no, that's not what we meant when we used separate. I wonder if we could say something like, "only if required

by substantive law, such as worker's compensation, may questions be submitted more narrowly."

MR. JONES: I would accept that.

MR. REASONER: Judge, let me -- you know, I have -- since I last participated in these debates, I have become converted to broad form issues.

MR. JONES: No. You've lost the battle.

MR. REASONER: No. You have not read my briefs. It depends on Mr. McMains. I favor broad form issues. And I would --

MR. JONES: I'm glad you're on my side.

MR. REASONER: Well, I understand that. But I would ask the question whether any reference of this nature needs to be made at all since in the beginning we say, "shall whenever feasible submit the cause on broad form questions." That, to me, says that the Court is going to do it, unless you can show them some statutory reason why they can't.

MR. SPARKS (SAN ANGELO): Precisely.

MR. REASONER: So, I would omit that entire sentence which avoids you getting into this

-- creating a new concept of separate questions.

Secondly, it seems to me that where we say, "on good cause" there is danger that you're narrowing what you're doing. For example, the way it is literally written, it says that you can't combine elements except on a showing of good cause. I do not understand the law to be that in a broad form area. I thought you could combine that element without any showing of good cause under the existing rules --

PROFESSOR EDGAR: We're trying to -- excuse me.

MR. REASONER: But why does it say in here, then, that you have to show good cause to submit questions containing a combination of elements?

PROFESSOR EDGAR: Well, I thought we thrashed this out at our earlier meeting, Harry. What we're trying to do is to first tell the trial court that the first thing that -- you start off with a proposition that issues are going to be submitted in broad form --

MR. REASONER: Right.

PROFESSOR EDGAR: -- period.

MR. REASONER: Right.

PROFESSOR EDGAR: Now, broad form has now become a word of art.

MR. REASONER: Right.

PROFESSOR EDGAR: And we have to understand what that word of art is.

MR. REASONER: I try.

PROFESSOR EDGAR: But, then, once you pass that hurdle, then it's only for upon a showing of good cause that you can do it any other way.

MR. REASONER: But what I'm saying to you is, broad form to me means that I can combine elements in a broad form question.

PROFESSOR EDGAR: No. Broad form -- that's what I'm saying. Broad form is -- in most context and the problem -- and we've got a problem here because the examples we're using are tort cases and we have all kinds of other kinds of cases out there that may present some type of problem. But Lemos versus Montez is a broad form submission, period.

Now, from that you have various gradations. For example, you have a broad form followed by limiting instruction. You have a broad form that combines the elements within the question itself.

But those are not to be submitted unless you can show good cause for doing so.

MR. REASONER: I mean, you're view of broad form questions is going to be that I have to submit a separate question on each element?

PROFESSOR EDGAR: No. It's exactly the contrary.

MR. REASONER: All right. But read what you've got here. "A court may submit" -- I mean, you know, however, "for good cause may submit," and then one of the categories you've got is on questions containing a combination of elements.

PROFESSOR EDGAR: That's right. Now, that's a word of art, too. That's a term of art.

MR. REASONER: Wait a minute. To me, you have now said that I can't combine elements in a broad form question unless I show good cause.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: That doesn't make sense.

CHAIRMAN SOULES: Broad does not reach a combination of elements, is what you're saying, if I'm understanding you.

MR. REASONER: That's what this rule says.

CHAIRMAN SOULES: But the way it says right now, broad form up at the top doesn't reach a combination of elements. It's got to be fewer than a combination of elements unless you show good cause.

MR. REASONER: That's what -- to me, that's what this rule says. And the way I understand the law, you can combine elements right now in a broad form question without any showing of good cause.

PROFESSOR EDGAR: That's right. No doubt about it.

MR. REASONER: Okay. Then I respectfully submit this rule narrows the present law.

PROFESSOR DORSANEO: Well, what I would read this rule to mean or authorize, if I was just reading it, is the broad form question, the way it's worded, what Harry said, basically, is the broad form question is, is the defendant liable.

PROFESSOR EDGAR: No.

PROFESSOR DORSANEO: And then only for good cause does the charge talk about what goes into that legally. And that's really what broad

-- you have in your mind what a broad form question is, but it isn't defined anywhere.

PROFESSOR EDGAR: Well, the case law, I think, has told us what we're talking about. And there's no doubt about it that this is a shift in emphasis because currently all of these are permissible. Every one of them are permissible.

What we're telling the trial courts is that there's a priority. The first one is the broad form. Then upon a showing of good cause, you don't have to submit the broad form. You could submit it in one of three other ways. And then, finally, it was my suggestion and we may not want to adopt it, that only if required by the substantive law may you submit it another way.

MR. REASONER: Well, Hadley, the way you intend this rule, do you have to show good cause to combine elements in a broad form question?

PROFESSOR EDGAR: Yes. That's what it says.

MR. REASONER: But under existing law you do not, do you?

PROFESSOR EDGAR: That's correct. In fact, under existing law you don't have to have

good cause to do any of these. The trial court has the discretion to do them all.

MR. JONES: Harry, would it solve your problem --

MR. MCMAINS: Just take it out.

MR. JONES: -- to just take that phrase out?

MR. REASONER: Yes. I would take it out and I would take out the reference to workmen's comp.

MR. MCMAINS: Let the record reflect that I represent -- I do agree with it, that this a a limitation on what we're trying to do. Because I think it is very clear that concepts -- we keep trying to imply a lot of times what our thinking is in negligence cases to other cases.

CHIEF JUSTICE POPE: Right.

MR. MCMAINS: And I know that -- I think, what Hadley is talking about is he doesn't like the idea of submitting brakes, lookout and speed in the question as opposed to negligence. That's really what he's talking about. But the problem is that the term "combination of elements" means something much broader than that, I think, to most practitioners, particularly other folks

purely --

PROFESSOR EDGAR: Sure.

MR. MCMAINS: -- outside the tort automobile accident cases. I think it's clear if you take that out because it does look like you're contrasting a broad form question with a combination of elements that should require a showing of good cause. You're contrasting it with what broad form questions that are undefined. And if we're trying to define it by negating what we don't want it in it, it looks to me like what we don't want in it is what should be in the second paragraph and those are the things that we listed. And I don't think that you would want to exclude the ability to ask a broad form question with a combination of elements as distinguished from acts. And that's my concern and I agree with you.

CHAIRMAN SOULES: Justice Wallace.

JUSTICE WALLACE: Hadley, how do you envision submitting a DTPA case, for instance, where right now they're running 10 and 12 issues to get a case submitted?

PROFESSOR EDGAR: I'd think you would probably have good cause to submit it under the

second portion here, or maybe this might be a case required by the substantive law to submit more narrowly.

CHIEF JUSTICE POPE: Well, now, we have the first DTPA case that came up -- I can't recall its name.

MR. MCMAINS: Spradley versus Williams (phonetic).

PROFESSOR DORSANEO: Spradley versus Williams.

CHIEF JUSTICE POPE: What?

MR. MCMAINS: Spradley versus Williams.

CHIEF JUSTICE POPE: But in that case, you submit it in the terms of the statutory prohibition which to me is the broad issue. But you don't break that statutory thing down into -- because he did this and did this and did this.

Now, there may be five or six of those statutory things, but it's broad if it tracks the statute, and I think that's the law of deceptive trade practice.

MR. MCMAINS: Right. But if you put in this combination of elements, it may be that a judge would be reluctant to include producing

cause in the same question. Whereas, I think you want to encourage the ability to do that.

CHIEF JUSTICE POPE: That's right. As in a fraud case, one issue -- all of the elements defined, in this and this, but one issue.

PROFESSOR DORSANEO: I move the elimination of the "Only if required by the substantive law" sentence in this draft, if that has fallen by the way or is sinking, we ought to vote on that. I think that was Franklin's. I'm not sure what the motion is, if there is a motion.

CHAIRMAN SOULES: Hold on a minute. Let's stay on one thing at a time. Now, we're talking about questions containing a combination of elements. Is there a motion to delete that phrase?

MR. JONES: I so move, Mr. Chairman.

CHAIRMAN SOULES: Moved by Franklin Jones. Is there a second?

MR. MCMAINS: Second.

CHAIRMAN SOULES: Second, Rusty McMains. Favor, show by hands. Opposed? Okay. It's unanimously voted that we strike "on questions containing a combination of elements."

While we're on good cause, do we want to require a showing of good cause to get limiting instructions?

MR. JONES: No, sir.

CHAIRMAN SOULES: This rule does that.

MR. LOW: We went through that before because the philosophy was we're trying to give the trial judge discretion and encourage him to submit it as broad as possible. That's what we're trying to do. My argument before was, then, why impose good cause because he's going to say, well, we've always done it that way and you've got to show me something else before I can do it and I don't know what good cause is, so I'll do it. So, I would again not go with good cause but I got voted down before.

CHAIRMAN SOULES: Is there a motion to delete "upon broad form questions accompanied by limiting instructions" where it appears that that can only be done for good cause. In other words, that's right before on the questions containing a combination of elements. I don't know whether it's been discussed or not for everybody to understand what the issue is but where it appears, "upon broad questions, accompanied by limiting

instructions," where those words appear, you could only do that having first shown good cause the way this rule is written. And to me, the broad form issue carries with it the thought of limiting instructions whenever they are necessary.

PROFESSOR EDGAR: I don't think it does at all.

CHAIRMAN SOULES: Okay, Rusty.

MR. MCMAINS: Once again in negligence cases, I think it is obvious what we are trying to get at, which is in answering this question consider only brakes, lookout, speed, et cetera, on negligence question, that you ought not to have to put that in. And you ought to be encouraging them to do otherwise. The problem is it assumes that we -- that there is some generalized interpretation of what limiting instructions mean as distinguished by explanatory --

PROFESSOR EDGAR: Exactly.

MR. MCMAINS: -- which is not exactly valid.

PROFESSOR EDGAR: Well, but you see that's something that has crept into the practice, though, once we adopted the amendment to Rule 277

back in 1973 and there is a difference between them.

MR. MCMAINS: Correct. And I'm not sure there is a recognized judicial distinction among the class of instructions. That is an explanatory instruction, and albeit if it has a different office, it is nonetheless an explanatory instruction and we deal in here with allowing explanatory instructions that may be necessary. And so, I mean, I think that's what Luke's -- I know that was one of the complaints addressed in the letter.

CHAIRMAN SOULES: Exactly.

MR. MCMAINS: I understand what you're saying.

CHAIRMAN SOULES: I think that all instructions should be permitted that are proper to enable a jury to render a verdict and that good cause should not be a part of the instruction practice for any instruction. Just -- to me, the tail end of it, of this first paragraph, takes care of all instructions and definitions.

MR. MCMAINS: What we're really talking about is good cause for showing a different type of submission other than broad form

questions or whatever instructions are necessary.

MR. LOW: Right.

CHAIRMAN SOULES: That's right.

MR. MCMAINS: The only three types that we're really looking at that are in current use are broad form questions, specific questions, which we have now just deleted altogether and a general charge. If we don't authorize specific questions at all, except implicitely through the "whenever feasible" or whatever, then you eliminate check lists by requiring a showing of good cause, basically, and you eliminate general charge except with the showing of good cause and it seems to me we've covered --

(Off the record discussion ensued.

MR. BRANSON: I'd like to ask Justice Pope and Justice Wallace whether or not they perceive the last paragraph, the last sentence of this paragraph on explanatory instructions, to change existing case law on such instructions as the doctor is not an insurer and mistakes of judgment.

CHAIRMAN SOULES: Frank, please hold

that until we're through talking about limiting instructions because we need to get this resolved, if you don't mind, and I will get to you on that.

MR. BRANSON: I'm not really talking about changing the current law.

CHAIRMAN SOULES: Does it bear on the limiting instruction issue, what you're doing? I may not be understanding, Frank, where you're coming from on that. Is yours a limiting instruction point?

MR. BRANSON: Well, no, it's a general explanatory instruction.

CHAIRMAN SOULES: Okay. Right now we're trying to determine whether or not this committee wants to require a showing of good cause to get limiting instructions to a broad issue. Justice Pope.

CHIEF JUSTICE POPE: Now, limiting instructions got in with this thing on account of wide variances between the pleadings and the proof. And, I think, even in a broad charge, if you have a repetition which I don't think it would be rare if we did, of the Scott case, where they alleged A, B, C, D and E and didn't prove those but they crept in evidence G, H, I and J. Now, I

think that would be an appropriate place even in a broad charge for a limiting instruction for the charge to say you are limited to A, B, C, D and E. That would be good cause.

So, there is a difference between limiting instruction and explanatory instruction. Otherwise, we have a repetition of Scott where you just submit it to them broadly and then you appeal the case and you demonstrate, well, that wasn't pled and there was an exception to its submission; therefore, you have to reverse the case.

Now, how could it be corrected, by the trial judge saying, jury, when you answer this, we go hold you to just what's been pleaded. So, that would be good cause. There may be a place there for it, or the Court may submit good cause upon a -- for good cause upon showing of good cause, may submit it on a general charge. I don't know. We're pretty close to the general charge.

But there may be a case -- I know there are some people by agreement just submit it to the jury, you know, little bitty cases, but there may be a place for it in that case or for good cause, a limiting instruction, and I don't know what to say about the checklist form.

MR. LOW: Judge, but what does good cause mean?

CHIEF JUSTICE POPE: Good reason.

MR. LOW: Which means much discretion with the Judge anyway, so why put good cause there that allows the Judge to do it? He's going to do it if he's got reason anyhow.

PROFESSOR EDGAR: Because -- may I speak to that?

MR. LOW: Sure.

PROFESSOR EDGAR: My thought on that was this, Buddy, that it's just possible that the Supreme Court might say to a trial judge that that was not good cause. At least there is some basis for review by the appellate court. You see, you start off on the premise that you're supposed to submit on broad form.

MR. LOW: Yes.

PROFESSOR EDGAR: And then the Court realizes that there is some standard by which the Court might be a judge from an appellate level if they submit it any other way. If you don't put good cause in there, then you're going to be right where you are now and judges are just going to submit them whatever way they want to.

CHAIRMAN SOULES: San Angelo Sam.

MR. SPARKS (SAN ANGELO): I think the -- what Rusty was saying a while ago about there's only three ways to submit it, a general charge, a broad form and specific questions.

When you take the first sentence, "In all jury cases a court shall, whenever feasible" -- and that's the kicker right there -- "whenever feasible, submit the cause upon broad form questions." You don't need a good cause showing that -- what Edgar is talking about because if you submit it on a general charge and you shouldn't have, it wasn't feasible. You're going to get reversed. You understand? The next sentence just needs to say, "However, the Court may submit the cause upon a general charge," period.

Now, you have eliminated specific questions totally except when it's not feasible to do it in a broad form. And I would suppose the Supreme Court is going to say in a deceptive trade practice case not feasible, trespass to try a title, comp.

You understand that "whenever feasible" has got a purpose there, and I think what you want to do is say, okay, submit this in broad form.

You've got permission to do it by the general charge. You understand. And then all the rest of it is surplus. You get the last sentence to give instructions, explanatory instructions, definitions, might include limited, if feasible. That's what the Supreme Court will tell us, what is feasible and not.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: Let me ask you: Would it perhaps assist trial practitioners and trial courts if we're going to leave the good cause in if we put for good cause shown rather than just for good cause? That way you get into the record what the good cause is and allows the trial judge to make an informed decision, but further allows the party advocating the other side of the proposition an opportunity to evaluate the merit of their position.

CHAIRMAN SOULES: Is there any objection to inserting -- if we're going to leave in the concept for good cause, inserting the words "shown of record"?

JUSTICE WALLACE: Are we going to add shown or as stated on the record as shown might be? You've got to search directly to find it.

MR. BRANSON: All right. How about as stated on the record?

CHAIRMAN SOULES: Okay.

MR. LOW: Let me answer Hadley's question posed to me.

CHAIRMAN SOULES: Yes, sir.

MR. LOW: I think the Supreme Court is going to look at really the question of whether there is a fair submission. And I don't think they are going to be confined to just specifically this. You know, they've got pretty broad powers and if they think that it was not really a fair submission of the issues raised by the pleadings and so forth, I think what they are going to look at rather than necessarily having to hang their hat on the wording of good cause, but maybe I'm wrong. I'll say no more.

CHAIRMAN SOULES: Okay. How many feel that limiting instructions should be permitted only on showing good cause on the record? How many feel the other way, that limiting instructions should be available as are explanatory instructions whenever they enable a jury to reach a verdict?

MR. JONES: Mr. Chairman?

PROFESSOR EDGAR: What you-all have done, you've -- well, go ahead Frank.

MR. JONES: Let's get a reading on how many folks would go with Sam Sparks' suggestion.

CHAIRMAN SOULES: Well, that's what I'm getting to, Franklin. I'm taking this sentence that he's discussing one part at a time.

MR. JONES: It seems to me like you just structuralized that.

CHAIRMAN SOULES: Yes, one part at a time.

MR. SPARKS (SAN ANGELO): I'd like to hear Judge Wallace's thoughts about the term "whenever feasible." That term, to me, covers good cause and instructions or anything else.

MR. REASONER: May I say one thing on that?

CHAIRMAN SOULES: Yes, sir, Harry. And then, Justice Wallace, you can give that some thought.

MR. REASONER: The reason I would disagree with that is that we know it's feasible to submit anything on a general charge because, you know, you have Federal Courts that submit complex --

MR. SPARKS (SAN ANGELO): But you've got an instruction to do it broad form. You don't have an instruction to do it general charge. You've got an instruction to do it broad form, whenever feasible. You've got permission to do a general charge.

MR. REASONER: And when is it you would have permission to do it general charge?

MR. SPARKS (SAN ANGELO): You've just got permission.

MR. REASONER: Well, that's what I mean. You just say do it whenever you want to.

MR. SPARKS (SAN ANGELO): Whenever feasible.

MR. REASONER: It's always feasible submitted on a general charge.

MR. SPARKS (SAN ANGELO): Good. That's good.

CHAIRMAN SOULES: Let's take them one at a time here. The limiting instructions issue I'd like to dispose of, and then we're going to go to the last sentence which I think we've already got a consensus on, and we'll come back to whether or not good cause should be required to submit on a general charge. And we're changing subjects in

several ways. Hadley.

PROFESSOR EDGAR: As I understand, what Luke is now -- Rusty.

MR. MCMAINS: Luke, if I may, as I recollect the meeting in the Supreme Court, the reason for the insertion of good cause was as a discouragement to do it any other way for the reason that the current rule has good cause to submit it on a general charge and the courts won't do it. We know that.

So that the thesis, I think, that we operated on was that since you can't get a general charge now in any trial court when anybody opposes it because you've got to have a showing of good cause and there isn't any trial judge that's going to do that, we know by experience, that if you keep the same test, then they also are going to be reluctant to try and do anything other than the broad form questions. That, at least, was the thesis, I think, when we started.

MR. JONES: I disagree with that, Mr. Chairman.

CHAIRMAN SOULES: Franklin Jones.

MR. JONES: The rationale in the subcommittee and as reported to this committee and

which, as I recall, this committee adopted was, we wanted to liberalize the Court's option to use general charge. Consequently, we took the old language of the old rule which says "for good cause shown subject to review" and deleted it and substituted the language simply "for good cause."

And I must disagree with my friend Rusty that we were trying to discourage entirely the use of general charge. We were not. And there are occasions when we want the trial courts to use a general charge and that was the consensus of this committee when we adopted 277 over in the Court's chambers.

CHAIRMAN SOULES: Certainly, the committee voted that for good cause a general charge should be considered by trial judges to be available in Texas, and there was no doubt about that, and it was not to be as available as a broad form because broad form was to be the preference in all cases. And that's the way we wound up the first session on your report, as I remember it, Franklin, and then went back to the drawing board with some of these, and now we're getting down to the specifics.

Just what do you have to show good cause

for? The committee has consistently taken a position that to submit a general charge, good cause had to be shown. Now, there is dissent about that and Franklin is in that dissent. He would like for the general charge to be available -- just as available as a broad form submission, but that's not where this committee is or has been up to now by way of consensus.

So, there's a difference between the availability -- we have, as a committee, been intending to propose -- there's a difference in the availability of a general charge and a broad issue charge. General charge is not as available to the trial judge. And I think that Sam has stated it to some extent there that if we say "whenever feasible," that clearly indicates signals of a disposition or favoring of the broad charge over anything else. But we can only get these things resolved one issue at a time.

MR. BRANSON: I'm not sure as I look --

CHAIRMAN SOULES: And we're changing -- let me -- I want to get back to whether or not -- what's going to be the test for getting a limiting instruction. Is it going to be good

cause, or is it going to be if that limiting instruction enables the jury to render a verdict, if it's a proper instruction that enables a jury to render a verdict. That's the issue we need to decide right now. Okay, Hadley Edgar.

PROFESSOR EDGAR: No, I'll yield to Judge Pope.

CHAIRMAN SOULES: Judge Pope.

CHIEF JUSTICE POPE: Well, there is someone ahead of me, but I will say this: Why don't we resolve this limiting instruction business by dropping down there to the last sentence right above the second paragraph so that it would read this way: "In submitting any case, the Court shall submit such limiting or explanatory instructions and definitions." They're different things. They serve different purposes. And a judge is going to show a little bit of sense, and that takes care of the limiting.

CHAIRMAN SOULES: Okay. That doesn't take care of the issue that's on the table, though.

PROFESSOR EDGAR: No, it doesn't take care of the issue of which I'm concerned.

CHAIRMAN SOULES: The issue on the table is -- is the basis on which you get a limiting instruction going to be good cause shown or enable the jury -- proper instruction that enables the jury to render a verdict. Now, Judge, see right in the center, that underlying language is a good cause basis.

CHIEF JUSTICE POPE: Okay. I understand that. I don't see any reason that you should have to show good cause to have a limiting instruction to a jury just so they won't go off here and take into consideration unpled material any more than you have to show good cause for an explanatory instruction. Well, it's just to help enable the the jury to reach a verdict.

CHAIRMAN SOULES: Hadley Edgar, rebuttal?

PROFESSOR EDGAR: Well, with some trepidation, Judge Pope, I make the following remarks: It seems to me that a limiting instruction is really in the nature of a special issue. That is, you are confining the jury and directing the jury in answering this question to consider only brake, speed and lookout. Now, that is a theory of recovery or part of a theory of

recovery or a part of the theory of defense. Therefore, that is part of the litigant's case.

An explanatory instruction, on the other hand, is an instruction that enables the jury to render a verdict. And that -- and I think Rusty used this term one time and it's for this purpose I certainly think it's adequate. Explanatory instructions belong to everybody. Issues belong to the litigant. And limiting instructions have a much more substantially different purpose in the charge than explanatory instructions do. And, therefore, it's for that reason that a limiting instruction in order to preserve error to an alleged defect in a limiting instruction, a party preserves error as if it were an issue as distinguished from it being an instruction.

And so it seems to me that they are different and that they should be treated differently. And if you simply say that such limiting instructions shall be submitted and that they have the dignity or the same prominence in the charge as an explanatory instruction, then you have really eliminated the basic purpose in how you preserve error to them, and that's just contrary to what I think ought to be done.

CHAIRMAN SOULES: Judge Pope, did you have a reply to that?

CHIEF JUSTICE POPE: I'm not sure I followed everything that you were saying. If I want to prove a nuisance case and it's got certain elements, all I've got to do is, do you find from the preponderance of the evidence that the defendant maintained a nuisance? All right. That's his issue. Now, the explanatory instruction that he owns, not the world, is the definition that says this is what a nuisance is. It's got this and this and this. The same thing about fraud; the same thing about statute of limitations; the same thing about trespass to try title; one issue and all of the elements. That's the explanatory instruction and that belongs to the plaintiff. He is entitled to that.

MR. BRANSON: Statute of limitations belongs to the defendant, doesn't it?

MR. MCMAINS: The discovery rule belongs to you.

CHIEF JUSTICE POPE: I'm talking about adverse positions, is what I was thinking about.

CHAIRMAN SOULES: Rusty and then San Angelo Sam.

MR. MCMAINS: Well, I guess my -- what I was really proposing is -- and personally as I perceive the cases, the word "limiting instructions" in the current rules do not appear. They don't exist in the current rules. They're only in the case rules. They are, in fact -- I mean, basically, as I -- in the current case law, as I perceive it, everything is either an issue and now a question, an instruction or definition. It doesn't matter -- I mean, because that's all they are. You're either defining something, explaining something, and the limitation is nonetheless, in my judgment, an explanation. I think all limiting instructions, if you were to follow set theory, are within the set of explanatory instructions. Even explanatory instructions are not in the current rules, just instructions.

Now, if you want to take out explanatory and just say such instructions and definitions as shall be proper to eliminate this distinction, I don't think we should be emphasizing limiting instructions, requiring or not requiring good cause to give limiting instructions. The only function of instruction and/or definition should

be to help the jury get to the right result under the substantive law.

CHAIRMAN SOULES: Right.

MR. MCMAINS: And it doesn't matter whether that's because of the state of pleadings or whether that's because of the state of substantive law. And I share Hadley's concern about emphasizing it by delineating limiting instructions which would be presumed to be, I believe, by a lot of trial courts, a codification of what the courts have been referring to as limiting instructions. And I don't want to emphasize that either because I think that does detract from our purpose.

CHAIRMAN SOULES: Let me see if this gets at it: If we delete the good cause requirement for limiting instruction and then strike explanatory out of the last sentence so it says that "in submitting any case, the Court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict," that was your suggestion, I think, was it not, Rusty, that you not use the word "explanatory" or "limiting"?

MR. BRANSON: If you do that, you're

going to open the door for all kinds of instructions.

MR. SPARKS (SAN ANGELO): It's my turn next.

CHAIRMAN SOULES: Okay. I'm sorry, Sam, it is your turn.

MR. SPARKS (SAN ANGELO): All right. We hashed this out once before and we did it on a no evidence point. If you play it lookout, brakes and speed and you've got no evidence of lookout, brakes and speed and you've got evidence of something else, you're going to get reversed. Whether there's a limiting instruction in there or not, you've done away with the other appellate points.

I think we need to keep the word "explanatory instruction" in there, and then to get this down to where we can handle it, I'd like to make a motion. That is, that 277 read as follows: "In all jury cases the Court shall whenever feasible submit the cause upon broad form questions. The Court may submit the same -- or the cause upon a general charge. In submitting any case, the Court shall submit such explanatory instructions and definitions as shall be proper to enable the jury

to render a verdict." That's my motion.

CHAIRMAN SOULES: Is there a second?

MR. MCMAINS: Second.

CHAIRMAN SOULES: Further discussion?

MR. MCMAINS: I didn't understand all the rules.

CHAIRMAN SOULES: Well, here's what it does. It starts out -- the first sentence is the same. The second sentence, you would strike "however for good cause" out of the proposal and start with a capital T, "The Court may submit the same -- the cause upon a general charge," period. Then you would strike everything down to "in submitting any case," and you would leave the last sentence as it's written. So the first sentence is intact and the last sentence intact. "The element of good cause" would be eliminated from the second one, and the only thing that you would have there would be "general charge." You would not have the other types of submissions mentioned. Justice Pope.

CHIEF JUSTICE POPE: Of course, it is no secret that I believe in the broad charge, but now let me tell you what we are doing here now. And we may be coming out a little bit foolish. We

say in the first sentence that it shall be a broad form charge --

MR. SPARKS (SAN ANGELO): Whenever feasible.

CHIEF JUSTICE POPE: -- whenever feasible. Now, that's good. And then in the next one we say the Court may -- it's optional -- but we say the Court may submit it on a general charge. And is that the only alternative?

CHAIRMAN SOULES: Yes, sir.

MR. SPARKS (SAN ANGELO): No. Whenever feasible, you've got somewhere that you can answer specific questions.

CHAIRMAN SOULES: That's the only alternative in Sam's proposal to a broad issue as a general charge.

CHIEF JUSTICE POPE: That's right. That's the only alternative. I would say this that --

CHAIRMAN SOULES: That's stated.

CHIEF JUSTICE POPE: -- I'm equally as -- for a member of the veteran jury charge thing that's meeting on the floor right above us as I am on this committee but they are having -- we are having our final meeting today and tomorrow and we

haven't written that thing upon the basis of what you said, that we had passed on this thing in April, I think it was. And if we outlaw the option of a checklist form or the option of something else, limiting instruction, well, we've got to start over and rewrite that book.

CHAIRMAN SOULES: Judge, no, the last sentence does not outlaw. The last sentence permits limiting instructions. It does not outlaw limiting instructions. It simply reduces the burden to get them from showing a good cause to whatever -- what enables a jury to reach a verdict. Now, I don't --

PROFESSOR EDGAR: Well, it seems to me that --

CHAIRMAN SOULES: Sam, would you accept the insertion as Judge Pope had suggested in the last sentence of the word "limiting," so it would say, "In submitting any cause, the Court shall submit such limiting or explanatory instructions"? I know Rusty doesn't want that, but --

MR. SPARKS (SAN ANGELO): My problem is that we're trying to do away with appeals for preponderance -- I mean, against the great weight

of preponderance of the evidence and things -- we're trying to get down to no evidence.

CHAIRMAN SOULES: No, that's not right. That doesn't have anything to do with this.

PROFESSOR EDGAR: That's not what we're talking about here, Sam.

CHAIRMAN SOULES: Not at all.

PROFESSOR EDGAR: What your proposal does is, the trial Judge sees the rule that you proposed and says I've only got two options; I either submit broad form or a general charge.

MR. SPARKS (SAN ANGELO): I disagree with that -- but the words "when feasible."

PROFESSOR EDGAR: Yes, but you see you're not giving the Court any guidance at all.

CHIEF JUSTICE POPE: That's right.

MR. SPARKS (SAN ANGELO): All right.

PROFESSOR EDGAR: Just put yourself in the minds of the trial judge.

MR. SPARKS (SAN ANGELO): Then I'll tell you how to satisfy that if you're going to do that. Take out the permissive general charge. Just drop that and say, "whenever feasible submitted as a broad form question." Now, it may

be -- it may be you get a general charge. The Court says, okay, that was feasible; that was not feasible. You may need specific questions. You know, that's something on the type of case you're litigating.

PROFESSOR EDGAR: But you're giving the trial court no direction about what the Court might -- when it's feas -- or what other options are available to it other than a broad form or a general charge. That's all you've told the trial judge.

MR. SPARKS (SAN ANGELO): I even asked you, Hadley, if you took out the permissive -- the Court may give a general charge, take that out. You drop back up to the top and just say, "In all jury cases the Court shall whenever feasible submit the case upon broad form questions," period. Then you drop all the way to the bottom and say, "submitting any cause, the Court shall submit explanatory instructions."

Now, you haven't given them just two choices. You've told them, submit it broad form, when feasible. Sometimes it's not feasible because you've got to have specific questions, trespass to try title or whatever. On the other

hand, you could still have a general charge. You know, you tell me you're the professor. I'm just trying to get it down to what we're really trying to do.

PROFESSOR EDGAR: Well, what I'm saying is that the trial judge and the lawyers, it seems to me, need to have some guidance to what form of submission --

MR. SPARKS (SAN ANGELO): But we have Lemos versus Montez. We have a Supreme Court that gives us directives. We have fraud, we know the elements. We have deceptive trade practice that has to be submitted. That's --

CHAIRMAN SOULES: I'm going to have to get a consensus on this. As we try to take this whole paragraph from one end to the other, it just -- you know, we keep changing subjects. Let me get a consensus.

MR. SPARKS (SAN ANGELO): I was not changing my motion. I was asking a question for my information, what do we do, in your opinion, if we delete the permissive sentence, "the Court may submit upon a general charge."

CHAIRMAN SOULES: Okay. Rusty, I'm going to call on you, and let me get a consensus.

How many think good cause should be shown before you could get a limiting instruction?

MR. SPARKS (SAN ANGELO): I don't think that's your question. Have you beaten your wife enough until you're tired of it? I don't like your question.

CHAIRMAN SOULES: Well, I'm sure you don't, but -- we're either going -- we've got to get this rule --

MR. SPARKS (SAN ANGELO): You're asking me, do I have to have good cause to show a limiting instruction. I'm telling you I don't want a limiting instruction, a good cause or anything else.

CHAIRMAN SOULES: I know it, Sam, but I'm trying to get a -- take them one step at a time. If we're going to have limiting instructions in this rule, if we're going to use the term, are we going to have it up in the part that requires good cause or are we going to have it down in the last sentence if we have it at all, to enable the jury to render a verdict? Let me see a consensus on that, please.

PROFESSOR EDGAR: Well, let me just say one thing in favor of it, Luke. Limiting

instruction tells the jury that it can only consider certain parts of the theory of recovery or defense, and you've got to have good cause to get that to the jury in some form. You've got to have evidence on it, you've got to have pleading on it. You just can't -- it's part of an issue and it's got -- it's got to be based on good cause. I'm not talking about the form list submission. I'm talking about submitting the concept of limiting instruction to the jury.

CHAIRMAN SOULES: That's what enabling the jury to render a verdict -- Harry.

MR. REASONER: Well, you know, I would really like to urge that we consider Rusty's suggestion that we simply go to saying instructions as shall be proper to enable the jury to render a verdict, I mean --

CHAIRMAN SOULES: Is that a motion?

MR. REASONER: Yes. I move that we do that. That's what the case law -- well, yes, I make that motion and let me say why I think we should --

CHAIRMAN SOULES: Okay.

MR. REASONER: The more we talk about trying to conceptualize the difference between

limiting instructions and explanatory instructions, it seems to me we're just creating new categories to argue over because at least in my mind, there is no definition -- there is no way to determine whether any particular instructions -- for example, when you were pointing at --

MR. SPARKS (SAN ANGELO): Are you moving to amend my motion by deleting the word "explanatory"?

CHAIRMAN SOULES: In effect, yes.

MR. SPARKS (SAN ANGELO): Well, if that's what he's doing, I'll accept it. But if he just wants to sit here and talk and eat up my lunch hour, then, you know --

MR. REASONER: No, you're right under the Robert's Rules of Procedure, I'm out of order. I think technically you have the right to call a question on your motion before we discuss it.

CHAIRMAN SOULES: The only other thing is we have eliminated -- be sure that everybody understands. We have eliminated that -- or did you -- you did not change your motion to take out "the Court may submit the cause upon a general charge," did you, Sam? That's still in your

motion?

MR. SPARKS (SAN ANGELO): It's still in there and I wanted somebody to give me a -- some feedback on -- have you eliminated a case that has to be submitted upon specific questions?

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: My observation actually goes back almost to the threshhold. To be perfectly honest with you -- and maybe Dorsaneo or Hadley can figure out something -- but I can't think of a case that can't be submitted on a broad form question. Now, I mean, I'm not saying that there's -- that if you put enough instructions in there -- and again we say broad form questions -- I don't see any -- I don't know of any case because in Federal Court, they do it all the time. You know, they do it on a general charge which may actually be a form of broad form question.

PROFESSOR EDGAR: That's exactly what it is. That is one big question.

MR. MCMAINS: All I'm saying is if what we are trying to do is to force the Court to ask broad form questions and keep the book intact, can't we do that by telling them that they've got

to submit it in broad form questions, period, and that they will give what instructions are necessary to enable the jury -- are proper to enable the jury -- explanatory instructions and definitions and that when they do that, it's not going to be objectionable, that it's a general charge or that something more narrowly wasn't asked.

CHAIRMAN SOULES: Are you suggesting that Sam's motion be amended to just include the first and last sentences of the first paragraph and to delete everything in between?

MR. MCMAINS: That "whenever feasible" be taken out.

CHIEF JUSTICE POPE: Mr. Chairman?

CHAIRMAN SOULES: Let me get done here and then I'll get to Justice Pope.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Why don't we break for lunch? Justice Pope.

MR. SPARKS (SAN ANGELO): Let's take a break to eat.

CHAIRMAN SOULES: Chief Justice Pope, should we just go ahead and take our lunch break and then get back to this after lunch? How many

feel that's a good thing to do? Judge Pope.

CHIEF JUSTICE POPE: I'll temporarily yield the floor since you had recognized me. I'm always hard to get.

(Recess - lunch.

CHAIRMAN SOULES: We're ready to proceed with the debate on Rule 277, as proposed. I apologize for there being too few people here but we need to get on with our business so we should shut the door and proceed. Okay. Sam, would you restate your motion so we can have it on the floor for debate?

MR. SPARKS (SAN ANGELO): I think what would be better is if I just withdraw my motion, if possible, and defer to Franklin Jones. He's the committee person, so I'll pull the motion.

CHAIRMAN SOULES: All right. The chair recognizes Mr. Franklin Jones.

MR. JONES: Mr. Chairman, I move the adoption of the following language for the first paragraph of Rule 277: "In all jury cases the Court shall whenever feasible submit the cause

upon broad form questions," period. "In submitting any case, the Court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict," period.

MR. SPARKS (SAN ANGELO): I'll second that.

CHAIRMAN SOULES: Moved and seconded. Any further discussion? Those in favor show by hands.

MR. JONES: I have another -- just one other change which I have made.

CHAIRMAN SOULES: All right. Excuse me.

MR. JONES: If you will turn to the last paragraph in the Rule on page 3, and I would move that after the word "answers," there be placed a period and the rest of the language in that paragraph stricken.

CHAIRMAN SOULES: Let me take it one paragraph at a time --

MR. JONES: All right.

CHAIRMAN SOULES: -- without trying to bunch those together.

MR. JONES: I'm back to my motion on the first paragraph.

CHAIRMAN SOULES: Okay. The first paragraph only, is there discussion on that proposal?

PROFESSOR EDGAR: May I just ask a question?

CHAIRMAN SOULES: Yes, sir, Hadley.

PROFESSOR EDGAR: I just want us to think now about adopting this provision. As it is now worded, assuming that the Judge determines it is not feasible, what guidance, then, is the Court given as to an alternate form of submission? Well, obviously not given any guidance and I just want us to think about whether or not we are really creating some problems that will take a long time to resolve.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Of course, my answer to that is that you shouldn't give them the option by deleting "whenever feasible."

MR. SPARKS (SAN ANGELO): I agree with that.

MR. MCMAINS: Because if you delete "whenever feasible," then you're telling them they have got it broadly submitted. And I come back to the same problem that in all of our

discussions I have yet to visualize a lawsuit that cannot be submitted on one or more broadly asked questions. And since it's questions in the plural, the fact that it requires two or three questions as opposed to one, just doesn't seem to me to be impediment.

CHIEF JUSTICE POPE: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, Judge Pope.

CHIEF JUSTICE POPE: We have spent, I suppose, 50 years thinking, when we sit around a table like this, of those kinds of actions that lend themselves to this type of thinking, and it always winds up a personal injury or a death case. But out there, there are 434 bodies of law other than negligence.

Now, in the construction business, for example, and there's only 14 percent of the cases that are negligence cases and about 30 percent of the cases, that are filed are business cases and about the same number are divorce cases.

But let's take a construction case. Take Black Lake that was decided 10 or 12 years ago. It was a case that involved a long pipeline and it involved hundreds of thousands of dollars. The

lawsuit itself involved something like $900,000 worth of claims. And what happened the first 10 miles on the pipeline involved a change of plans by the owner of the pipeline, and the next 20 miles it was bad weather and act of God. And then for another 10 or 12 miles, it was the demand by the pipeline company that he put on two crews to work instead of one crew to work.

What happened at one end of the pipeline was one kind of a lawsuit and then there was another. And that was submitted to the jury on a whole lot too many issues but the point is, that wasn't a one- or two- or three-issue case. There were about seven or eight or nine or ten different lawsuits between the same two parties on the same pipeline.

Now, I know that it can be said, well, there are broad issues there on fact. All of this is my way of asking if we do not want to leave to the discretion of the judge a checklist. I can remember when I was a trial judge and I had a case like that, and back in those early days, I had listed just by a few words and then I had yes, no, yes, no, yes, no, went down the whole page. That was a check list.

Now, when we think in terms of what we always think of, we say, oh, we don't need a check list. But there are lawsuits out there that you've got to have a checklist in order to make it intelligible to the jury. So, I think whether we want -- I don't know whether we want to say that that's an alternative. I really liked the rule that we had before we came in here this morning and the one that we had -- except for that part on questions containing a combination of elements. That came out.

CHAIRMAN SOULES: Any other debate on the motion that's on the floor?

PROFESSOR DORSANEO: Mr. Chairman, I'd like to speak in favor of Franklin Jones' suggestion, basically, because I think we will never be able to define for each and every case that's going to come up, the breadth of the broad form issues. It really is a matter of attitude and custom. It's now come to the point of saying it should be submitted as broadly as it feasibly can be submitted to submit the case fairly.

And the idea of a checklist is not to me incompatible with the idea of -- with broad form questions. It's just a matter of A's and B's and

C's rather than ones and twos and threes. It's a matter of form. The checklist does suggest -- it does, because of our history, separate and distinct, and that makes me bothered because it gets us back pointed in what I believe is, in fact -- and I've been convinced principally by your work, Judge Pope -- as the wrong direction.

So I would say let's keep it simple and it will work as well as it can work. What we've been doing over the last several months is crossing out a lot of this complexity that's caused trouble. I think we're better off just taking the simple approach, recognizing that broad form questions -- we couldn't really devise a definition that would be completely satisfactory.

CHAIRMAN SOULES: Anything new? Frank Branson.

MR. BRANSON: What if you put a little parenthesis in there and say, "broad form shall include general charge and on some occasions checklists"?

CHAIRMAN SOULES: Anything else?

MR. BRANSON: Hadley is right. I want a general charge probably as much as Franklin does. But there are going to be some issues just

like Justice Pope indicated where the true general charge is not going to work and the average trial judge doesn't have the experience of the judges on this committee in dealing with jury charges. And if you don't give them a little bit of guidance, I fear the appellate courts are going to be clogged with our action today for the next few years.

CHAIRMAN SOULES: Anything else? Those in favor of the motion show by -- Did you want to speak again, Rusty, excuse me?

MR. MCMAINS: The only concern that I have is when we say -- and I do share to some extent Hadley's concern in terms of characterization of broad form questions, and didn't you say "whenever feasible," but then you -- you leave out any options. If you're not willing to take the "whenever feasible" out, I would prefer to move it to say broad form questions to the extent feasible to indicate that we are trying to get the broad form questions. Obviously, what form they take in their broadness is what should be determined based on feasibility --

PROFESSOR DORSANEO: Yes.

MR. MCMAINS: -- rather than

characterising broad form questions different from checklists, general charge, et cetera.

PROFESSOR EDGAR: That might be the solution.

MR. MCMAINS: And that way we've given them a command to submit them as broadly to the extent feasible.

CHIEF JUSTICE POPE: How would that read, now?

MR. MCMAINS: It would just say "in all the jury cases the Court shall submit the cause upon broad form questions to the extent feasible."

CHAIRMAN SOULES: Do you accept that change, Franklin?

MR. JONES: Hadley, is that all right with you?

PROFESSOR EDGAR: Let me -- let's do something else. While we're just sitting here trying to improve this thing at one fell swoop, rather than use the term "broad form question" -- because when you think of broad form questions, kind of of the first thing that comes to your mind is Lemos versus Montez. That's a negligence case, and we're trying to get a form that would work for

all kinds of cases.

So, why don't we just simply say something to the effect that in all jury questions -- in all jury cases, the Court shall submit questions to the jury as broadly as possible -- shall submit questions to the jury broadly to the extent possible, or something like that.

CHAIRMAN SOULES: Broad form questions has now got a meaning.

PROFESSOR EDGAR: But only in a negligence case.

CHIEF JUSTICE POPE: Oh, no.

CHAIRMAN SOULES: Well, no it has a meaning in every -- oh, no.

MR. MCMAINS: My concerns about as broad as possible is that it gives rise to the new form of objection. Your issue ain't as broad as mine is.

PROFESSOR EDGAR: All right. I'll withdraw my comment. I'll withdraw my comment.

CHAIRMAN SOULES: Franklin, is the suggested change okay, in all jury cases the Court --

MR. MCMAINS: "In all jury cases the Court shall submit the cause upon broad form

questions to the extent feasible."

CHIEF JUSTICE POPE: Now, go on with the rest of that paragraph.

MR. MCMAINS: The rest of the paragraph "in submitting any case" --

CHIEF JUSTICE POPE: Wait a minute now. All right.

MR. MCMAINS: -- "the court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict."

CHIEF JUSTICE POPE: Okay.

CHAIRMAN SOULES: Is that your motion Franklin?

MR. JONES: Yes, sir. I will accept that amendment, Mr. Chairman.

MR. BRANSON: I'll second it.

CHAIRMAN SOULES: Okay. Those in favor show by hands. Those opposed?

MR. JONES: One other change, Mr. Chairman, I would like to move.

CHAIRMAN SOULES: There was one opposed. Let me see by hands again, those that were for. I'm sorry to have you hold your hands up. Just a second. 18 for and one against.

MR. LOW: In connection with this, I'd like to make a motion that we just not consider this at the next meeting.

CHIEF JUSTICE POPE: I second that one.

MR. JONES: Mr. Chairman, I have another motion on Rule 277 and that is in the last paragraph of the Rule on page 3 of our booklet, the next to the last line after the word "answers," a period be inserted and the remainder of that sentence be deleted.

MR. ADAMS: Second.

CHAIRMAN SOULES: Well, that language was put in when the broad issue language came in to encourage judges to use broad issues and not be fearful that if they did use broad issues with instructions, that they would be constantly subject to review for comment. And that "but the Court's charge shall not be objectionable on the ground," that is to facilitate broad issue submission and support it.

MR. SPARKS (SAN ANGELO): But what you're doing, you've already taken out the word "explanatory" in the first paragraph and given the courts full instruction and power. Why do you

need to repeat it here and limit it to an explanatory instruction.

CHAIRMAN SOULES: Well, "explanatory" should come out --

PROFESSOR EDGAR: The word "explanatory" should be removed.

CHAIRMAN SOULES: -- of the last line. But this language is supportive of the simplification process that we just enhanced by passing 277.

MR. JONES: I feel it is -- that last phrase does not --

CHAIRMAN SOULES: Do you think that the Court's charge should be objectionable if it incidentally constitutes a comment?

MR. JONES: I think if you read what I've left in there -- let me just read it.

CHAIRMAN SOULES: Okay.

MR. JONES: "The Court shall not in its charge comment directly on the weight of the evidence or advise a jury of the effect of their answers. But the Court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises a jury of the effect of their

answers," period.

PROFESSOR EDGAR: Yes. It's got a problem, though.

MR. MCMAINS: That doesn't explain what incidentally means.

MR. JONES: I don't think that last phrase does it any better.

PROFESSOR EDGAR: But, you see, there are some instructions that may not properly be a part of the Court's charge, and it's only those that are properly a part of it that are going to be saved.

CHAIRMAN SOULES: Okay. Well, the motion is to delete the words in the last two lines "where it is properly a part of an explanatory instruction or definition." We can go back and take out "explanatory," if we leave that.

MR. SPIVEY: That cleans it up. It looks to me like that's an improvement.

PROFESSOR EDGAR: Well, but now, stop and think about it, though, Broadus. Let's assume that defense counsel wants an instruction that doctors are not insurors of medical care.

MR. BRANSON: Shoot the son of a

bitch.

PROFESSOR EDGAR: You see that -- if you just stop it where you say "but the Court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advise the jury for the effect of their answer," then that would be proper; it wouldn't be objectionable. Because the limitation here where it is properly a part of an instruction or definition is what saves you. So, I don't -- I think you want to leave that there.

MR. BRANSON: I think, specifically, Franklin, that was put in there at the other hearing to take care of the deceptive trade practice problems, too, where it would be a requested instruction telling the effect of Trebler (phonetic) which is up in the current body of law, not a proper instruction, but without this might be.

MR. JONES: Well, let's take out "explanatory," then.

PROFESSOR EDGAR: Yes. That needs to be removed.

CHAIRMAN SOULES: All right. If we take out "explanatory," is the rest of it -- is

the consensus we leave the rest of it, just take out "explanatory"?

MR. JONES: I'll accept that amendment.

CHAIRMAN SOULES: Okay. Anyone object to that? There is no objection. So we would need to take out the word "explanatory" in the last line of the proposed rule and --

MR. SPIVEY: Just the word "explanatory," Luke?

CHAIRMAN SOULES: Yes, sir.

MR. SPIVEY: Hadn't we better do that by motion?

MR. SPARKS (SAN ANGELO): We've already got it in a motion and Gilbert seconded it.

CHAIRMAN SOULES: Well, I've got a consensus and no one objected. All in favor, show by hands. Opposed?

JUSTICE WALLACE: Can I ask one question?

CHAIRMAN SOULES: Yes, sir, please.

JUSTICE WALLACE: I thought I heard somebody say down there on this addition to the first sentence, broad form issues to the extent

feasible, something about rendering a verdict. Was that part of the motion? Was that entered in or not?

CHAIRMAN SOULES: No, Judge.

JUSTICE WALLACE: Okay. I wanted to make sure if it was that I got it.

MR. MCMAINS: That was the second sentence, Judge.

PROFESSOR EDGAR: Is the language here on page 3, the fourth line -- fifth line up, where it says, "but the Court's charge is," is that plural in the current rules? That should be singular, shouldn't it?

CHAIRMAN SOULES: It should be singular.

MR. SPARKS (SAN ANGELO): That's a typo.

PROFESSOR EDGAR: Well, I don't know whether it is or not.

CHAIRMAN SOULES: It's singular.

PROFESSOR EDGAR: All right. That should be eliminated, shouldn't it?

CHAIRMAN SOULES: That's right. That should be dropped, texturally.

MR. BRANSON: Before we leave this

section, could I get an answer of the question I asked earlier of Justices Pope and Wallace, and that is, whether or not by using the term "proper" back on page 1, where we say, "In submitting the case, the Court shall submit such instructions as shall be proper to enable the jury to render a verdict"? Have we done anything to the existing law keeping out the type of instruction that Hadley requested about doctors not being insurors and errors of the judges not being negligent.

CHAIRMAN SOULES: That's verbatim under the present rule.

MR. BRANSON: I don't want to change the existing body of law in that area unless we do it intentionally.

CHAIRMAN SOULES: That's the current rule. That's the language that's in the current rule. Since 1973 whenever we changed from "necessary" to "proper," this is the way it's been worded.

MR. JONES: I want to hear this advisory opinion.

MR. BRANSON: Well, the Court has written previously on that. I just wanted to make sure we weren't doing something inconsistent with

previous decisions.

CHIEF JUSTICE POPE: I just was going to say just what Luke has said. We thought that we were getting rid of the harshness and the basis for reversals when we got rid of the word necessary in 1973 and changed it to proper. And about all we have said since then, as I recall it, is that to be proper, it at least has to be legally correct because we reversed one case because the instruction was just a legal misstatement. And then the other stuff -- the Acorn (phonetic) case and I forget what the others --

MR. MCMAINS: Fleshmen versus Gadeano (phonetic); Roper.

CHIEF JUSTICE POPE: Yes, we struck those because they were just nudging, and nudging is a word of art, too.

MR. MCMAINS: Commenting on weight.

CHIEF JUSTICE POPE: Yes. I think proper is about as proper as we can get.

MR. BRANSON: Is it your opinion, Justice Pope, that we're not changing the body of existing law in that area by wording this?

CHIEF JUSTICE POPE: I think we're

keeping it intact.

MR. BRANSON: Okay.

CHIEF JUSTICE POPE: I'm afraid that if we change it -- because there are a lot of folks out there, you know, that take the jury and lecture them on their side of the case.

MR. LOW: This was not in effect when the Court reversed the case and said a products manufacturer is not an insuror, something to that effect.

MR. SPIVEY: How would that rule -- just so we know now -- can you give us a --

CHAIRMAN SOULES: Run down on it?

MR. SPIVEY: Yes. Read that rule.

CHAIRMAN SOULES: Okay. The first paragraph is just like Rusty last read it.

MR. JONES: Do you want me to read it?

MR. SPIVEY: I'm not sure -- does any of this italicize part of it --

CHAIRMAN SOULES: Let me read it because if mine is wrong, then I need to get it straightened out because I'm the one that's going to have to write it back to the Court. So tell me if this is right: "In all jury cases the Court

shall submit the cause upon broad form questions to the extent feasible." From that point we omit down to "In submitting any case, the Court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict."

MR. MCMAINS: May I make one point?

CHAIRMAN SOULES: Yes, sir.

MR. MCMAINS: I have been troubled, and I think maybe this is the only -- this is one of the concerns that Frank has about the proliferation of instructions, possibly, is the compulsion to submit instructions and definitions, that it says, "The Court shall" -- Does anybody else have any problem with that?

CHAIRMAN SOULES: That's the way that rule is right now.

PROFESSOR DORSANEO: I have a problem with it. I think it's a fact of history the way things have developed that the initial scheme you were only meant to give definitions and then it was relaxed to give instructions as well as -- as well as definitions, but they had to be, in effect, definition -- I mean, they had to be, as I read the cases, necessary instructions. Now, it's

proper and I don't think the "shall" part makes sense anymore. I think that --

MR. MCMAINS: All I'm saying -- I mean, I'm not so sure that it isn't really what we're saying it should. I'm not sure if that makes any difference.

CHAIRMAN SOULES: A party is entitled to the instructions that are proper to enable the jury to render a verdict, and if they don't do that, they're not entitled and that's what it says.

MR. JONES: What you're fixing to do is mess with the bodies of the law.

CHAIRMAN SOULES: That's right. This is the way that the rule has read since 1973 and we've got cases on both sides of when you've instructed too much and when you haven't instructed enough. So, we've got on both sides of this sentence some guidance. If we change that word, it's going to have to be changed for a reason, presumably to get a different result in what the case is telling us. Franklin.

MR. JONES: To follow the manner of procedure, Mr. Chairman, I believe that there was a motion on the floor and that you were reading

the rules so we could vote on the motion.

MR. SPIVEY: Yes. We want to get the rules read.

JUSTICE WALLACE: May I make one insignificant change here? We're talking about the first sentence "in submitting the cause" and then the second sentence "in submitting the case," it should be "cause" in both places.

CHAIRMAN SOULES: Yes, sir.

PROFESSOR EDGAR: May I make -- why don't we just change that just a little bit more, if I might add this to it. And I was looking at that same thing, Judge Wallace. Why don't we just say in the second sentence -- we've already said "the Court shall submit the cause on broad form questions to the extent feasible." Then say, "the Court shall include such instructions -- such proper definitions and instructions to enable the jury to render a verdict."

MR. BRANSON: That's a little cleaner.

PROFESSOR EDGAR: It's a whole lot cleaner.

MR. REASONER: I don't agree with that.

PROFESSOR EDGAR: Well, we don't want

to say "in submitting any case." That's redundant.

MR. REASONER: I'm not arguing with that.

CHAIRMAN SOULES: Why don't we just capitalize "The Court shall"? Capitalize "The Court shall" and strike "in submitting any case."

MR. REASONER: Yes. I think that's good.

PROFESSOR DORSANEO: Is that really getting back to the general charge?

CHAIRMAN SOULES: Then we delete the italicized language that follows that and pick up the language, "Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the questions," and the rest of that page 147 of the materials is italicized and it's deleted.

MR. REASONER: My "question" needs to be made plural, doesn't it, Luke? At least it's singular in mine. I guess you can leave it either way.

CHAIRMAN SOULES: Do we need to make a grammatical correction?

MR. REASONER: No, I think it's okay.

CHAIRMAN SOULES: Then, the first bracket is surplusage there. Starting on 148 the rule picks up, "In any cause in which the jury is required to apportion the loss among the parties," skip down, "a question or questions inquiring what percentage, if any, of the negligence or causation as the case may be" --

PROFESSOR EDGAR: That's "The Court shall submit a question or questions."

CHAIRMAN SOULES: I'm sorry. I missed it there, didn't I? Start over. "In any cause in which the jury is required to apportion the loss among the parties, the Court shall submit a question or questions inquiring what percentage, if any, of the negligence of causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been coupled. The Court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of the negligence of causation, if any, of the person injured."

PROFESSOR EDGAR: And there should be no bracket there.

CHAIRMAN SOULES: No bracket.

MR. REASONER: "Occurrence" is mispelled in mine.

PROFESSOR DORSANEO: Occurrence needs an E where that A is.

MR. REASONER: But it needs another R, too.

PROFESSOR DORSANEO: Another R.

MR. REASONER: Other than that, it looks pretty good.

CHAIRMAN SOULES: Where is all that, now? Oh, I see.

PROFESSOR DORSANEO: Six lines in the middle.

CHAIRMAN SOULES: O-C-C-U-R-R-E-N-C-E. "The Court may predicate the damage question or questions upon affirmative findings of liability. The Court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exist. For example, the Court may in a worker's compensation case submit in one question whether the injured employee was permanently or only temporarily disabled. Then the Court shall not in

its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers but the Court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers where it is properly a part of an instruction or definition."

Franklin has moved that be recommended to the Supreme Court for adoption and Sam Sparks --

MR. SPARKS (SAN ANGELO): I've got one question in that paragraph right above the last one.

CHAIRMAN SOULES: Yes, sir.

MR. SPARKS (SAN ANGELO): "For example, the Court may in a worker's compensation case submit one question where the injured employee was permanently or only temporarily disabled." Great. That's broad form. I've got no problem with it.

My problem comes up above that where it says, "The Court may submit a question disjunctively when it is apparent from the evidence that one or the other conditions or facts inquired about necessarily exist." But, you know, it's always

apparent from the evidence to me that it's total, permanent. All right. But the other side often has the condition that evidence doesn't show any disability. You know, what I'm trying to say to you, you're putting some kind of requirement in there that is not setting real well with me and I can't put my finger on it.

CHAIRMAN SOULES: That's the existing rule, Sam.

PROFESSOR EDGAR: It's been that way forever. No change.

PROFESSOR DORSANEO: But his point is a good one. That is the paragraph that was changed before the rules went into effect. And, I think back long ago -- I think what that sentence is really meant to mean, when under the law, one or another of these things is just -- it can't be both. It has to be one or the other.

MR. JONES: I don't think -- since the new rule that all you need to do is tell the Court he can submit disjunctively. You don't mean to say he can submit disjunctively only when it's impossible that one of the two --

MR. SPARKS (SAN ANGELO): That's what I'm saying. I think we just need a sentence

saying the Court can submit disjunctively.

MR. MCMAINS: Why do you need it at all?

MR. SPARKS (SAN ANGELO): You don't need it at all. It's a broad form question.

PROFESSOR DORSANEO: It's not necessary.

MR. MCMAINS: I mean, if you've got a broad form question -- that says "shall be submitted on broad form."

PROFESSOR DORSANEO: It was in a writ -- the disjunctive submission paragraph in the rule has always been an attempt to add exception to the separately and distinctly thing, and really we don't need this at all.

MR. MCMAINS: In terms of the combination of elements.

CHAIRMAN SOULES: Doesn't it serve a burden of proof function too?

MR. SPIVEY: Wouldn't you be better off leaving that first phrase in there?

CHAIRMAN SOULES: Buddy low.

MR. LOW: Everything that is taken out may be construed as meaning that we are -- that that is now being denounced. In other words, like

for instance, we've taken out in the first -- the first thing we acted on, we said the Court may submit a case by general charge. Now, we've taken that out. People could construe that, well, the Supreme Court has taken that out; that can't be done now.

So, things like -- Broadus has raised a good point. I think that first part of the sentence would be proper just to reaffirm, just like your wife knows you're true to her but you have to keep telling her that. You might reaffirm that.

MR. SPARKS (SAN ANGELO): Well, but in essence what we've really done is gone from a system where you had to have separate and distinct issues. And then that was expanded on over to the point where we now have -- well, first you had disjunctive and you understand the different forms. Now, we've got broad form questions and you don't need that whole paragraph. I just don't see why it's necessary.

MR. REASONER: But, Sam, why eliminate the possibility that someone wants to submit a broad form issue and have it answered disjunctively?

MR. MCMAINS: I don't think we have

eliminated it, if you take out the sentence.

MR. REASONER: Well, why take it out?

PROFESSOR EDGAR: It imposes the limitation.

MR. REASONER: What's the limitation?

PROFESSOR EDGAR: When it is apparent.

MR. SPARKS (SAN ANGELO): It has to be apparent from the evidence.

MR. SPIVEY: I'd say we've got a good thing and --

MR. REASONER: I'm not sure what "apparent" means, but unless the evidence is that it's either A or B --

MR. SPARKS (SAN ANGELO): Harry, I can assure you that it's not going to be the same thing to you and I on a comp case.

MR. REASONER: Listen, if you catch me trying a comp case, I want you to have me committed.

MR. SPARKS (SAN ANGELO): May I say the same for your business in regards to me?

CHAIRMAN SOULES: Is there a motion on the floor other than Franklin's to adopt this as it was read?

MR. BRANSON: What did we do with that

disjunctive bit?

CHAIRMAN SOULES: Well, there's been no motion made about it. There's been a question and debate about it, but there's been no motion.

MR. BRANSON: I move we put a period at the end of "disjunctively."

PROFESSOR DORSANEO: Second.

MR. MORRIS: I'd like to make an amendment to it. I think if we're going to do that, we should include "properly," and read "The Court may properly submit a question disjunctively."

MR. SPARKS (SAN ANGELO): Lefty, a broad form question is always proper. We don't even need this sentence.

PROFESSOR EDGAR: I don't -- you don't want to just put a period there. You want to put some limitation on a disjunctive submission.

MR. SPARKS (SAN ANGELO): That's my problem.

PROFESSOR EDGAR: If you're going to submit it, you want it to be -- under the evidence, only one of two alternatives are possible.

MR. SPARKS (SAN ANGELO): That's

exactly my problem because there's a third alternative in a comp case and that's there is no damned disability, so I'm never going to get a disjunctive submission from right here because --

PROFESSOR EDGAR: You're not entitled to one either.

CHAIRMAN SOULES: That's right.

MR. SPARKS (SAN ANGELO): But I think I am under the broad form question and that's the problem.

CHAIRMAN SOULES: If the evidence shows there's some injury.

MR. SPARKS (SAN ANGELO): Yes, I'll go for that.

CHAIRMAN SOULES: Then, you get --

MR. SPARKS (SAN ANGELO): The Court must instruct the jury that indeed there has been an injury. What I'm saying to you is that something has to be done right here.

JUSTICE WALLACE: This has been the law for 30 years, hasn't it?

MR. SPARKS (SAN ANGELO): That's what we're trying to change. We're changing a lot of law, I think, here today.

JUSTICE WALLACE: Well, you don't

submit either/or if you've got a dispute as to any injury because if there's a defense, no injury, you wouldn't submit it.

MR. SPARKS (SAN ANGELO): What I'm saying to you is that I think a workmen's compensation case can be submitted upon a broad form question. I really do. And, you know, maybe it needs to be disjunctive, do you find there was no injury or, you know, once they have found injury up at the top, you can put it this way right here.

CHAIRMAN SOULES: Why not delete the second sentence of the paragraph and leave the rest of it there so that you take out the worker's comp reference?

MR. SPARKS (SAN ANGELO): Well, when you come back and say when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exist --

PROFESSOR EDGAR: Well, let's take your comp case. You're going to say there was an injury; the defendant is going to say there wasn't any injury.

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

PROFESSOR EDGAR: Okay. Now you can submit disjunctively.

MR. SPARKS (SAN ANGELO): Once the jury answers --

PROFESSOR EDGAR: No, you can ask, was there or was there not an injury.

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

PROFESSOR EDGAR: But that can be done under the rule as it now reads because under the evidence, either there was or there was not an injury.

MR. SPARKS (SAN ANGELO): Well, I sure don't like that second example, that second sentence.

CHAIRMAN SOULES: Well, that can be taken out.

PROFESSOR EDGAR: You could eliminate that, but don't eliminate the first sentence.

CHAIRMAN SOULES: Well, let's vote on whether we eliminate the second sentence.

MR. JONES: I'll go for simply saying "The Court may submit the question disjunctively," period.

MR. REASONER: But with no

limitations?

PROFESSOR EDGAR: With no limitations at all? Either/or means one or the other has to exist.

MR. JONES: Hadley, I don't think there is any limitation -- on hardly any way you can submit a case when you mandate a broad form submission. I think you could take a comp case on what we've voted on here today and say ladies and gentlemen, do you find from the preponderance of the evidence that the plaintiff was injured, and if so, do you find that that injury resulted in any permanent disability, and that if so -- I mean, totally disability, and if so, was that permanent, and if not, did it result in partial disability and when did it start, and put all that in one question.

MR. REASONER: That's fine but that has nothing to do with --

PROFESSOR EDGAR: That has nothing to do with what we're talking about here, though, Franklin. I agree with you.

MR. JONES: But when you say you can submit that kind of question, then it carries with it the lesser which we're talking about here.

MR. REASONER: But this isn't a lesser, Franklin. This is saying that it's proper in some circumstances for a judge to say A or B. You're not permitting the jury to find that there's not a preponderance of the evidence either way. You're eliminating the possibility that the jury could simply find no preponderance of the evidence.

MR. BRANSON: Let me amend my motion that is on the floor to read, "The Court may submit a question disjunctively when proper."

CHAIRMAN SOULES: Well, this is when it's proper.

PROFESSOR EDGAR: That's the only time it's proper.

CHAIRMAN SOULES: You see, if the judge submits either/or and there's a third possibility, he is commenting on the weight of the evidence. He's eliminated the third possibility. You see, he's got to be in an either/or situation and that's all the rest of that sentence says.

MR. BRANSON: Okay.

CHAIRMAN SOULES: It's got to be either/or.

PROFESSOR EDGAR: By nature,

disjunctive has to be this.

CHAIRMAN SOULES: We can eliminate the second sentence because that's just trying to give you an example.

MR. SPIVEY: Let's just remove the second.

MR. BRANSON: I re-amend my motion to merely remove the second sentence of the second paragraph on page 3.

CHAIRMAN SOULES: From the "For example" through the word "temporarily disabled."

MR. BRANSON: Yes.

CHAIRMAN SOULES: All right. Now, with that deletion, do you accept that, Franklin?

MR. JONES: Yes.

CHAIRMAN SOULES: Okay. That's been deleted by agreement.

MR. MCMAINS: Luke?

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: I've got a question.

CHAIRMAN SOULES: Yes, sir.

MR. MCMAINS: In terms of -- I don't know whether Bill raised it or not where we said, whereas a matter -- a legal matter that had to be one or the other as distinguished from the

evidence.

CHAIRMAN SOULES: Well, it's evidence.

PROFESSOR EDGAR: It's factual.

MR. MCMAINS: I understand it's evidence here. But the effect of a disjunctive submission in all cases is to, in essence, smooth over the burden of proof issue, either it is or it isn't. If you say under the evidence, the person who does not have the burden of proof on an affirmative submission may not have put on any evidence. That doesn't mean that he isn't going to argue against the proposition on the basis of credibility. And I'm just -- you know, that there could be other alternatives which he is just kind of speculating about, but the person with the burden of proof now has skated that by saying either it is or isn't true.

MR. LOW: See, Rusty, this is a case where it's got to be one or the other, and if it is true, then it is.

CHAIRMAN SOULES: This eases the application for burden of proof. Rusty is right. For example --

MR. MCMAINS: It is apparent from the

evidence.

CHAIRMAN SOULES: The question may be should the managing conservator of the child be the father or the mother, answer, father or mother. All right. The party that is seeking the change has got the burden of proof. That doesn't assess a burden of proof. One thing you can do with a disjunctive submission is get an answer from a jury without telling them who has got the burden of proof. It's always been that way and it can be done. That's right. And it eliminates the the requirement to charge on the burden of proof if the Judge does it this way. He's got the right to do it this way.

MR. REASONER: On that, Luke -- Rusty, suppose you added an otherwise proper --

MR. LOW: Does that mean we have another section that the Judge can place the burden of proof on instruction, couldn't you?

CHAIRMAN SOULES: Well, you can't place the burden of proof by instruction on that question.

PROFESSOR EDGAR: But not if it can't be answered other than yes or no. You have to put it in the issue -- in the question.

MR. MCMAINS: Not if you answer it --

CHAIRMAN SOULES: But that's been the law. We're not changing, you know -- we've got some law on this. By taking out the example, we're still leaving it in the practice there that's been there.

MR. SPARKS (SAN ANGELO): Can we vote on that?

CHAIRMAN SOULES: Okay. Those in favor now of recommending that the Supreme Court change Rule 277 in the respects so that it reads as we now have on the table.

MR. SPARKS (SAN ANGELO): Luke, did you vote on deleting that second sentence now?

CHAIRMAN SOULES: Yes, with that out.

MR. MCMAINS: You're deleting the second sentence.

CHAIRMAN SOULES: I'm deleting the words "For example, the Court" --

MR. SPARKS (SAN ANGELO): We really never did vote on it but.

CHAIRMAN SOULES: On taking that out?

MR. SPARKS (SAN ANGELO): Yes.

CHAIRMAN SOULES: There was a suggestion that the motion be amended and the

proposer of the motion agreed to it.

MR. SPARKS (SAN ANGELO): Okay.

CHAIRMAN SOULES: So we didn't need to vote. Now, we're going to vote on it with that out. Those in favor show by hands. Those opposed? Okay. Same way.

MR. MCMAINS: I've just got a question. Is that the whole rule?

CHAIRMAN SOULES: The whole Rule 277, yes.

MR. MCMAINS: All I have is a grammatical suggestion to clear up.

CHAIRMAN SOULES: What was that? Okay. 278. 278 was 279.

MR. MCMAINS: Luke, can I raise one question?

CHAIRMAN SOULES: Oh, yes. What is it?

MR. MCMAINS: We've already talked about the last function of the last sentence in comparison to what the comments are and so on. I know you deleted "explanatory." My only concern is the adverb "properly," and my question is whether that's really where that belongs. Because it says, "the effect of their answers where it is

properly a part of an instruction or definition."

CHAIRMAN SOULES: Yes.

MR. MCMAINS: I'm not sure that what we're talking about there means where it is a part of a proper instruction.

PROFESSOR EDGAR: That's what's meant.

MR. MCMAINS: That's what it means. Because the problem is, for instance, in Lemos versus Montez, unavoidable accident, the definition may have been totally proper but it didn't belong in the case. If it's properly a part of the definition or the instruction, theoretically, you meet the requirements of the rule, it's still a comment.

CHAIRMAN SOULES: Any objection to making that change? There being no objection to it -- Judge Pope, did you have an objection to that?

CHIEF JUSTICE POPE: No, I was voting for it.

CHAIRMAN SOULES: Okay. All in favor show by hands. Let me show Judge Wallace where it is. Thank you, Rusty, that's a good suggestion.

MR. RAGLAND: Will you read that, Luke, as it was last --

CHAIRMAN SOULES: The whole rule?

MR. RAGLAND: No, just that last phrase there.

CHAIRMAN SOULES: The last phrase, then, would read -- the last two lines will read, "The effect of their answers where it is a part of a proper instruction or definition."

Okay. Now, we'll go to -- Is there anything else on 277?

PROFESSOR EDGAR: I hope we don't ever come back to this again.

JUSTICE WALLACE: There will be no motion for rehearing on it.

CHAIRMAN SOULES: No further motions for rehearing. Okay. 278, that's pretty much 279 as it was, wasn't it, Hadley?

PROFESSOR EDGAR: Yes, that's right. We tried to move it over because actually Rule 279 was really doing two things and since we no longer had a Rule 278, it seemed to me like it would be more proper to have two separate rules. But, yes, this is basically Rule 2 -- this was taken verbatim from Rule 279, except as it was modified to talk about questions instead of issues and things like that.

CHAIRMAN SOULES: The only -- we've got this Yellow Cab case that I've got cited over here that really changes what the rule says. It's an old case and I don't know whether we ought to deal with it or not. Let's see if I can find it.

PROFESSOR EDGAR: I don't really think that Yellow Cab changed anything. The Court just simply said that Yellow Cab -- that since the instruction had been -- since an instruction had been submitted, then you could preserve your error by simply objecting because this was considered an incorrect instruction rather than no instruction, and there are any number of cases in which you dealt with that problem from time to time.

PROFESSOR DORSANEO: It's an impossible problem to deal with because you could say it's -- you could always visualize something as being incomplete rather than wrong when the problem is it doesn't say something that needs to be said in order to get it right.

CHAIRMAN SOULES: Well, that's fine, but Yellow Cab is not in the rule. Yellow Cab is a case that says how you preserve error. What's now proposed as Rule 278 is the rule that says how you preserve error in the charge. But the rule

doesn't touch on Yellow Cab, doesn't even touch on the issue that's embraced in Yellow Cab and shouldn't. Because that's the one kind of error in a charge that's preserved by following Yellow Cab that you're not told anything about in the rule.

PROFESSOR DORSANEO: What's that, an incomplete instruction?

CHAIRMAN SOULES: That's right. An erroneous instruction given, how do you preserve that error. Yellow Cab says you do it by objecting. The rule doesn't say anything about that.

MR. MCMAINS: Luke?

PROFESSOR EDGAR: That's what the last sentence says. That's what the last sentence says, I think.

CHAIRMAN SOULES: It says, "Failure to submit a definition shall not be deemed a ground for a reversal unless a substantially correct definition has been asked for by the party who wants to preserve that error."

Okay, in Yellow Cab, the problem was that the party who sought to preserve error in a charge did not submit a substantially correct instruction,

did not; they just objected. Now, you can object whenever the other side submits an issue -- an issue that is erroneous and you've preserved the error in that issue. But there is nothing that tells you how to preserve an error to an instruction that's been submitted erroneously.

Now, that's why Yellow Cab came up. They said wait a minute; there's no way to preserve error and instruction unless you request that instruction in substantially correct form. Read the last sentence. And that's what the rule says. But Yellow Cab says, no, if the error is in a given instruction, an instruction that went to the jury, a party can preserve that error by objecting. Now, that's all in Yellow Cab and it's never been in the rules.

MR. WALKER: I think that's correct. You -- if the Court attempts an instruction and does it erroneously, you object pointing out what's wrong. If it totally omits an instruction, you request and tender it.

CHAIRMAN SOULES: That's right. Now, the last point and problem that you raised is --

MR. MCMAINS: It's in the Rule 274.

CHAIRMAN SOULES: -- covered in the

last sentence of the rule. What?

MR. MCMAINS: It's in Rule 274.

CHAIRMAN SOULES: Where?

MR. MCMAINS: Objections and requests. It says "Any complaint as to an instruction, issue, definition or explanatory instruction on account or any defect, omission or fault shall be deemed specifically included in the objection."

I mean, you know, the rule specifically authorizes you to object to a defect in an instruction that is given where it was tendered. It's when they -- the only place that you're required to request is if there is an entire -- an entire omission of the subject matter.

PROFESSOR DORSANEO: Which is really what Yellow Cab is about. It's as plain as that.

MR. MCMAINS: If it's there, but there is -- an internal omission -- it's a defect.

MR. WALKER: It's a defect and you object.

MR. MCMAINS: And that's the way the law is provided.

PROFESSOR EDGAR: All Luke is saying here is, that the rule does not clearly state --

I'm emphasizing the word "clearly" -- state -- the manner in which you preserve error to what you perceive to be an incomplete or erroneous instruction or definition.

MR. MCMAINS: That's why I have a question about it.

PROFESSOR EDGAR: Now, that's all Luke is saying. The law is clear on what you have to do but the rule, he says, does not clearly state it.

MR. MCMAINS: Luke, may I speak to the rule in general?

CHAIRMAN SOULES: Yes, sir, Rusty.

MR. MCMAINS: 278.

CHAIRMAN SOULES: Please.

MR. MCMAINS: As -- and I'm not sure, Judge Pope, if you have really looked at our new appellate rule on preservation of complaints. We've got a specific appellate rule, now, which says that any complaint is sufficient if it apprises the trial judge of what the action is that you want him to take, without regard to what the form of it is, which, of course, is basically the Federal rule, which is in large measure inconsistent with the notion of building in

special predicates for complaints on appeal that are here now.

And I'm not sure that if -- whether or not we should be trying to, in essence, be consistent with what our appellate rule has done, and that is that if you make known what your complaint is to the trial judge that there is something missing here, whether you requested it or objected to it shouldn't make any difference as form over substance as opposed to the nature of your complaint. Now, if your complaint was obscured, that's a different issue. You don't remember what I'm talking about, Bill?

PROFESSOR DORSANEO: Yes, I do.

MR. MCMAINS: What is your -- do you have a specific rule in the --

PROFESSOR EDGAR: Why did you-all put that rule in there for anyhow?

MR. MCMAINS: Well, I objected to it at the time.

PROFESSOR DORSANEO: I agree with what you're saying, Rusty, that that ought to be what we would strive for, but I wonder if here -- our rules on the objecting of the charge, the request procedures are incredibly complex, they're very

detailed, they come from a different era, a different method of thinking and they don't -- it doesn't make a great deal of sense that we do it the way we do it. But we could either fix that later or be stopped at this point in this process of going through these rules permanently over this weekend.

MR. MCMAINS: No, I'm not suggesting that. Rule 52-A general rule which now says, "In order to preserve a complaint for appellate review, a party must be presented at the trial court at the time they request objection or motion stating the specific grounds for the ruling he desired the Court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party requesting the objection or motion. If the trial judge refuses to rule on objection, the Court's refusal to rule is sufficient to preserve the complaint." It's not necessary the formerly accepted rulings of the trial court.

I just raised the question. It just looks to me like our appellate rules on preservation are marketedly different than what we are installing.

MR. REASONER: I don't understand that, Rusty. I mean, it refers specifically to objections, et cetera.

MR. MCMAINS: It says objections or motions -- it defines it in terms of, did you clearly present it to the trial judge by motion or request. It does not say that you've got to jump through a particular hoop at a particular time. It just means that he has to understand what your complaint is. And those are passed is all I'm saying.

(Off the record discussion ensued.

CHAIRMAN SOULES: Well, I can see 274 really tells you how to object and it talks about defective submissions and 278 is really -- both those sentences start out, "Failure to submit a question" or "failure to submit a definition or instruction," so they do deal with different topics.

PROFESSOR DORSANEO: But the point that you were making is a good one. Failure is one thing and defective is another except there are a lot of -- there are a number of close

cases. When something is merely incomplete, you can say it's not -- that it's a failure or it's a defect and that's an eye of the beholder kind of thing.

PROFESSOR EDGAR: But the Court has traditionally treated those cases, though, as defective as distinguished from omissions.

MR. LOW: You've attempted to do it.

PROFESSOR DORSANEO: That's the way you teach it. I teach it that the Court has said that either way is okay.

PROFESSOR EDGAR: Well, do you have the benefit of both worlds? I'm saying the least you do is adequate is the point I'm getting at.

CHAIRMAN SOULES: Either way you handle it, you've preserved that there is some instruction there.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: Okay. Well, I guess we really don't need to fix that then if maybe it isn't broken.

PROFESSOR DORSANEO: I've got one complaint about this thing.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Rule 278,

formally 279. I don't like and I think this was -- I thought this was voted on before. I thought Lefty raised this one time before. But I don't like the word "controlling." It makes me think about -- within the first line, "The Court shall submit the controlling questions."

CHAIRMAN SOULES: That's got a lot of law -- case law on it.

PROFESSOR DORSANEO: Yes. And all of it ought to be -- it does have a lot of law on it but I'm not sure it's very helpful law in light of broad form questions, because controlling questions are construed to be of the right -- it has to do with size, you know. It had to do with breadth or narrowness, I think, didn't it?

CHIEF JUSTICE POPE: That's right. Controlling is what the whole fuss is about.

MR. MCMAINS: As a matter of fact, later on down here we've also got this stuff about various phases and different shades in the middle of that rule.

CHAIRMAN SOULES: What specifically is troubling about the word "controlling"?

PROFESSOR DORSANEO: All the history that says that a controlling issue -- if the

controlling issue is not negligence, the controlling issue is brake, speed or lookout. I think, in fact, when these rules were amended in 1973 -- and Judge Pope would be better to talk about this than I am -- but this controlling thing -- this created this Scott problem in part, talked about controlling, you know, controlling issue that this part of the rule -- this was a change when 277 was amended. I think controlling as a modifier is a troublemaker.

MR. MORRIS: It is a troublemaker.

MR. MCMAINS: Why can't we just say that the Court shall submit jury questions in the form provided by Rule 277?

PROFESSOR EDGAR: Well, we are talking -- we have already stated that we shall submit broad form questions to the extent feasible, thus recognizing that there might be situations in which it is not feasible to submit broad form questions.

MR. MCMAINS: That's not what we did.

PROFESSOR DORSANEO: No, they're all broad form to the extent feasible.

PROFESSOR EDGAR: Well, but some might be less broad than others. Let's put it that

way. But once you do that, though, then you might arguably have to deal with an issue in the context of whether it's raised by the pleading in the evidence, which causes you to look at it a little more narrowly than you might otherwise look at it.

PROFESSOR DORSANEO: But I'd leave "raised by the pleadings in the evidence" in there and just take out the word "controlling." If for no other reason, it is that I'm not sure what it means. And it can only create mischief when you look at the old precedent.

PROFESSOR EDGAR: I'm just directing -- Rusty said he wanted to put a period after Rule 277.

CHAIRMAN SOULES: No, no.

MR. MCMAINS: No.

PROFESSOR EDGAR: I thought that's what somebody said.

CHAIRMAN SOULES: No.

MR. MCMAINS: No. I said "shall submit the jury questions in the form provided by Rule 277."

PROFESSOR EDGAR: And then when you stopped, I thought you meant to put a period

there.

MR. MCMAINS: No, I just went on.

PROFESSOR EDGAR: All right. I'm sorry.

MR. MCMAINS: I just took out the word "controlling" but I put in jury questions. It didn't have to be there.

MR. MORRIS: Let's just delete "controlling," period. We haven't been calling the jury questions back over here in 277, just called questions.

PROFESSOR EDGAR: Why don't you just say, "shall submit the questions to the jury"?

MR. LOW: Who else do you submit it to?

PROFESSOR EDGAR: Well, but --

MR. LOW: Why do you have to say "jury"?

CHAIRMAN SOULES: I think that we use questions several times in the immediately preceding rule without saying "controlling" or "jury" or any modifier. See, look at the page that faces this, we talk about "shall submit a question or questions."

PROFESSOR EDGAR: Well, but that was a

different purpose for the rule. This is how -- this is dealing with something else.

CHAIRMAN SOULES: Oh, which questions do you ask.

MR. MCMAINS: Right.

CHAIRMAN SOULES: That's why it's there. Controlling questions meaning the questions that are raised -- What about this: "The Court shall submit the questions which are raised by the written pleadings in the evidence in the form provided by Rule 277." That's what we're saying. That's what's controlling, the questions that are raised by the pleadings in evidence in broad form.

MR. LOW: That's the way it refers back to it.

MR. MCMAINS: I don't have any problem with that.

PROFESSOR EDGAR: I don't either. I don't have a problem with that.

CHAIRMAN SOULES: "The Court shall submit the questions," and then go down to "which are raised by the written pleadings and the evidence."

MR. REASONER: You can just leave it

in the form it is, Luke, then you won't have to change all that.

JUSTICE WALLACE: Just strike "controlling."

MR. REASONER: Just strike "controlling."

PROFESSOR EDGAR: Yes, just strike "controlling." You don't need that.

CHAIRMAN SOULES: Okay.

MR. WALKER: What's wrong with "controlling"? Is that an evil word?

PROFESSOR DORSANEO: Yes.

PROFESSOR EDGAR: It's a concept that's really no longer relevant.

MR. WALKER: We submit the issues that of stock controlling -- is that what we're doing?

CHIEF JUSTICE POPE: No. If you'll look at this rule, this rule has not been changed since the statute that was adopted in toto in 1941. In other words, this statute goes back -- this rule goes back 70 years, and back then controlling issues under the subtle law had distinctly and separately.

MR. SPARKS (SAN ANGELO): With that in

mind, I'll move that we delete the word "controlling."

MR. MORRIS: I second it.

CHIEF JUSTICE POPE: By precedent.

CHAIRMAN SOULES: It's been moved and seconded. Any further discussion? Those in favor "I." Opposed?

MR. SPARKS (SAN ANGELO): You convinced me, Judge.

CHAIRMAN SOULES: The word "controlling" will be deleted in the first line, and other than that, are we ready to -- and the word "explanatory" in the last line and the word "explanatory" in the second line on the next page. Other than that, are we ready to act on the committee's recommendation?

PROFESSOR EDGAR: No. Wait a minute.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: What are we going to do now in the middle of the page, here on page 4, about various phases or different shades of the same question? Now, Rusty has raised the point that that may no longer be necessary. My only concern -- and Rusty might be right. My only concern is that by eliminating it, could an

argument be made until it got to the Supreme Court to the contrary that it's now permitted since you said you can't -- that it's no longer prohibited.

CHAIRMAN SOULES: Does it hurt anything to leave it in?

PROFESSOR EDGAR: I don't think it does. I don't think if we leave it in, it's not going to hurt anything, and I'm concerned that if we take it out, it might create some unnecessary appellate time.

PROFESSOR DORSANEO: But it is interesting and it says various phases not only in the same question but definition or instruction, and that's curious on its face because we do have -- we do have various phases of the same instruction and it's just in there now anyway. It's a troublesome sentence anyway.

PROFESSOR EDGAR: That's the way the rule read.

PROFESSOR DORSANEO: Oh, I know, but I never noticed that it dealt with anything other than questions before.

MR. REASONER: Wait a minute. Hadley, it looks like to me the rule refers -- if I'm reading the right place, it says, "Failure to

submit other and various phases or different shades of the same issue." It seems to me when you add definitions and instructions, you've really complicated it and raised a ground for argument.

PROFESSOR EDGAR: This is -- I didn't change this. This is what's now in Rule 279.

MR. REASONER: Well, maybe you could find it because where I'm reading it says to submit other and various phases or different shades of the same issue. It doesn't say anything about definitions.

MR. MCMAINS: Is that in Rule 279?

MR. REASONER: Yes, if I'm reading the right one.

MR. MCMAINS: Okay. That's what I thought. I didn't think that was in there. That's why I was --

MR. REASONER: Because I'm not really sure I know what a shade or a phase of an instruction is.

CHIEF JUSTICE POPE: Well, that was Judge Alexander's effort to reduce the number of issues.

MR. REASONER: Well, issues I can

understand. I don't say I understand it, Judge, at least I understand the history of it.

PROFESSOR EDGAR: I stand corrected. I thought that -- I intended simply to retype that provision out of Rule 279. And it's not there now so it certainly doesn't need to be included.

PROFESSOR DORSANEO: So what words would come out? What words disappear?

PROFESSOR EDGAR: "Various phases or shades of the same question shall not be submitted," you just --

MR. REASONER: I really wonder if it wouldn't be more -- at least cleaner, intellectually, just to take the whole thing out. Are you really worried that people are going to submit shades and phases of broad form questions?

MR. SPARKS (SAN ANGELO): Or give four different instructions.

PROFESSOR EDGAR: All I'm saying, Harry, is that conceptually I have absolutely no problem in removing it. I'm just wondering if an argument could be made by its deletion that various phases or different shades of the same question can be submitted.

MR. REASONER: Well, you know --

PROFESSOR EDGAR: And somebody is going to make that argument.

MR. REASONER: That seems to me a lot less -- it seems to me we're talking about a pretty narrow range of probability anyway. That seems to me a lot less troubling than some judge would be silly enough to do that than to think that you would get up on appeal and people would be arguing well, look, you know, broad form question one is a shade and phase of question three. You know, it seems to me it would be better just to eliminate the whole thing.

CHAIRMAN SOULES: That does somewhat make sense because broad form --

PROFESSOR EDGAR: Conceptually, you're right.

CHAIRMAN SOULES: Broad form issues are more likely to have minor overlaps.

MR. REASONER: It seems to me they might well.

PROFESSOR EDGAR: Right and it's that kind of thing I'm trying to elminate.

CHAIRMAN SOULES: Harry, is it your motion to delete that sentence?

MR. REASONER: Yes, I would just

delete the whole thing.

CHAIRMAN SOULES: Is there a second to delete? Rusty, were you --

MR. MCMAINS: Second.

CHAIRMAN SOULES: You second it. Any further discussion? Those in favor show hands.

PROFESSOR EDGAR: Well, I'm worried now, because by adding that when it didn't belong there -- let's all read this very carefully to make sure there isn't something else that doesn't belong there.

CHAIRMAN SOULES: Opposed? Nine to one.

MR. MCMAINS: Wait a minute. Why is -- what about instructions?

CHAIRMAN SOULES: With the deletion of that sentence and the deletion of the word "controlling" in the first line, "explanatory" in the last line of page 149 and the word "explanatory" in the second line, page 150 -- and, Bill, you have one more?

PROFESSOR DORSANEO: Yes. These words up here at the beginning -- I hope I'm going to get this out of my mouth straight. But in the first sentence it says, "The Court shall submit,"

et cetera, and then going down further, "a party shall not be entitled to an affirmative submission of any question on that party's behalf where the same is raised only by a general denial and not by an affirmative written pleading by that party."

Correct me if I'm wrong, Hadley. Wasn't that put in there in order to require somebody to plead inferential rebuttal?

MR. MCMAINS: No.

PROFESSOR DORSANEO: No? Am I in the wrong place?

CHAIRMAN SOULES: It's just affirmative defenses.

PROFESSOR EDGAR: If you don't plead it, you can't get any evidence on it and you waive it. You waive your right to get a submission on it.

MR. MCMAINS: You have never gotten an issue under 279 without an affirmative defense. You're not supposed to have, it's been in there from the beginning.

PROFESSOR DORSANEO: It has -- I'm not going to argue about what it's in there for. But I wonder whether we should speak about affirmative submission, and I'm troubled by the word

"affirmative," and I'm also troubled by the word "question."

MR. MCMAINS: Oh, okay.

PROFESSOR DORSANEO: I mean, if this rule says that if you don't plead it, you can't have something in the charge about it --

MR. MCMAINS: 279 deals with -- 279, historically, and I think in it's current word, it deals with issues.

PROFESSOR DORSANEO: But this part of it deals with -- imposes a pleading requirement. It says you can't have -- it's -- I'm sure it has to do with matters that would otherwise be raised by a general denial.

MR. MCMAINS: No.

CHAIRMAN SOULES: These are Rule 94 defenses and other affirmative defenses.

PROFESSOR DORSANEO: I think you're -- I think you're wrong, historically. "A party shall not be entitled to an affirmative submission of any question on that party's behalf where the same is raised only by a general denial." Okay. What questions are raised only by a general denial? Think about that. Inferential rebuttal defenses are raised by a general denial; they

are.

MR. MCMAINS: Except that you could also -- if a party pleads contributory negligence, you are not required to plead contrib in order to submit evidence on it. If he pleads I'm not contributory negligent, you're entitled to raise contributory negligence but you aren't entitled to an issue on it.

CHAIRMAN SOULES: If you haven't pled.

PROFESSOR DORSANEO: But leave the affirmative defenses out of it. That's not the part I'm talking about. What this seems to have been put in here for is to require somebody to plead an inferential rebuttal matter, if you like, in order to get inferential rebuttal information in the charge in the place where that information used to go. Issues.

CHIEF JUSTICE POPE: Yes. But, Bill, that was back when inferential rebuttal issues were affirmative defenses. They are no more.

MR. SPARKS (SAN ANGELO): There are no issues for instructions.

CHIEF JUSTICE POPE: They're furious.

MR. MCMAINS: Judge, I think, however, his point is that, at least according to the most

recent rules of 1986, we ain't ever amended Rule 279.

PROFESSOR DORSANEO: It's part of the same -- I'm trying to say in my awkward way, Judge, that that language is also part of the same old problem that's tied up with the separately and distinctly and inferential rebuttal defenses and that needs -- that needs to have something done to it. Now, I would think that it would make sense to preserve this concept that you're not entitled to have something -- something in the charge that's not pled.

CHAIRMAN SOULES: But that's said in the first sentence.

PROFESSOR DORSANEO: So, let's take out this last part.

CHAIRMAN SOULES: You've got to raise it by written pleadings and evidence, and we probably don't need that.

MR. SPARKS (SAN ANGELO): I've got a question along that, too, where it says, "affirmative submission of any questions." What about instructions, you know --

MR. MCMAINS: That's what he's talking about.

MR. SPARKS (SAN ANGELO): Sole approximate cause, unavoidable accident and you just go down.

PROFESSOR DORSANEO: That's exactly what I'm talking about, Sam, in my own way.

MR. MCMAINS: He's saying it has to be pled.

MR. SPARKS (SAN ANGELO): But, you see, you're dealing with a classroom and I'm dealing with reality. If they don't plead it, then we get it.

MR. LOW: But if Rusty's point is correct and if it's raised by the pleadings, the other party raises it in their pleadings and you don't raise it and he says you're not entitled to a submission, that would be raised for their pleadings.

PROFESSOR DORSANEO: He's correct but I don't think what he's saying is helpful to the point I'm trying to make.

MR. LOW: Well, what I'm saying is that if he is correct, then -- then, if you take that out, then, this would be something that they would be entitled to a submission on, contrib. That is raised by your own pleadings not just the

pleadings as one raised by your own pleadings.

PROFESSOR EDGAR: I don't understand your problem, Bill. I really don't.

MR. REASONER: I'm glad you said that, Hadley.

PROFESSOR EDGAR: It says, "A party shall not be entitled to an affirmative submission of any question on that party's behalf." Now, we know that that's talking, then, at least in the context that you're now discussing it, as an affirmative defense because an inferential rebuttal is not submitted as a question.

PROFESSOR DORSANEO: But it used to be --

PROFESSOR EDGAR: We're talking about today. Let's look at this rule today. Now, we're talking only about affirmative defenses under this rule, right? An affirmative defense of any question on that party's behalf where the same is raised only by a general denial and not by an affirmative written pleading by that party. That means if the party does not plead an affirmative defense, he doesn't get an issue on it or a question on it. That's all it means.

MR. LOW: That's right.

MR. SPARKS (SAN ANGELO): Edgar?

PROFESSOR DORSANEO: Then we need to take out "where the same is raised only by a general denial."

MR. SPARKS (SAN ANGELO): Can we extend that one more point, then?

PROFESSOR EDGAR: Well, let's just --

MR. SPARKS (SAN ANGELO): I'm talking about the same thing. You've got a guy that comes in and wants to defend with sole approximate cause but he never pleads it. He's not going to get an instruction on it unless he pleads it. I'm extending the word "question" to include questions, instructions, you understand?

PROFESSOR EDGAR: Oh, I know exactly what you want but that's not what -- Bill is talking about something else right now. And we were trying to deal with that first.

CHIEF JUSTICE POPE: Wait a minute.

PROFESSOR DORSANEO: I'm trying to talk about that right now.

CHAIRMAN SOULES: Justice Pope. Justice Pope has the floor.

CHIEF JUSTICE POPE: Now, you have a defendant who does not plead unavoidable

accident. He's not entitled to an instruction when he gets down to the instructions.

PROFESSOR EDGAR: The rules don't pro se that, Judge.

MR. MCMAINS: That's not true.

CHIEF JUSTICE POPE: Well, I'm talking about what I think this rule is trying to say.

MR. MCMAINS: Yes. I think that's what its purpose was, initially, because it was passed at a time when we did not have the amended Rule 277, when you still had inferential rebuttal issues which is why you have a line of cases in the 50s that have been relied upon variously by courts recently which say you've got to plead inferential rebuttal matters to get instruction on them. And then you've got some cases which say you don't have to plead them. And the cases that say you don't have to plead them are probably right under the existing rules because the only thing you had to plead was something you wanted an issue of --

PROFESSOR EDGAR: That's under Rule 279.

MR. MCMAINS: -- not something you have an instruction on.

PROFESSOR EDGAR: You see the very first part of current Rule 279 says, that only issues have to be supported by pleadings. It doesn't say instructions have to be supported by pleadings. And, therefore, I've argued since 1973 that there is nothing in the rules that requires that an instruction be supported by pleading.

Now, that gets back to the question with which Sam -- that San Angelo Sam's concerned about. He says we ought to make it clear that an inferential rebuttal must also be pleaded to support an instruction.

MR. SPARKS (SAN ANGELO): I never said that.

PROFESSOR EDGAR: I thought that's --

MR. SPARKS (SAN ANGELO): I'm saying if -- you take a worker's comp case, they have got to plead sole cause before they get an instruction on sole cause.

PROFESSOR EDGAR: Well, I'm not sure they -- I'm not sure that's right, Sam. I'm not sure that's right.

MR. MCMAINS: There are courts that say that, but there are courts that say otherwise.

PROFESSOR EDGAR: Yes, I'm not sure --

says you don't get them without a written pleading.

PROFESSOR DORSANEO: And that language -- and it was put in there for that purpose to solve this problem that Sam is talking about.

MR. MCMAINS: It doesn't make any sense any other way because it doesn't refer specifically to a general denial.

MR. LOW: But it is intended broader than that, I think, Rusty. I think it was really intended broader than that. He raised the point, but I think what his question is, we've already taken care of and unless we want to go to the step that Sam is talking about, then the rule stays as proper.

MR. MCMAINS: But I'm not sure that -- I mean, right now we do have a conflict in cases in the Courts of Appeal as to whether or not inferential rebuttal defenses must be pled in order to support a submission. There are cases going both ways on different inferential rebuttal defenses such as sole cause, acts of God, unavoidable accidents, sudden emergencies -- instruction. And whether you get that instruction in some courts depends on whether you pled it or

not, and in other courts, it doesn't. And I'm not sure that we shouldn't deal with that since we deal with it fairly simply with a swift pen.

CHAIRMAN SOULES: Let me see here.

PROFESSOR EDGAR: We really just can't insert the words "inferential rebuttal" here because sometimes there are instructions of an inferential rebuttal nature which might want to be submitted by the plaintiff.

MR. WELLS: Well, doesn't this apply only to submission of questions? It doesn't talk about instructions.

PROFESSOR EDGAR: Well, I say we would have to simply include an affirmative submission of any question -- we could say, "or an inferential rebuttal on that party's behalf."

CHAIRMAN SOULES: What about this --

MR. SPARKS (SAN ANGELO): Could you say "any matter" instead of "questions"?

MR. MCMAINS: In fact, we use inferential rebuttal matters in the earlier rules.

CHAIRMAN SOULES: The case law says what has to be raised by pleadings in order to get instructions and issues. What about -- and I

realize that sometimes when the plaintiff's pleadings entitle him to issues because of other law that enables a jury to reach a verdict, the defendant's entitled to an instruction, or a definition, because it makes the question that's being submitted by the plaintiff clear. It does help the jury answer it accurately one way or the other.

So the defendant may not have to plead to get an instruction in some cases. On the other hand, he may have to plead to get an instruction in other cases. The plaintiffs own pleadings may raise everything that's needed by way of pleadings in order for the defendant to get certain kinds of instructions.

Now, that's probably a very confused statement, but in trying to explain it, if we put here, "The Court shall submit the questions and instructions in the form provided by Rule 277 that are raised by the written pleadings ~~in~~ the evidence," and just take out that sentence down the line then whatever questions and instructions are raised by the pleadings in the evidence you get. You may or may not have to plead to get them. You may or may not.

PROFESSOR DORSANEO: Superb; excellent; that does it. And then take out this other crap, "The hearings shall change the burden of proof from what it would have been under a general denial."

CHAIRMAN SOULES: Would that work?

PROFESSOR EDGAR: What are you suggesting now?

CHAIRMAN SOULES: Okay. What I'm suggest is this, and I'll go through the whole thing down to about where we are: "The Court shall submit the questions and instructions" --

MR. MCMAINS: You need to put definitions in there, too.

CHAIRMAN SOULES: Except in definitions, do they really key to evidence or pleadings?

MR. MCMAINS: I'll give you an example, what is sole cause. It's inserted in the definition of proximate cause. Now, is that an instruction or definition?

CHAIRMAN SOULES: I don't think you have to raise definitions by evidence or pleadings. That's why I omitted that in my thinking. Do you?

MR. MCMAINS: I can produce to you the cases in sole cause. Comp case are all very clear. Sole cause has got to be pled.

CHAIRMAN SOULES: Okay. "The Court shall submit the questions, instructions and definitions" --

PROFESSOR DORSANEO: Whenever we say "definitions" and "instructions," we have to treat it together as one thing because it is one thing, instructions and definitions.

CHAIRMAN SOULES: "The Court shall submit the questions, instructions and definitions in the form provided by Rule 277 which are raised by the written pleadings in the evidence."

MR. REASONER: Well, wait a minute. Now, does 277 provide the forms for "instructions and definitions"?

PROFESSOR DORSANEO: Proper. Proper form.

CHAIRMAN SOULES: And I don't know whether we need this trespass to try title, statutory petition and that sort of thing. I haven't done many of those. It seems to me like we would stop right there at the word "evidence" and strike --

CHIEF JUSTICE POPE: Well, wait a minute. What are you going to do about that? You're not going to take those out, I hope.

PROFESSOR EDGAR: No.

CHIEF JUSTICE POPE: Because trespass to try title is a pure statutory form and the issue is, do you find the defendant guilty or not guilty.

MR. MCMAINS: Yes, but --

CHAIRMAN SOULES: But isn't that --

MR. MCMAINS: But, Judge, isn't that determined because that's determined by the written pleadings under the rules?

CHAIRMAN SOULES: He submits the question raised by the written pleadings and the evidence. The question is guilty or not guilty.

MR. MCMAINS: That is governed by the rules which tell you what the pleadings give you and what the verdict form is.

CHAIRMAN SOULES: And I guess that's a broad question if you really want to know.

CHIEF JUSTICE POPE: I know but it goes on, "shall not be entitled to an affirmative submission of any question on that party's behalf where the same is raised only by a general denial"

and not by an affirmative --

CHAIRMAN SOULES: Now, that's what we're trying to get worked out.

MR. MCMAINS: Why don't we say "of any matter on that party's behalf unless it is raised by an affirmative pleading"?

CHAIRMAN SOULES: What if it doesn't have to be raised by -- the reason I went up to the first line was that I was working on that one as you were. Maybe I'm entitled to submit some matters that I haven't pled, particularly whenever you talk about broad form issues with explanatory instructions or with instructions.

MR. REASONER: You know, Rusty, I'm really afraid you're going to undermine notice pleadings if you have to say that your pleadings have to be so detailed that you could show where you ask for a particular instruction.

MR. LOW: That's what I'm afraid of, that people are going to go to that and say, well, he hasn't really pled that he wants that instruction. That bothers me. I know that sounds kind of trite but --

MR. REASONER: No, I think you've got it right.

MR. LOW: The pleadings generally have gone to the question of the issues that will be raised and then the instructions and so forth and then tying in with the issues, generally.

CHAIRMAN SOULES: The problem is, though, that now we're submitting issues and instructions and you're not even -- if we follow -- if I follow through with your line of thinking, I could just not plead something and say, well, I don't have to, it's an instruction, it's not an issue. I want it in an instruction. It's a defense; it's an affirmative defense but I didn't have to plead it in order to get an issue on it.

MR. LOW: No. I'm not saying that you wouldn't follow traditional -- certain things that traditionally were an issue now are an instruction, I realize. And you may have to plead them. I'm not trying to change that. I'm merely saying that I don't want somebody to expand the other way and say, well, before you can get an instruction that such and such, that you have to plead -- I want that instruction is what I'm saying. I can't think of all of the different instructions that would be given in many different types of cases. We again tend to think of tort

and negligence, and I can't think of it there but I'm sure already other types of cases that that can be a problem.

CHAIRMAN SOULES: Chief Justice Pope was about to point out something, I think. We were talking about trespass to try title.

CHIEF JUSTICE POPE: No, go on, pass me.

CHAIRMAN SOULES: No, I don't want to. I want to get your input on this.

MR. REASONER: Well, while Chief Justice Pope is looking, you know, it seems to me what you've really get there if you take the first sentence and say "the Court shall submit," as you have it, "the questions, instructions and definitions in the form which are raised by the written pleadings in evidence."

It seems to me that takes care of the general problem but then you still need to say "a party shall not be entitled to affirmative submission of any question on that party's behalf where the same is not raised by an affirmative written pleading by that party." But then once a party has justified the submission of a question, then the appropriate instructions and definitions follow.

You've got to justify the question and then the Court can decide what instructions and definitions are appropriate to go with his justification of submission of the question.

CHAIRMAN SOULES: That makes sense.

PROFESSOR DORSANEO: This is so hard.

CHAIRMAN SOULES: Doesn't that make sense, Rusty?

PROFESSOR DORSANEO: I like your suggestion.

CHAIRMAN SOULES: Well, but Harry is coming back with --

MR. REASONER: But you're going --

CHAIRMAN SOULES: -- if you're going to have a question, you've got to have an affirmative defense.

MR. REASONER: I mean, don't want you to want to point out -- I mean, you want to put somebody on notice --

MR. MCMAINS: Your affirmative defenses could now be included even under the Supreme Court's authority and the false arrest cases, where you've got a justification.

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: Unless justification

is an inferential rebuttal.

MR. MCMAINS: Well, I mean there are a lot of defenses -- affirmative defenses that could be submitted by instruction.

MR. LOW: What worries me is --

MR. MCMAINS: I guarantee that they can't be under our rules now.

CHAIRMAN SOULES: No doubt about it.

MR. MCMAINS: That's the whole point.

CHAIRMAN SOULES: No doubt about it. Chief Justice Pope.

CHIEF JUSTICE POPE: The reason that I think we need to keep in that exception about trespass to try title, statutory, petition, proceedings and others is, we've all forgotten how to try a trespass to try a title case but they are difficult. And the answer in a trespass to try title case is not guilty.

Now, that puts the plaintiff -- you don't have to -- you could sit back there and just wait for him to put in his chain of title, and finally he comes down to put in a document and he says, I object to that, Your Honor, because the deed is forged, or there is not a connection between John Doe and his successor in interest.

But that's the way you try trespass. You have this chain of title and the plaintiff starts putting in his documents and finally you come to the thing that the defendant breaks that chain of title. You don't have to plead that. Now, everything else you've got to plead. But when you plead not guilty, that puts in issue every defense except limitations that a defendant wants to assert and you don't have to plead it; it is hiding. So, I think we've got to preserve those. They're statutory and should be in there as exceptions.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, Bill.

PROFESSOR DORSANEO: Stepping back away from this page and looking at it and trying to figure out what -- why we're preserving any particular part of this, you have decided to take the word "controlling" out so it says "The Court shall submit the questions in the form provided by Rule 277." I already know that. Then it says, "which then" -- some new information, "which are raised by the written pleadings in the evidence" -- so and all the rest of this is just kind of extra stuff.

So the one little thought here in the first part of this paragraph -- and that is that the questions that are submitted in compliance with the last rule are meant to be raised by the written pleadings and the evidence in some fashion. Until we get down here to the words, "Failure to submit a question," in this end part, there is no new thought that I find of any value stated. And I agree with what Judge Pope said but it's stated as an exception -- stated as an exception.

What I'm trying to say is, I wonder why we even need to say any of this stuff here at the beginning. I mean, wouldn't something be objectionable if it was not raised by the evidence in the objection part? Wouldn't it be objectionable if it was not raised by the pleadings at least if there was a wide variance under Rule 274 and the other -- what is going on here in the beginning of this paragraph that's of any real value that doesn't cause us more trouble than it will be worth?

PROFESSOR EDGAR: Bill, to respond to that, I can assure you that if we eliminated, we're going to cause nine times as much problems

as if we leave it in.

MR. REASONER: In Rule 274 it doesn't say anything about it being raised by the written pleadings and the evidence. It's got to say it somewhere.

CHAIRMAN SOULES: This is where it's said.

PROFESSOR EDGAR: You leave this out and you're going to have more confusion by not only the bench but also the bar.

PROFESSOR DORSANEO: But the only -- but then to come back to it, the only real thought that's here is the matters in the charge are meant to be raised by the pleadings in the evidence.

PROFESSOR EDGAR: That's right. That's right. That's a central thought.

PROFESSOR DORSANEO: And what it used to say is the matters in the charge were allocated to issues -- are to be raised by the written pleadings in the evidence and those were component elements of grounds for recovery or defense plus inferential rebuttal in the type of time this was written.

MR. LOW: What about maybe a case -- I can't think of some -- but there might be some

kind of statutory case that says you're entitled to a particular instruction. I don't know. You know --

CHIEF JUSTICE POPE: Malpractice. The statutes --

MR. LOW: -- without even pleading it. And what I'm get to is I'm just afraid when we talk about instructions, there are instructions out there in left field and right field that I don't know about and we're going to get in a position where the courts are going to say, well, you didn't plead that where you might be entitled to without pleading. We're not trying to change the law. I think Rusty had a suggestion earlier.

MR. MCMAINS: I would be content in terms of solving the problem that I think the rule was intended to solve, as Bill has pointed out, historically, if we just put in the inferential rebuttal matters -- or inferential rebuttal instructions had to be supported by the written pleadings and evidence.

CHIEF JUSTICE POPE: Question.

CHAIRMAN SOULES: Chief Justice Pope.

CHIEF JUSTICE POPE: I wish we could bury that phrase once and forever. It has a

decent death. Let's -- once we write into our rule that it's got dignity, why, it's going to get right back as an issue.

MR. JONES: Amen.

MR. LOW: But, Judge, there are inferential rebuttal instructions. We can't ignore it. If we want to write it out, we can do it.

MR. REASONER: Let me say I think Judge Pope is right. I mean, when you say inferential rebuttal questions shall not be submitted in the charge, I think that's reasonably clear in any kind of case. The problem is once you get beyond cases that are fairly patterned, I don't know what inferential rebuttal issues are in security litigation or antitrust litigation. And, you know, we don't have a problem as long as we leave it to questions, but once you start talking about inferential rebuttal instructions --

MR. MCMAINS: That can be solved. We've already passed Rule 277 now. But we say -- we dealt with inferential rebuttal question, why should it not be submitted.

MR. REASONER: Just questions. Just questions.

MR. MCMAINS: I understand. We talked about it the last time whether or not inferential rebuttal matters shall not be submitted in the charge.

MR. REASONER: I just don't know what that is.

MR. BRANSON: What if we just say the term "inferential rebuttal" shall be stricken.

MR. MCMAINS: From the jurisprudence.

MR. JONES: Talk about where all that came from, it came from special issues.

CHIEF JUSTICE POPE: I understand that.

MR. REASONER: I understand that and it means something in the personal injury practice, Franklin. I don't think it's ever been really defined in commercial litigation.

MR. JONES: Commercial litigation had more sense to ever embrace such a thing.

MR. REASONER: I understand that. But at least as I read this rule, it's supposed to apply to commercial litigation as well as personal injury litigation.

CHAIRMAN SOULES: Doesn't Harry really -- hasn't Harry really put his finger on the pulse

of this thing? I mean, if we say in the first part that the question, instructions and definitions raised by the pleadings in the evidence ought to be submitted, and then we get down here and we say that no party can have a question submitted that's raised only by a general denial --

MR. REASONER: Or you can just say not raised by an affirmative written pleading.

CHAIRMAN SOULES: Or not raised by an affirmative written pleading. That is sort of saying the same thing twice, raised only by a general denial and not raised by an affirmative pleading. And leave in these special references to these special proceedings as Judge Pope has pointed out.

You get issues in those out of the common law that -- and they haven't changed the fact that they're going to let them lay behind a log and I guess until they do, they can do so. But anyway just start out, "questions, instructions and definitions raised by the pleadings in the evidence," and then maintain these "special proceedings," and then say party can't have a question submitted unless it's affirmatively pled

and then failure to submit complaints on appeal.

Doesn't that cover the whole spectrum of what's left for this rule to speak to?

MR. MCMAINS: Well, it still doesn't deal with the requirement to plead or not plead an inferential rebuttal defensive matter.

CHAIRMAN SOULES: Well, if it's got to be pled, that's dealt with in the first sentence because the Court shall submit instructions that are raised by the pleadings of the evidence. It says that in the first sentence, I mean, in my proposal.

MR. MCMAINS: If you're keeping in a thing that says you're not entitled to a question --

CHAIRMAN SOULES: You are not entitled to a question that's not affirmatively pled.

MR. REASONER: That's right.

MR. MCMAINS: But I don't agree. I think it just leaves it open and up in the air just like it is now.

PROFESSOR EDGAR: Why do you need that question if you've already said, "The Court shall submit questions that are raised by the written pleadings in the evidence"?

MR. MCMAINS: That's what I'm saying. That sentence is unnecessary if you have done the first.

MR. REASONER: No, Rusty, you ought to -- not everybody has the vast knowledge of the law as you do. I mean, when some new lawyer reads this, he ought to -- it ought to tell him that if he has an affirmative defense, he wants to submit a question to the jury on, he has to plead it.

CHAIRMAN SOULES: The first sentence says what you get. Later on it emphasizes by saying what you don't get.

MR. LOW: What you don't get.

CHAIRMAN SOULES: That's right.

MR. MCMAINS: But that doesn't say that you don't also get the inferential rebuttal.

CHAIRMAN SOULES: That's true it does not speak to inferential rebuttal.

MR. REASONER: What it does is it leaves open -- it leaves the Courts free to distinguish between personal injury and commercial litigation which is the way they solved this problem in the past. You say you already have a case that's holding and you can't get inferential rebuttal instructions if you don't plead them. I

mean, the courts will take care of that.

CHAIRMAN SOULES: They've taken care of that because of the pleadings. Chief Justice Pope.

CHIEF JUSTICE POPE: Let's see if we can unravel this phrase "inferential rebuttal" which is a shorthand rendition of law talk -- lawyer talk. We start off -- we're going way back, and a defendant answers that this was an unavoidable accident. That's my affirmative defense. I'm not negligent because this was an unavoidable accident. Logically, that means I rebut your negligence because of this argument. It was unavoidable accident.

Now, then, there were some lawyers that were smart enough to convince some judges who were dumb enough to say, well, then, if that is the truth, then the burden is on the plaintiff to negate unavoidable accident. So, then we transfer the affirmative defense over to a part of the plaintiffs. This is the thing that makes it not only rebuttable but an inferential rebuttable issue. That's what it is. It is placing the burden upon the plaintiff to negate an affirmative defense. And that's what an inferential rebuttal

issue is now.

When our courts started knocking those down one at a time and trying to get this thing back into its correct posture, we got it back in its correct posture. Why? Not because it was an inferential rebuttal issue because that was a mistake all along, but because this is an argument, unavoidable accident, not even an issue. And Wheeler versus Glaser (phonetic) said that back in the 50s that the only purpose of unavoidable accident is to call the attention to the jury about this argument.

So it never was an inferential rebuttal issue. It was always an argument in the nature of a defensive answer to negligence. The defendant says he wasn't negligent because it was unavoidable accident. That's all it is is argument.

MR. MCMAINS: That's true on all of them, Judge.

CHIEF JUSTICE POPE: I know it. So it's not an inferential. An inferential rebuttal issue is some smart lawyers' ways of winding up the course. So let's don't get back into it.

PROFESSOR EDGAR: Judge, let me pose

this question. This is very fascinating and let me just pose this question to you. Plaintiff sues defendant on a note. And the defendant's affirmative defense is a release of the note. Now, plaintiff asserts that the release was obtained by fraud. Now, is that an inferential rebuttal?

CHIEF JUSTICE POPE: No. But on the same kind of reasoning that makes unavoidable accident an inferential rebuttal, it could be because it would place the burden on the plaintiff to negate the defense.

PROFESSOR EDGAR: Well, that's my question.

CHIEF JUSTICE POPE: And the same thing about the "no duty" rules and voluntary assumption of risk. And no duty is two of the three elements of voluntary assumption of risk. But it's just -- somewhere down the line they imposed upon a plaintiff a burden to negate defenses. But there is just as much reason to place the burden on a plaintiff to negate the fraud on that note, or whatever the defense is, as there is to negate unavoidable accident.

MR. REASONER: I'm not sure --

CHIEF JUSTICE POPE: It's a false issue.

MR. REASONER: I'm not sure, Judge. You're not suggesting that if the defendant put the release into evidence and the plaintiff says you obtained that by fraud, then it's the defendant's burden to show that the plaintiff didn't do it.

CHIEF JUSTICE POPE: No, no. I thought that was sued on promissory note.

MR. REASONER: That's what I'm talking about, also.

CHIEF JUSTICE POPE: And the defense is, no, the plaintiff makes out his case by coming in and putting the original note in evidence and quitting.

MR. REASONER: Okay.

CHIEF JUSTICE POPE: And he doesn't have to negate.

MR. REASONER: I agree. The defendant -- now, the defendant comes forward and proves up a release.

CHIEF JUSTICE POPE: That's right.

MR. REASONER: Now, the plaintiff says wait a minute, you fraudulently obtained it.

Surely, it's the plaintiff's burden to show the fraud.

MR. MCMAINS: Should be affirmative.

PROFESSOR EDGAR: Well, that depends on what an inferential rebuttal is.

MR. REASONER: No, it does not.

PROFESSOR EDGAR: It seems to me --

MR. REASONER: See, that's my very point.

PROFESSOR EDGAR: But it seems to me --

MR. REASONER: That's my very point. You get outside the personal injury area and start throwing these concepts around, you're going to mess yourself up.

PROFESSOR EDGAR: Well, it seems to me that an inferential rebuttal --

CHAIRMAN SOULES: Whoa, whoa, we're trying to make a record. Okay. Sam Sparks, San Angelo.

MR. SPARKS (SAN ANGELO): In all that they're talking about, shouldn't we -- I thought we had stopped practicing law from hiding behind the log and beating the hell out of somebody. I hear somebody saying, you owe me; here's the

note. The other guy says, no, here's my release. Certainly, the plaintiff ought to have to plead then sometime, you know, that you obtained that by fraud, you know. I mean, how do you -- what we're talking about is get instruction and issues on things that have never been pled, that's inferential.

MR. JONES: The point is, Mr. Chairman, that defraud is not a part of the plaintiff's case in chief. Defraud is an affirmative defense that the defendant has to plead and prove. Now, unavoidable accident is simply a negativing of a part of a plaintiff's cause of action which is negligence. And Harry's example just doesn't fit. Judge Pope is exactly right. What inferential rebuttal does is put the burden on the plaintiff to --

MR. REASONER: Franklin, I have no argument with that in the personal injury area. My only point is that once you get outside the personal injury area, it gets very slippery as to what your going to call inferential rebuttal.

MR. JONES: Well, I don't know that there is such a thing as an inferential rebuttal issue outside of personal injury.

MR. REASONER: I think that may be right but if you put it into rules generically, then people are sure as hell going to try to apply it outside the personal injury area.

CHIEF JUSTICE POPE: We're talking about, at most -- on our pattern of jury committee we have tried to list what are the inferential rebuttal issues, and we have to stand on tip toe to get more than three or four, but every one of them are simply arguments that rebut negligence. They are good arguments that did not get themselves to where they get a name. Then they become special issues. But I just hope that we don't write into the rules this very disturbing term.

MR. MCMAINS: It's already there, Judge, in Rule 277 and that's why --

CHIEF JUSTICE POPE: Inferential rebuttal issues?

MR. MCMAINS: The questions, yes.

CHIEF JUSTICE POPE: Does it use that term?

MR. MCMAINS: Yes.

CHIEF JUSTICE POPE: But it's --

CHAIRMAN SOULES: It prohibits them.

PROFESSOR EDGAR: It recognizes them by prohibiting them.

CHAIRMAN SOULES: Whoa, let's have one speaker at a time. Chief Justice Pope.

CHIEF JUSTICE POPE: That's all I'm saying is, we killed it in 277 and let's don't resurrect it in 279.

MR. MCMAINS: What I'm saying is aren't you really saying, though, that inferential rebuttal matters shall not be submitted, not just questions?

CHIEF JUSTICE POPE: Oh, yes.

MR. MCMAINS: See, you don't want instructions either, right?

CHIEF JUSTICE POPE: That's right.

MR. MCMAINS: I mean, I'm not arguing. I'm trying to clarify. We ain't done that yet.

MR. WALKER: I've always felt Muckleroy (phonetic) was terrible and they should put neither in there and neither is clearly -- Now, you would need to have an instruction under Muckleroy.

CHIEF JUSTICE POPE: No. Was the plaintiff negligent? No. Was the defendant

negligent? No. You never need to get to the neither. You've already answered --

MR. WALKER: I know it. Don't you need -- you give the jury the opportunity to find unavoidable accident. Do you?

CHIEF JUSTICE POPE: No, you argue that. The plaintiff -- the defendant was not negligent because it was an unavoidable accident, therefore, you answer it no. But if you -- if you put the neither in there, the plaintiff has got to get an affirmative answer, the fact that the defendant is negligent and he's got to retry the whole thing and get a second answer the defendant -- the plaintiff was not negligent.

In other words -- well, I mean, but that's the theory of the thing. It is -- that Muckleroy thing is an unavoidable accident raised through the back door, and it's the set of law.

CHAIRMAN SOULES: Franklin Jones. Oh, I'm sorry, Orville, are you still -- Orville, speak up so we can hear you.

MR. WALKER: When you ask the jury who was negligent, that you somebody is negligent, you find out who. Now, if you leave it like that, they're going to find somebody negligent. But if

you put an instruction in there -- you can't put neither in there, that's inferential. Surely you're entitled to leave the jury out but they don't have to find anybody negligent.

MR. BRANSON: Well, they answered no to both issues, Judge. It doesn't --

MR. JONES: I really don't have a right to speak to all this because I've been out of the room a good deal during the debate, but I thought it might be helpful for the committee as a whole to know the whole feeling of the subcommittee on this question when we hashed this out.

I don't think we made it very clear in the rules but the six members of that subcommittee felt just like just Justice Pope does, and that is that this whole concept of inferential rebuttal is an illegitimate child at a family reunion and the closest grade that you can put the whole mess in, that's where it belongs. That's what we tried to do but obviously we didn't do a good job.

PROFESSOR EDGAR: Well, to speak -- if I might come back -- if I might digress to Rule 278 for a moment. It seems to me --

CHAIRMAN SOULES: Hadley, I think

we've had so much fun here, I'm not sure I want to stop it. Do we have to go back to work?

PROFESSOR EDGAR: It seems to me that we could cure this problem and maybe I just don't understand the problem. But it seems to me that we could simply say that a party shall not be entitled to an instruction -- no, to an inferential rebuttal matter or to an instruction on an inferential rebuttal matter or an affirmative submission of any question on that party's part if the same is raised only by a general denial and not by an affirmative written pleading by that party.

CHAIRMAN SOULES: Where to me that creates problems, is that the Court may do what Judge Pope has said. It may write an opinion and say there is not going to be any inferential rebuttal instructions. And if it does that, it doesn't make any difference whether there's pleadings or not pleadings. It's over.

And if the first sentence says, "The Court shall submit questions, instructions and definitions raised by the pleadings in the evidence," and the Court some day writes that opinion, we don't have to worry about inferential

rebuttals being mentioned in this rule. They're gone. And if we've got something down in this rule that says if you've pled them you can get them, then the Court has said in this rule when it adopts this rule that if you plead them, you can get them. And the Court is probably not ready to do that, at least, certainly if Judge Pope was there, he wouldn't vote that way.

But to me, to put in inferential rebuttal in this rule, those words, it is a mistake. If inferential rebuttal instructions can be gotten and are going to be continued, then the words "questions, instructions and definitions" in the first sentence permits you to get them. If they're not under the case law, you can't get them.

MR. BRANSON: Why don't we run up a flag and say you can't get them? The Court is going to have to pass on our rules anyway. And if we're wrong, I'm sure they'll correct it at that point.

CHAIRMAN SOULES: All right. First, how many are in favor of even the mention of "inferential rebuttal," the term in Rule 278? How many favor --

MR. BRANSON: Negatively?

MR. SPARKS (SAN ANGELO): Negatively or affirmatively?

CHAIRMAN SOULES: Either way.

MR. MCMAINS: It's already in 277.

CHAIRMAN SOULES: No, I'm talking about in 278.

MR. JONES: It's in 277 by way of saying it's a dodo bird.

CHAIRMAN SOULES: They're saying it's dead. Okay. Should the term "inferential rebuttal" be in 278? How many say "yes"?

MR. BRANSON: Well, now, when you put that, it's really misleading unless you say positive or negative. There are probably people here who would like to resurrect this dodo bird.

CHAIRMAN SOULES: Do you want it resurrected?

MR. BRANSON: No. I'd like to get rid of the vestiges of it.

CHAIRMAN SOULES: Well, that's what 277 tried to do.

PROFESSOR EDGAR: It just eliminates it as a question, not as an instruction.

CHAIRMAN SOULES: Okay. Well, I'm

trying to get along here. Now, we -- somehow we're going to have to -- we've been debating this for about an hour.

MR. BRANSON: Could we do that by amending 277 to make it "matters" instead of "questions."

MR. SPIVEY: 277 is closed.

JUSTICE WALLACE: No motion for rehearing.

MR. BRANSON: Just change the word "questions."

CHAIRMAN SOULES: No. 277, Justice Wallace has already said no motion for rehearing. We're on 278. There is mixed feelings about whether the term "inferential rebuttal" should be mentioned in 278. How many believe that term should be mentioned in 278, should be there, either way positive or negative? Seven. How many feel that it should not be there?

PROFESSOR DORSANEO: This is assuming that we leave it in 277.

CHAIRMAN SOULES: Eight. It fails eight to seven.

MR. SPIVEY: You outvoted them eight to seven.

CHAIRMAN SOULES: Pardon?

MR. SPIVEY: You outvoted them eight to seven.

CHAIRMAN SOULES: That's right.

MR. BRANSON: I don't think you counted Judge Tunks and I'd like a recount.

CHAIRMAN SOULES: I did count Judge Tunks. Okay.

MR. SPARKS (SAN ANGELO): Which way did it go, Luke?

CHAIRMAN SOULES: Eight to seven. It's not going to be mentioned in 278.

MR. BRANSON: Could you recount the vote?

CHAIRMAN SOULES: Sure. How many feel that the term "inferential rebuttal" should be specifically used in 278?

MR. SPARKS (SAN ANGELO): Either affirmatively or negatively, either way.

CHAIRMAN SOULES: Either way. Nine. All right. How many feel that it should not be used? Ten.

MR. NIX: Do you want another recount, Sam?

PROFESSOR EDGAR: The damned Chairman

voted. He voted by golly.

PROFESSOR DORSANEO: Mr. Chairman, the problem is it's not mentioned now but it is described.

CHAIRMAN SOULES: Now, but the case law is -- but now we've got to get into -- I'd just leave it like it is, Luke.

CHAIRMAN SOULES: What?

PROFESSOR EDGAR: Just leave rule 278 just by saying "questions, instructions and definitions." We've got up there and people are going to argue about it and the Court is going to ultimately tell us whether it has to be raised by pleadings and the evidence. Just let it go at that.

CHAIRMAN SOULES: That's right. The only -- the second sentence -- or pardon me. From the word -- starting with "The party shall not be entitled to," and going to the end of that sentence, that language is awkward. You can take half the words out and get the idea across.

PROFESSOR EDGAR: Yes, but everybody knows what it means because it's always been there.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: I don't want to argue this forever but the words "where the same as raised only by a general denial," you know, I don't -- that means to me -- the only things that are raised by general denial that are not affirmatively pled are inferential --

CHAIRMAN SOULES: I think that ought to come out. I think we ought to say "A party shall not be entitled to submission of any question not raised by affirmative written pleading by that party."

MR. SPARKS (EL PASO): So you're going to change everything on course and scope. General denial puts course and scope in issue and that raises that issue.

CHAIRMAN SOULES: For an instruction. This is a question. This is talking about a question. We're trying to -- Well, if a general denial raises it, you can get it under the first sentence in this rule the way we've changed it. But you can't get a question unless you plead. So my suggestion and this is just for draftsmanship, shoot at it --

MR. BRANSON: Luke, for the sake of beating a dead horse, I'm not sure the committee

fully comprehended the last vote. I perceive looking at the committee, the majority of it would have been in favor of doing away with inferential rebuttal matters including instructions. The way you phrased the motion it was, does anyone want to deal with inferential rebuttal in this issue?

Now, I would move that the committee eliminate inferential rebuttal instructions in Rule 279 -- 278.

MR. SPARKS (SAN ANGELO): That's a different motion.

MR. BRANSON: That's a different motion.

MR. SPARKS (SAN ANGELO): I'll second that motion.

MR. LOW: Are we going to try to define inferential rebuttal?

MR. MCMAINS: They're just defined in cases --

CHAIRMAN SOULES: Not in the business cases --

MR. REASONER: But that's the problem, Frank. In the commercial area you have no --

MR. BRANSON: It's defined and falls into repute in the case law in the tort areas. I

mean, it's not in the definitions in the business area and it won't be a problem.

CHAIRMAN SOULES: Frank, I'd like to assign --

MR. REASONER: It will be the first case I'm in because -- and I lose because I've argued that they violate this rule by getting inferential rebuttal instructions against it.

MR. BRANSON: Luke, I'd like to either call for a debate on my motion or call the question.

PROFESSOR BLAKELY: A point of order, Mr. Chairman, it strikes me that this is really a motion for reconsideration and that can only be made, I think, by somebody who voted in the majority.

MR. JONES: I don't consider it to be that, Mr. Chairman. We were asking for a vote for a weather vein as to how the committee felt about the --

CHAIRMAN SOULES: I'm going to rule that it's not before the house. It's not in the rule that's here. We've passed on how we're going to handle it. It was defeated twice. We've got a lot of work that is before us.

MR. SPIVEY: But in all fairness to you, Mr. Chairman, that is not -- that is not what I thought we were voting on. I thought you were talking about a weather vein, to use Frank's expression, about whether we should or should not include it. I did not understand that that was a final vote on the issue.

CHAIRMAN SOULES: The proposition was whether the term "inferential rebuttal" should be mentioned in 278 negatively, affirmatively or otherwise.

MR. BRANSON: Well, if you'll read back, I don't think that was the Chairman's motion.

CHAIRMAN SOULES: Well, Frank, state it however you want to and conduct a poll.

MR. BRANSON: I would move that in Rule 278 we inform the bar that inferential rebuttal instructions are inappropriate.

CHIEF JUSTICE POPE: That would mean that there would be no instruction on unavoidable accident.

MR. BRANSON: Yes.

CHIEF JUSTICE POPE: Well, we sure are changing the substantive law.

MR. SPARKS (EL PASO): He's trying to change it.

MR. BRANSON: But all you're saying is that, Judge. You're not instructing on something that doesn't exist.

CHIEF JUSTICE POPE: Well, unavoidable accident has never been rejected as a valid argument, a defensive argument.

MR. BRANSON: We're not saying they can't argue it. We're just saying they can't instruct it. There's a difference.

CHIEF JUSTICE POPE: Well, that, too, changes the law in a sense because I don't think you can show me a case where the evidence raises it and it is pleaded where the Supreme Court has ever said that it is not an entity.

MR. BRANSON: But a lot of things are entities that aren't instructed, Your Honor.

CHIEF JUSTICE POPE: But it has always been a subject upon which you could instruct. I thought that -- well, Garver against Burner (phonetic) and Wheeler against Glaser. Lemos recognized it as a valid defense. It is a perfectly valid defense, and if the facts are there and if it is pled, then they are entitled to

the instruction. But --

MR. LOW: Act of God.

CHIEF JUSTICE POPE: Yes, act of God is another one. I really don't think that we ought to sit here and change the substantive law.

CHAIRMAN SOULES: It's beyond the scope of the committee's recommendations and it's out of order. If you want to raise it next time, if you'll submit a written request to the committee, we will take it up at the next meeting.

MR. SPARKS (SAN ANGELO): Luke, I agree.

CHAIRMAN SOULES: And I'm down to Rule 278, and we're going to try to work on what has been submitted.

MR. SPARKS (SAN ANGELO): In the middle of that paragraph as you're going there, the affirmative submission of any question can -- how about taking the the word "question" and just changing it to "any matter"? Okay?

CHAIRMAN SOULES: The problem with that is that sometimes the plaintiff's pleadings raise issues that still give the defendant entitlement to instructions. And sometimes the

defendant's pleadings raise issues that still give the plaintiff entitlement to instructions.

MR. SPARKS (SAN ANGELO): Well, not as I read this because at that it's not raised only by a general denial. It would be raised by the plaintiff's pleadings, so they would still be entitled to it.

PROFESSOR DORSANEO: I think he may be right.

MR. JONES: No longer is there an act of God.

MR. SPARKS (SAN ANGELO): No, you wouldn't have act of God. I'm not debating that.

CHAIRMAN SOULES: Does this mean that if I don't plead the instructions that I expect to seek in connection with your issues, I cannot get those instructions?

MR. SPARKS (SAN ANGELO): If you don't plead sole cause, unavoidable accident.

CHAIRMAN SOULES: I'm talking about business cases.

PROFESSOR EDGAR: That's the problem we've got. There are things more than unavoidable accident and sole cause roaming around out there as Harry has tried to suggest to us.

MR. SPARKS (SAN ANGELO): Hadley, I've still got the floor.

PROFESSOR EDGAR: I'm sorry.

MR. SPARKS (SAN ANGELO): My problem is this: Why can't we as lawyers start pleading what we're going to prove? Why do we have to lay around behind the log and try the cases on things that aren't pled that nobody knows about. You can't do it in Federal court; why in the heck can you do it in state court? Is one upmanship here such a good thing in our state courts? I don't think so. What's wrong with pleading what you intend to prove? That's my question.

PROFESSOR EDGAR: Well, let me -- may I just -- let me give you one example. Let me just ask this question. Let's go back to the question a minute ago. Plaintiff sues defendant on a note.

MR. SPARKS (SAN ANGELO): Yes, sir.

PROFESSOR EDGAR: And the defendant --

MR. SPARKS (SAN ANGELO): The defendant says release.

PROFESSOR EDGAR: All right. -- says that there is a release, and the plaintiff wants to take the position that that was a forgery.

MR. SPARKS (SAN ANGELO): He better plead it.

PROFESSOR EDGAR: Well, but now shouldn't the plaintiff -- shouldn't the defendant be required to prove that that is a valid release?

MR. SPARKS (SAN ANGELO): Yes. Because the release under 94, I think, is an affirmative defense, and he's got to plead it before he is going to hear any evidence. And when he does plead it, if the plaintiff wants to prove that it was a fraudulently obtained release, he better plead.

PROFESSOR EDGAR: Not fraudulently obtained, a forgery.

MR. SPARKS (SAN ANGELO): Forgery. He better plead it's a forgery.

CHAIRMAN SOULES: Take a construction case. The pleadings are -- the plaintiff's pleadings are there was substantial completion and he's entitled to be paid.

MR. SPARKS (SAN ANGELO): You bet.

CHAIRMAN SOULES: And as the case goes along in trial, you find out he's trying his case on the basis that 55 percent is more than half and

that's substantial and he's entitled to be paid. But that's not what the law is on substantial completion. It's more than that. It means essentially done.

Now, the defendant, after that effort on part of the plaintiff to try to prove that -- prove his case that way says, look, I want the legal definition of substantial completion put to that jury because he hadn't proved; he hadn't gone that far. I didn't plead substantial completion or lack of substantial completion. That was raised -- that issue was raised --

MR. SPARKS (SAN ANGELO): The plaintiff pled it.

CHAIRMAN SOULES: -- by the plaintiff's pleadings.

MR. SPARKS (SAN ANGELO): That's right. And it should be an instruction on substantial --

CHAIRMAN SOULES: Yes, but this says that a party -- I'm not entitled to an instruction unless I pled it. That's what -- when you get down inside of here. The first sentence -- the first sentence takes care -- if any party pleads --

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

CHAIRMAN SOULES: -- something that raises the right to an instruction by any party himself or another, he can get that instruction. But down in here, it's the party that wants the instruction has to have pled it. That's why that's a problem to put instruction down in that middle of that thing, because I haven't pled it, don't intend to, but I may be entitled to several instructions and definitions that append to your issues regardless of whether I plead anything beyond a general denial.

CHIEF JUSTICE POPE: Question.

CHAIRMAN SOULES: Yes, sir. Chief Justice Pope.

CHIEF JUSTICE POPE: Has this thing that we're talking about caused any courts any trouble anywhere? Aren't we the only ones that are having any problem with it? Why don't we leave this just like it is except get rid of that phrase, "phases and shades" and the word "controlling" and go on down the road?

The cases have already said that you're entitled to an unavoidable accident instruction

and you're entitled to an act of God, if you plead it. It's clear about that, so I don't think we've got a problem.

MR. MCMAINS: It's not clear on the pleading. I mean, I think we already answered that based on the vote but it is anything but clear on the pleading as to whether there is an obligation to plead inferential rebuttal. I think El Paso Sam will give you that.

CHIEF JUSTICE POPE: My thought on that is please start pleading. That will solve that problem.

MR. MCMAINS: Oh, I don't disagree with you. It's just that you try a straight up negligence case where the only pleading is contrib, you go to the Judge and inevitably what you get submitted are sudden emergency, sole cause, unavoidable accident, act of God, everything. They don't give it to you until the end of the trial. Arguably they don't have any evidence on it, but up until recently, Lemos and a few others, the courts always aired in giving rather than not giving because it never got reversed, in my opinion.

CHAIRMAN SOULES: Okay. How many -- I

think we voted to take out that sentence, "Various phases or different shades of the same question, definition or instruction shall not be submitted." How many approve the deletion of that from the proposal? Okay. Any of you feel that should be maintained? Okay. That's deleted unanimously.

I think the -- essentially, the language although it's awkward is apparently easier to leave than to change.

PROFESSOR EDGAR: We struck "controlling."

CHAIRMAN SOULES: We struck "controlling" out of the first sentence. How many feel that "instructions and definitions" should be added after "questions" in the first line? Please show by hands. How many opposed? That's unanimous.

Okay. With those three changes that is the striking of "controlling" in the first sentence, the insertion of "instruction and definitions" after the word "questions" in the first line, and the deletion of the sentence that we just voted upon and the taking out of "explanatory" in the last line of the first page and the second line,

second page, let's take a vote on -- a show of hands on passage of this. How many favor recommending this to the Supreme Court? 15. Opposed? Those opposed? Okay, that's unanimous.

MR. REASONER: I think we should vote to condemn Dorsaneo for raising this question.

PROFESSOR DORSANEO: Well, you-all never understood it up to the present time.

CHAIRMAN SOULES: When we walk out of this room, he'll be the only guy in step.

PROFESSOR DORSANEO: For the record, the words were the same as raised only by a general denial. We're talking about inferential rebuttal.

CHAIRMAN SOULES: There probably is but we sure couldn't do anything about it.

PROFESSOR DORSANEO: But if nobody knows that, it doesn't matter.

CHAIRMAN SOULES: It doesn't matter. All right, 279. Do you-all want to -- let's go get a cup of coffee and just drink it here or maybe some soda outside. I don't know whether we can get some soda.

(Brief recess.

MR. SPARKS (SAN ANGELO): We're not talking about negligence. I'm talking about a worker's comp case. The only thing is, it kind of helps you know what your case is about and, in fact, if they plead sole cause, I get to file a special exception, tell me what sole cause are you talking about.

PROFESSOR EDGAR: All I'm saying is you want the party to be required to plead the inferential rebuttal matter in order to get an instruction on it. That's what you want. The rules do not provide for that, and you're suggesting that they should. But that's really a different -- somewhat of a different issue.

MR. MCMAINS: Well, except I think that Bill's comment --

PROFESSOR DORSANEO: It's the same issue. That's the thing.

MR. MCMAINS: -- is right. What he's saying is that you used not to get inferential rebuttal defenses if you hadn't pled them.

PROFESSOR EDGAR: That's right, but that is no longer true.

MR. MCMAINS: And the reason you didn't get them was because of this rule which

CHAIRMAN SOULES: Okay. We're ready to take up 279, what's left of 279. Okay. Who wants to take the affirmative on presenting this deemed elements aspect? I'm obviously on the other side of it and for reasons.

PROFESSOR EDGAR: Well, I think obviously that as a result of our action earlier today on Rule 277, that we're going to have to change some of the language of Rule 279. And now the extent to which we change it, I don't know, and I think what we ought to do is just take it sentence by sentence.

CHAIRMAN SOULES: Okay.

MR. REASONER: Well, would you explain what the differences -- what are the major changes?

PROFESSOR EDGAR: Well, the changes that we have in -- what I have recommended here on pages 7 and 8 actually just change the word "issues" from the concepts of separate and distinct submission issues to "elements." That's basically all I attempted to do, plus adding the paragraph over here at the top of page 8 which the committee approved in its entirety as a concept at

the meeting we held in the Supreme Court room some months ago.

Now, that concept has already been approved. But the only language that we have here that's different from the existing rule is we're talking about elements -- deeming elements rather than deeming issues, the deeming principle.

CHAIRMAN SOULES: Discussion? Rusty.

MR. MCMAINS: I just have one question before that.

CHAIRMAN SOULES: Yes, sir.

MR. MCMAINS: On Rule 278, on the last page, when you turn the page, did we take out the explanatory instruction on that?

PROFESSOR EDGAR: Yes.

MR. MCMAINS: Okay. I remember taking out the bottom of the page. I just didn't remember about turning the page and seeing it again.

CHAIRMAN SOULES: Thank you.

PROFESSOR EDGAR: Now, it seems to me that the first sentence we definitely need to retain. I mean, "The concept of independent grounds of recovery of defense not conclusively established and no element of which is submitted

or requested shall be deemed waived."

CHAIRMAN SOULES: No question.

PROFESSOR EDGAR: I would think that needs to be retained.

CHAIRMAN SOULES: That's right.

MR. MCMAINS: Hadley, does the current Rule 279 use the term "deemed waived"? I mean, I'm just curious.

PROFESSOR EDGAR: Let's look.

PROFESSOR DORSANEO: It does.

PROFESSOR EDGAR: "Upon appeal, all independent grounds of recovery or of defense not conclusively established under the evidence upon which no issue is given or requested shall be deemed as waived."

MR. MCMAINS: Okay.

CHAIRMAN SOULES: It should be "are waived."

MR. MCMAINS: I was just curious.

CHAIRMAN SOULES: There's no deeming about that.

PROFESSOR EDGAR: It shall be deemed as waived.

CHAIRMAN SOULES: But the rule ought to say "are waived" because they're not deemed --

there's nothing to be deemed about them. No part of them were ever submitted.

PROFESSOR EDGAR: That's true. I agree. You're right. It should be deemed are waived.

MR. MCMAINS: The whole concept of deemed findings or whatever versus waived grounds seem -- grammatically, it seems better if you just say "are waived."

CHAIRMAN SOULES: Are waived.

PROFESSOR DORSANEO: Second the motion.

PROFESSOR EDGAR: Just say "shall be waived."

CHAIRMAN SOULES: "No element of which is deemed or requested are waived."

PROFESSOR EDGAR: And no element of which is submitted or requested shall be waived or is waived.

CHAIRMAN SOULES: Well, it's -- independent grounds, so it's plural. That's why I put "are waived."

PROFESSOR EDGAR: Yes, are waived.

CHAIRMAN SOULES: Okay. All in favor of retaining that first sentence, show by hands.

Opposed? Okay. That stays.

PROFESSOR EDGAR: Now, the second sentence -- again, we were thinking of those situations in which -- for example, assume we have a limiting instruction which we have now eliminated from any reference in Rule 277. And the -- well, no, that wouldn't -- I'm really trying to think of the relevance to Rule 277 as we have just passed it in light of --

MR. MCMAINS: Well, the example, Hadley, that we had talked about before to some length was, if, for instance, we ask whether or not somebody committed a fraud and defined the elements of fraud but leave one out to the jury, it's not that -- it's not a separate question, but it's in either instruction or definitions. You haven't tried to change the substantive law of fraud; you're trying to supply that element or finding on that element to satisfy the substantive law.

PROFESSOR EDGAR: Well, but that comes back to a fundamental problem. Well, let's just assume that the Court has omitted one element of fraud.

MR. MCMAINS: Right.

PROFESSOR EDGAR: Now, wouldn't that be treated, though, as an incorrect definition of fraud and doesn't have anything to do with deeming principles?

PROFESSOR DORSANEO: That really is the issue.

PROFESSOR EDGAR: That's the problem, you see. So element really doesn't fit into that context. Element fits into the context in which you have something that is part of a question as distinguished from a definition or instruction or explanatory instruction; not a limiting instruction but explanatory instruction.

MR. MCMAINS: But if you are defining a term that is submitted to the jury in the question to contain three elements which as a matter of substantive law has four, I do not see how you can say that that isn't part of the question.

PROFESSOR EDGAR: Well, I'm just simply saying that that's a definition and definitions are -- errors to definitions have to be preserved in a particular way and the deeming principle is totally inapplicable. You just waived your right to complain because you failed

to object.

MR. MCMAINS: What if there is no evidence on it?

PROFESSOR EDGAR: On what, on the element that's omitted?

MR. MCMAINS: Yes.

PROFESSOR EDGAR: Well, the verdict has to be supported by pleading in evidence.

MR. MCMAINS: Yes, but --

CHAIRMAN SOULES: On every element. The no evidence and insufficiency evidence points are really not a problem in these rules because if there's -- even if you don't get all of the elements into your instruction, you still have to have all of the elements to support a judgment. So, you're going to have to discover that that element was there.

The question is really -- let me see if I can outline it a little bit. Say there's four elements to a cause of action. You only get three of them in your instruction. And the broad issue is whatever -- is the plaintiff -- is the defendant liable to plaintiff? The defendant is liable to plaintiff if he does these three things. They omit the fourth one. Jury says,

yes.

If there is sufficient evidence of the fourth item, then we're into the problem that we're addressing right now. What do you do about it? Can the Judge go against the verdict or not? Now, if there is no evidence on the fourth one, there is no evidence to support a judgment even though you've got a jury finding, just like if there was no evidence on one, two or three, you wouldn't have it.

MR. MCMAINS: If -- you know, the specific context of what Hadley was talking about was saying that we may not be talking about different elements; we're talking about a defective definition. I guarantee you there are cases in which a legal concept has been misdefined without objection and the courts have said that you have waived that.

PROFESSOR DORSANEO: Waived the law.

MR. MCMAINS: Yes.

PROFESSOR DORSANEO: You've changed the law --

MR. MCMAINS: That's right.

PROFESSOR DORSANEO: -- because you have not insisted upon proper law for this case,

that is the law for this case, the law that you use without making complaint or request.

MR. MCMAINS: And what I'm saying is that does precisely go to the no evidence question. It does affect your right on a no evidence issue if you have changed the law by dropping it.

If I define something to omit a key element and manage to skate it through and the other side doesn't discover it until then, I've got no place to complain on appeal if we don't have any kind of deemed findings or something whereby we can substitute an attack.

PROFESSOR DORSANEO: See, Luke, you want --

MR. MCMAINS: The defective law -- that we have case law on and you can agree to a change in the law, basically, and if you apply that same principle to omission, that is a significant change in your appellate rights.

PROFESSOR DORSANEO: But, Rusty, what Luke wants to do -- I think what the suggestion is that the way that we will deem under circumstances when something is left out.

MR. MCMAINS: Well, I understand.

PROFESSOR DORSANEO: What he's saying is that you will deem -- getting around to break this logical problem. What he wants to do is change the deeming rule and say it's going to be deemed answered consistently with the answers already given by the jury if there is evidence to support that rather than treating it as a waiver of the right to jury trial and letting the trial judge deem it whatever way the conflicting evidence would suggest. And I'm about ready to be convinced that that's a better way to do things than the old deeming approach of letting it be treated intellectually as it was really found by the Judge on the basis of a reasoned analysis in a particular way.

MR. MCMAINS: The Federal rule still applies what we do now.

CHAIRMAN SOULES: The old practice was that if you had -- if you were supposed to submit four granulated issues and you only got three of them and the plaintiff gets all three of those answered his way, the last one was not submitted; that was an omitted issue of a ground that got submitted. The way that you know that that was an omitted issue was it had to be necessarily

referable to the three that got submitted.

Now, if it wasn't necessarily referable to those three, it was an omitted ground, and that comes into this first sentence. But if it's necessarily referable to the three that went in to the jury, then the whole case was submitted, or at least right for decision. If the trial judge entered a judgment against the jury verdict on the three -- and this is assuming no objection, you understand. None of this arises if there's been objections at the charge stage.

So, three issues got submitted, no objection to the omission of the fourth one. But the trial judge enters a judgment against the jury verdict for the plaintiff. And on appeal, then, it is deemed that the trial judge -- and, of course, there had to be conflicting evidence on the fourth item -- that the trial judge on conflicting evidence found the fourth element against the plaintiff. Therefore, the plaintiff didn't establish all four parts of his cause of action and he loses. That's the deemed issue.

PROFESSOR EDGAR: Only if the Court makes an expressed finding to the contrary.

CHAIRMAN SOULES: No. No, it's deemed

found consistent with the Court's judgment. He just enters a take nothing judgment. Plaintiff takes nothing, period.

MR. MCMAINS: That's true.

CHAIRMAN SOULES: So, now without ever finding -- that issue never having been answered by the jury or expressly addressed by the Court, the fact that there was conflicting evidence on that fourth element, the plaintiff loses his case. Okay. That's the old practice.

PROFESSOR EDGAR: The current law.

CHAIRMAN SOULES: Well, I don't know whether it is or isn't. Now, we've gone to broad issues.

PROFESSOR DORSANEO: It surely is. Come on.

CHAIRMAN SOULES: Now, we've gone to broad issues, and we submit a broad issue which arguably contains the fourth one; maybe it doesn't. You know, I mean, broad issues -- it's kind of hard to really see what's there if you don't make it a convoluted long, long question that includes everything there is. If you generalize it back to making it a good broad issue, whether all four of those things are there

or not may be arguable. Say that when you really get to looking at it, it really looks like only three of them are there, but this fourth part is necessarily referable to that broad issue.

Now, see, you've got to remember you don't even come to a deemed problem unless you've got necessarily referable omission. My belief is that if something is necessarily referable to what went to the jury, it went to the jury. Because in the broadest construction of that broad issue, it includes what's necessarily referable to it, so, you have really submitted that matter. And the trial judge cannot ignore that broad issue and enter a judgment against the plaintiff.

Now, of course, if the plaintiff didn't get answers to the first three, he cannot get a judgment from the trial court just because the trial court deems the fourth one in his favor because he hasn't made the other three. So, it's clearly the deemed concept -- except in the context of affirmative defenses is really a defensive concept. It's appealed from a judgment entered -- a take nothing -- it protects a take nothing judgment even though the plaintiff has gotten a verdict on every issue that got

submitted. He still gets nothing. And I'm on both sides of the docket in business cases so it doesn't -- you know, how that cuts is really not too important to me.

Okay. So, if we're going to go back into the old granulated practice in how we used to deem issues -- omitted issues found against the jury verdict whenever the trial judge entered a take nothing judgment, then we're getting back into picking apart the elements of a cause of action that we used to submit by granulated issues and we're just transferring that dissection into the instruction practice.

Now, we're going to look to the instructions. And even though we've got a broad issue to which the omitted material was necessarily referable answered in favor of the plaintiff, we've got this instruction which doesn't set forth everything. It omits one thing.

Now, then, we're going to take that old dissection problem, transfer it to the instructions, let the trial court enter a take nothing judgment because the instruction was incomplete. And it was not even objected to by

the defendant at the time of submission. Now, my feeling is that that is not consistent with simplification. Simplification means that we're going to give some sanctity to that broad issue and what's necessarily referable to it. So that when it's answered, it's a verdict and we don't go back and dissect it.

Let me finish this -- one other thought ran through my mind there. If you permit the post verdict -- it all starts post verdict, you understand. Nothing happened prior to the verdict. Never -- no objection was ever raised. It starts post verdict. If we're going to permit a party who loses a jury verdict to go back through, dissect the instructions, go to the judge, maybe persuade the judge that something didn't get submitted, get a take nothing judgment on conflicting evidence, to me, we have now caused the bar and the bench to get all tensed up again at the charge stage about getting every little thing dotted -- every I dotted and every T crossed because if you don't, then an appellate judge or the judge after verdict is going to get a new look at this case. I think that ought to be done prior to submitting the case to the jury.

So, if there is no objection to a broad issue and an instruction and matter omitted or arguably omitted is necessarily referable to that, the broad issue in simplification practice, in my judgment, compels us to support the jury's verdict and not to permit a post verdict review of something that was omitted. Thank you. That's all.

CHIEF JUSTICE POPE: Isn't what you say just deeming it as found?

CHAIRMAN SOULES: Deeming as found consistent with the jury verdict. Now, see the present practice is --

CHIEF JUSTICE POPE: I know you said consistent with the judgment.

CHAIRMAN SOULES: -- the judgment. You can either conceptualize it, Judge, that it was a part of the broad issue because it was necessarily referable so you don't have to deem anything. That's one way to conceptualize it. Or the other one is, if it was omitted, you deem it consistent with the verdict in order to support trial judge's efforts to make issues broad and to simplify the charge.

MR. BRANSON: How would you word it,

Luke?

PROFESSOR EDGAR: You really mean consistent with the jury's verdict on the matter to which the omitted element refers.

CHAIRMAN SOULES: Is necessarily referable, yes.

PROFESSOR EDGAR: Not the verdict because the verdict -- with the verdict you look at everything.

CHAIRMAN SOULES: Exactly.

PROFESSOR EDGAR: You're talking about something consistent with the jury's answer to the question to which it's referable.

CHAIRMAN SOULES: To which it's necessarily referable. Now, the concept of necessarily referable has got plenty of understanding.

PROFESSOR DORSANEO: It's a difficult one, though, because what's necessarily referable -- it's the thing that's submitted is necessarily referable to the ground of recovery or defense of which the omitted thing is conceptually a part.

CHAIRMAN SOULES: That's right.

PROFESSOR DORSANEO: So it's the other direction rather than what's omitted as referable.

CHAIRMAN SOULES: So, I'm saying instead of deeming something consistent -- the trial court, in effect, then, has got to enter judgment on the verdict. He can't enter judgment, a take nothing judgment -- or he can't enter a judgment contrary to the verdict because on a hindsight view he thinks that there was an element omitted from an instruction.

PROFESSOR DORSANEO: Even if he made an expressed finding? Would you eliminate the ability of the judge -- let's say, everybody forgets to put scienter in the charge, would the Judge be able as he -- taking the deeming part out of this rule, would the Judge be able to be asked to decide that issue on the basis of conflicting evidence or would you say you've eliminated that, too?

CHAIRMAN SOULES: Well, again, my real -- the way I conceptualize this is if it's necessarily referable to the broad issue, it's been submitted and there's not anything to be found.

PROFESSOR DORSANEO: And answered, okay.

CHAIRMAN SOULES: And there's not

anything to be found; it's been answered. Now, that's the way I really see it in support of the broad issue, and I've got a broad concept of broad issues. But that's about as broad as it can get. Sam Sparks, El Paso.

MR. SPARKS (EL PASO): Let's take this rule as proposed, and Hadley says this has already been voted on so if it was, I'm sure I voted against it. But if I object to --- let's just say the instruction that has the four elements, that one of the elements either has no evidence, can't be deemed against me just like you would do now. Tell me why this as proposed would not make me prove that a finding was calculated to and probably did result in an improper verdict notwithstanding whether there was evidence on it at all.

In other words, my objection is good, it's overruled and then you get to the next paragraph in here. It's a good objection, there wasn't any evidence on it, but I still have the burden of proving that it was going to result in an improper verdict.

CHAIRMAN SOULES: I don't know whether you -- I don't know whether you have to show harm

where there is no evidence of an essential element and you've objected to the omission from the instruction.

PROFESSOR EDGAR: That's relating -- That's really relating to different things. The question that you're asking is not -- is not answered by the paragraph here on the top of page 8. That's another -- that's another matter.

CHAIRMAN SOULES: This is where no objection has been made.

MR. SPARKS (EL PASO): I think you're right. But my question is: It is not answered, but if you read the next paragraph, it gives me the inference that, in fact, you could make that objection. It could be overruled and -- and you have lacking in legal or factual sufficiency of the evidence which, I assume, is no evidence, and you've got to now show that it was calculated to and probably did result in an improper verdict. I don't see -- I mean, I think it's -- you could have that instruction. That's the instruction I get when I read it.

PROFESSOR EDGAR: Aren't we really talking about three different things, now, instead of just one or two?

CHAIRMAN SOULES: Yes. The harmless error part of it is another somewhat complicated concept.

MR. REASONER: Yes. I think we should come back to that but I think Sam is right, Hadley. This is written so broadly.

PROFESSOR EDGAR: I'm saying we need to do something -- in view of what we do with Rule 277, we need to come back and rethink what's here. I don't deny that at all. I'm just simply saying that what you're talking about is not what Luke's talking about.

MR. REASONER: Yes, I agree.

CHIEF JUSTICE POPE: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir. Chief Justice Pope.

CHIEF JUSTICE POPE: I hate to just throw another dead cat here on the table but except for the brilliant people who are sitting around this table, the lawyers of Texas do not yet know that nearly all of 277 has been deleted so that we are aiming at broad issues.

And out there there's going to be some county judge who will be slow to find that out, and he's going to submit the fraud case in four issues

instead of five. It's going to be a rather simple lawsuit and it's going to be a simple charge. He's going to have four issues out there submitted the old fashioned way. Or the more modern way, he may submit it with a checkoff on each one of these, misrepresentation, reliance and so forth and he is going to omit one, and there's nothing wrong with that. It's an entirely proper method of submitting the case and that's going to continue for some years because there's nothing wrong with that.

Now, don't you think that the deemed as found rule should apply to that type of situation like we have applied it in the past?

CHAIRMAN SOULES: Judge, I don't, but that's because I'm trying to go to the broad issue. I would just change the bottom of this to say deemed found -- "deemed found by the jury in such manner as to support the answers of the jury to which the omitted element is necessarily referable." In other words, the trial judge on conflicting evidence has got to go with the findings of the jury on the things that were submitted. He can't go contrary to the findings of the jury on the things that were not -- that

were submitted. Anything that's necessarily referable to what was submitted, the jury's verdict is going to control.

Now, that's -- and if you go along -- if you do that, then whether it's a broad issue or granulated issues, the same rule would apply. And it does support the going to broad issues because then you don't break it down. Now, that's my feeling about it. I don't know whether that's -- and here's Rusty and he disagrees with me. I want to hear it fully. Is that Orville speaking?

MR. WALKER: Yes.

CHAIRMAN SOULES: Orville and then Rusty.

MR. WALKER: I think we've got two waivers; one when you have an independent ground of recovery that's not requested, it's waived.

CHAIRMAN SOULES: It's waived.

MR. WALKER: The other is when you have an omitted element, which you've got a waiver there. You have waived a jury trial and you have placed that in the lap of the court to find. In other words, by that issue it's a nonjury trial and if the jury is free to answer that either way, so has the trial judge the power to answer it

either way.

He should not be bound by what the jury has already found because the jury can find that contrary to what is already found, like proximate cause. He could say everything is negligent but, no, the proximate cause omitted. The the Judge can say, well, I don't think it's proximate cause. And it's not in harmony with the verdict, you might say, but he should have the power to find in such manner as he pleases as to that omitted element.

CHAIRMAN SOULES: That's the principle argument against it. I recognize that. Rusty McMains.

MR. MCMAINS: The necessarily referable concept I don't think is -- I mean, where we disagree, I think, partly is, you think it's necessarily referable to the issue asked. Of course, the entire concept of omitted element is the jury isn't asked. The first thing is, it has to be missing. In the example that we've been talking about where you've got fraud that has so many elements, one of which isn't there but the theory of recovery obviously is fraud, that's what is submitted.

Lawyers and judges know that that's an element. Laymen don't know because they are told by the Judge that they are to consider only what they are told as to be the law. And I think that it is against common sense for one thing, in addition to being contrary to Rule 26-A on what we instruct the jury, to presume that the jury knows what this missing element is and found it in a particular manner.

And I agree with Orville that the question in concept of distinction -- we're talking about waiver both places and the question is, what did you waive? Did you waive the right to try that issue altogether, because that's what you're arguing, or did you merely waive the right to get the jury to answer that issue?

Now, as a pragmatic thing, I doubt there's anybody in this room who's ever had a judge rule contrary to the verdict on a supposed deemed finding. He either did it because he didn't like the parties or even because somebody was intelligent enough to realize that they've left it out and ask them to make a finding. Most of the time the judges say, well, that's your tough luck you didn't object to it and they enter the

judgment, pretending, in essence, as you suggest they should, that the jury would have found that way if I asked.

Most of the cases on deemed findings you don't ever get to them until you get to the appellate court and all of a sudden it's the appellate court that discovers there's a deemed finding and that's where it's mentioned. The problem I have with your theory, however -- with your theory of presuming that it was determined by the jury is particularly consistent now with our appellate rules.

If this is a jury finding, then you don't have a factual sufficiency attack on that finding unless you make it in the motion for new trial. You ain't got one. So, all you're talking about now is the no evidence attack. Yes, I can make a no evidence attack. Factual sufficiency, no, I ain't got one of those because I didn't notice it back then.

At least in this manner in the way that we have rewritten the rule -- because the rule has two things that are changing; one, to deal with a distinction between elements and issues to adapt it to broad form questions, but two, to indicate

that the deemed finding must be supported by factually sufficient evidence. So that when nobody tries that issue and it gets to the Court of Appeals, the Court of Appeals gets to look at it and say, look, everybody forgot about this, but there is proof that is sufficient to satisfy us that there is sufficient evidence to support that deemed finding.

And if you recognize that there is a distinction between no evidence and insufficient evidence, then what you are doing is imposing on that party, the same one who missed it when it went to the jury. If he misses it on motion for new trial, he's blown it forever. And the other party can say, well, it's a deemed finding and all I've got to have is a little scintilla and it could even be hearsay as long as it was unobjectable. I get to support it all without ever having a fact finder ever trying that case. I find it difficult to believe that endemic to the broad form submission is the concept that we have to make the charge that much jeopardy for a lawyer that if he has messed up, that he can't at least go back and try that issue at some level and get some judicial determination rather than making all

these presumptions about, well, the jury would have answered it that way anyway if they had only known about it.

CHAIRMAN SOULES: Buddy and then Bill Dorsaneo.

MR. LOW: I would agree, I think, that this is a finding that was not addressed by the jury. Then, before a judgment was entered if they find out about it before a court should address it, you have waived the right to a jury. Then someone should consider it and consider the justice in the case in arriving at a decision.

Then if it's on appeal, I think, as Rusty suggested, might come up to go to appeal, then I think you should go along in favor of affirming the trial court rather than reversing the trial court on something he really -- that wasn't even brought to his attention because he enters a judgment.

CHAIRMAN SOULES: Bill Dorsaneo, then Frank.

PROFESSOR DORSANEO: Well, the reason why I've decided to go with Luke's approach on this is that when you take a look at this rule and what really happens, an element is left out along

the way and nobody knows that through the entire proceeding including rendition of judgment.

So, to say that conceptually that we're merely waiving the right to jury trial and that the Judge has made this finding on the basis of conflicting evidence, is it -- it's a pretense. It is because that's really not what happened. What happened is nothing happened on that element, and on appeal we treat something as having happened based upon how the judgment was rendered.

Now, in the cases that I've seen that end up with a kind of a judgment that's in disharmony in a sense with the verdict, there's usually some screwball reason why the Judge rendered the judgment the way she did, or he did in a given case. You see. And that has nothing to do with it.

So, this device that's in our Texas rules that has the appeal, the logical appeal of being of a rational solution to a problem that really exists, it has an intellectual appeal. It isn't -- doesn't really work rationally at all. And so what's the difference whether we say it's this pretense or that pretense on the issue.

MR. MCMAINS: Would you take away the power of the trial judge to make a finding if it's called to his attention?

PROFESSOR DORSANEO: That's what I asked Luke and I have a hard time with that one.

MR. MCMAINS: The key is, if you would not take that power away, that's the reason that they have deemed it found in entering the judgment because they give the trial judge credit for recognizing it and deem it found that way as if it had been expressly called to his attention. If you're going to give him that power, then the extent of the waiver is the waiver of the right to a trial by jury, and you've got to be consistent there to say that if you don't phrase it, you don't --

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: Now, Rusty, as I understand what Luke is saying, though, what is necessarily referable elements, the time to be pointed out is the time to object to the charge. And what -- exactly what would happen in a fraud case or any of your other cases, is the defense lawyer, who is probably more up on the procedures and the elements than your average plaintiff's

lawyer, will sit there knowing that the element is missing and take his bite at the apple on his motion for new trial level knowing he can't lose the lawsuit at that stage.

CHAIRMAN SOULES: The response to Rusty that I see is that both sides --

MR. MCMAINS: You've already won.

MR. BRANSON: According to judgment here -- I mean, if he knows the jury finding is not going to be any good on him, he's got a duty to point it out to the trial court to make that correction prior to being submitted to jury. If we do it the way it's proposed, that's taking away from him. He doesn't have to make that objection.

MR. REASONER: Frank, I've never met a man with that kind of attitude.

MR. SPARKS (EL PASO): You're a failure to make the objection to the malpractice carrier at the same time.

MR. SPARKS (SAN ANGELO): What Frank wants you to do is to help him try his case. It would be your burden to point out each element he needs.

CHAIRMAN SOULES: Well, no lawyer here

would fail to object to, I think, an omitted element unless it was essentially just a foregone conclusion that the jury was going to go that way anyway. I mean, I can't imagine not objecting to an instruction or definition of cause of action that omitted one of them that you had a chance to argue with the jury on, and people here wouldn't do that.

But, you know, who -- what do you weigh? I guess that's really what we're down to. If a party omits an element, all the parties, it's not just one party. The plaintiff trying to -- who wants to prove this cause of action or defendant who wants to establish the affirmative defense doesn't get all the elements in. He omits the one necessarily referable element.

The other side doesn't object. Neither party has -- is seen fit to try that to the jury. They both waive the factual determination of that by the jury. They have submitted to the jury what they both regarded as the controlling issue in the case and it's been decided.

To me, a judge ought to have to enter a verdict on that. And the parties can't now come back after the fact and go back and try to do

something they should have done at the charge stage because what are the odds? Is a jury that sees nearly all the case your way going to see the rest of it or not? I can't answer that. I mean, nobody has got a crystal ball. But I would suspect that in most instances, if that had been submitted, probably the jury answering the question will be pretty much the same.

It depends on how hard you're going to hammer on that issue in jury argument. If you're going to hammer on that issue in jury argument, believe me, you're going to object to the charge if it omits that element. So, if it's that important, to me, it ought to be raised before the submission. So I guess, really -- did you have a question?

MR. JONES: No, sir.

CHAIRMAN SOULES: Let's go ahead and get everybody heard on this. I mean, it's pretty important. Hadley.

PROFESSOR EDGAR: Assume there's no evidence. Now, that's not waived, is it?

CHAIRMAN SOULES: No. No evidence is not waived. And what I don't understand, Rusty, and I'd like to understand it -- on an

insufficiency point, how does it change your right to appeal of an insufficiency point whether it's --

MR. MCMAINS: Because right now if what you do is change this to be a finding -- it is a deemed finding by the jury, then, it is a jury finding. Rule 324 requires a jury finding for attacks on against the great weight or factual sufficiency or even remitted to be attacked by motion for new trial.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: All I said was -- and it just needs to be understood that this is a necessary counterpart of what you're suggesting.

CHAIRMAN SOULES: And a judge finding can --

MR. MCMAINS: We can keep our motion for new trial. Nonjury cases don't need motions for new trial under our practice, with very limited circumstances under 324.

CHAIRMAN SOULES: Even a nonjury trial of one part. In other words, suppose prior to the -- and I don't know this -- suppose that this omitted element is raised between verdict and judgment --

MR. MCMAINS: It doesn't make any difference.

CHAIRMAN SOULES: -- and you say, Judge, make a finding and that judge makes a finding. Do you have to raise that in a motion for new trial?

MR. MCMAINS: That's what we're trying to deal with in the rule. I mean, the point is, see, you're saying that the rule should be that the judge has only the power to render judgment in accordance with the verdict.

CHAIRMAN SOULES: I'm trying to get an answer to something else.

MR. MCMAINS: That's your position, then, the Judge has no fact finding power at all in that element.

CHAIRMAN SOULES: I'm not --

MR. MCMAINS: If he has no fact finding power on that element, it is a jury finding. A jury finding on against the great weight or factual sufficiency must be attacked by a motion for new trial or it is waived.

CHAIRMAN SOULES: Okay. Let me ask Bill a question.

MR. MCMAINS: So, you are refined,

then, to a no evidence attack at all assuming that you have managed to discover it by the time you did your brief.

CHAIRMAN SOULES: Bill Dorsaneo, if the Judge makes an expressed finding on an omitted element between verdict and judgment, does insufficiency of the evidence on that express finding by the Court of just one element have to be raised in motion for new trial?

PROFESSOR DORSANEO: Well, no. The rule doesn't say that, but the rule doesn't say a lot of things that we also know have to be raised in motion for new trial.

CHAIRMAN SOULES: So, maybe there's no difference in which way you deem it.

MR. SPARKS (SAN ANGELO): The Judge has to enter a verdict consistent with what the jury has found is what Rusty is saying.

MR. LOW: Are we treating that as a jury finding or judgment?

MR. MCMAINS: If you treat it as a jury finding, it's going to have to be raised in a motion for new trial. That's for certain.

PROFESSOR EDGAR: And maybe it should.

PROFESSOR DORSANEO: And it ought to

be.

PROFESSOR EDGAR: It sure should be.

CHAIRMAN SOULES: And if you treat it as a judge finding, you may have to raise it on a motion for new trial.

PROFESSOR DORSANEO: It should be.

PROFESSOR EDGAR: It sure should be.

CHAIRMAN SOULES: So it may be the same.

PROFESSOR DORSANEO: Under the current rule, Rusty is right. It literally only says that you have to raise factual insufficiency complaints when you have a jury finding, but this paragraph B of Rule 324 is -- when I read it and teach it, I think that there are also other situations and I know about some of them in which you have to include something in a motion for new trial when they're not enumerated in it. And I just don't think this issue was addressed by the Supreme Court.

MR. MCMAINS: It was addressed, though, because that's what the conflict was in the previous rule in Rule 324, because there was a previous rule that talked -- in which there was a dispute between El Paso and Dallas with regards to

whether you had to have a motion for new trial to attack findings by a judge.

PROFESSOR DORSANEO: Let me put it this way: If anybody asks me whether they ought to include a point in a motion for new trial and it's a factual insufficiency complaint concerning a judge finding in a jury case, I'd say you better do it. If you don't, then you have some nice technical arguments but you probably have made a mistake, so, that's my answer. I know what my legal advice would be.

CHAIRMAN SOULES: Are there -- Harry Reasoner.

MR. REASONER: Yes. I would like to raise a somewhat different but related question. You know, as I understood the prior rule, we had no problem in only factual matters being deemed because issues appropriately submit only factual questions to the jury. I take it an element can be a mixed fact in law, right? So, it seems to me that at a minimum we should qualify this to say factual element.

PROFESSOR DORSANEO: Well, you see you're going to get yourself into a place where we're going to be lost forever.

MR. REASONER: No, the judge always -- the judge always decides agency, validity of contract; these are always decisions that the Judge makes. The way you've written the rule, you're going to take away his power.

PROFESSOR DORSANEO: Let me give you an example of a conflict that we have now where this problem really exists now. There is a case called Allen versus American National Life Insurance Company or a name to that effect, and in that case, I think that the charge was a case as to whether there was fraud in getting insurance. Fraud was defined in terms of what the person -- what the applicant knew or should have known at the time they applied rather than what they knew.

In other words, the scienter requirement of the defense was not defined properly. Okay. Now, that's treated as a law problem rather than a mixed law and fact problem. I can't explain it well enough to get it across simply.

MR. REASONER: That's not a law -- whether you knew or should have known is a question for the jury.

PROFESSOR DORSANEO: No, no, but --

PROFESSOR EDGAR: But the words "are

should have known" were left out of the definition.

PROFESSOR DORSANEO: They were put in.

PROFESSOR EDGAR: They were put in the definition and it was only what they knew rather than what they should have known that was required.

PROFESSOR DORSANEO: The dividing line before on whether something is treated as defective such that you waive the law which is where we started out, Rusty, arguing that you're waiving the law in this and -- or subject to deeming principles had to do with whether it was a law question -- law giving improper law, you waive the law, too bad, tough luck, no relief. If it's messing up the factual elements question, that's different. That never made any sense.

MR. REASONER: But why don't you call these factual elements, then?

PROFESSOR DORSANEO: Because I don't want to preserve that old stuff.

MR. BRANSON: Luke, what are you recommending?

CHAIRMAN SOULES: What I'm recommending and I'd like to think overnight about

whether we ought to put factual in there. I don't want to -- I mean, either -- my inclination would be to do it now or think about it overnight and see if Bill does come up with some things that historically we would really be mudding things up, because you know we can't --

CHIEF JUSTICE POPE: Tell me one more time what's wrong with the deemed as found in support of the judgment. Just tell me one more time what is the vice that flows from that, and what are we going to do about these thousands of cases that are going to be correctly tried on the system that's not the fraud issue, particularly in the lower courts.

MR. BRANSON: Well, what happens, Your Honor, when the trial court deems the missing element against the jury verdict and enters a take nothing judgment and on appeal you are limited to what he deemed the facts to have been, which is totally contrary to the jury finding.

CHAIRMAN SOULES: Judge, I think this --

CHIEF JUSTICE POPE: Now, of course, we have that situation right now.

MR. BRANSON: I understand that they

NOV --

CHIEF JUSTICE POPE: But how many -- how many times have any of you had an experience or have read about a judge deeming a finding contrary to the jury verdict?

MR. BRANSON: I've got two on appeal now with major NOV findings in them. If the Judge was going to NOV specific jury finding, he would sure as hell go back and look for elements left out.

CHIEF JUSTICE POPE: I'm not familiar with the ideas actually.

MR. REASONER: But, Frank, isn't the answer to Judge -- my suspicion is the answer to Judge Pope's question is that none of us know of a case that we've been involved in where the Judge has deemed a finding contrary to the jury verdict.

CHAIRMAN SOULES: Well, they're in the books.

MR. WALKER: I don't think it's happened since way back in maybe the '30's. The case of Nixon -- where the Supreme Court upheld a jury -- of course, finding contrary to the verdict not in harmony, way back. Nixon against Hershey (phonetic), I believe, was the title of it. I

think it was in the '30's or maybe '40s. I think that's the last time it's ever happened.

CHIEF JUSTICE POPE: Well, that don't mean that found in accordance with judgment has got a rather illustrious history. It goes back to Silliman versus Gunoe (phonetic) prior to the turn of the century. That's where it happened. Judge Gaines wrote it in which was an oversight case. They didn't submit an undisputed issue.

MR. WALKER: Judge Gaines wrote it and so forth.

CHAIRMAN SOULES: Judge, I go to Lemos --

CHIEF JUSTICE POPE: My question is, don't we have the same problem if we say "verdict" instead of "judgment" that we have right now?

CHAIRMAN SOULES: I think not, Judge, and here's why: It comes out on your case at Lemos versus Montez where you condemn proliferation of instructions. Now, if -- and I don't care whether it's on affirmative defense by the defendant or cause of action by the plaintiff but I want to use cause of action by the plaintiff. If in the plaintiff's cause of action, he has risk of being deemed out of court because

he doesn't have every conceivable element in that instruction, I think we're going to proliferate instructions.

On the other hand -- because he doesn't get a chance to have a defendant shoot at him in that charge conference over this. This is after the verdict. As a matter of fact -- and the trial judge has ruled against him, so he has got to come back in and just analyze every conceivable instruction to be sure that he doesn't leave an element out of that instruction.

My feeling is that as a policy -- it's just a policy matter in support of simplification of the trial judges crafting a charge and the sanctity of the broad issue that gets submitted that we support that verdict every way that we can including if somehow an element is left out in the -- in the leaning towards not proliferating instructions as we used to proliferate issues, that if that's not complained about, that jury verdict stands and that party who got that verdict gets a judgment on it.

MR. BRANSON: And the truth of the matter is, Your Honor --

CHAIRMAN SOULES: That's why --

MR. BRANSON: -- if the Judge feels like an element was not proven, he's still got the NOV power.

CHAIRMAN SOULES: He can grant a new trial.

MR. BRANSON: That's right. He can grant a new trial, either way. But you have given sanctities in the jury's verdict and you've taken away an opportunity for one side to hide behind the log and not make the objection until post verdict.

MR. MCMAINS: There ain't nobody hiding behind the log.

MR. BRANSON: There could be.

MR. LOW: Luke, one thing you're overlooking, some of your business verdicts have many issues and the courts might steal -- in issues, so there might be a big question what's consistent with the verdict. And I tried some business case where it's very difficult to figure out what the verdict was when it was over but there's not much difficulty in figuring out what's consistent with the judgment.

MR. REASONER: That's a very powerful point.

PROFESSOR DORSANEO: It is a point.

MR. SPARKS (EL PASO): Luke, do we have to change the rule now where a lawyer is required to submit legally sufficient issues or instructions to that he has to submit -- he or she has to submit almost legally sufficient issues. It seems to me that this is one of the times that we're looking at trying to adapt a rule to a lawyer who didn't do his homework and who is making a mistake, and that's been one of the problems in always drafting rules is how far do you go. I guess, I just -- for the record I think I better say that it's one of the first times I've ever agreed with Rusty.

PROFESSOR EDGAR: Do you want that on the record?

MR. SPARKS (EL PASO): I put it there.

PROFESSOR DORSANEO: There's another motivation involved here instead of just favoring verdicts and juries and that kind of business. One of the main procedural motivations that I have is that once we start changing the roles of questions and instructions as we've done, as has been done since 1973, we run into problems of

distinguishing between cases that are defective instruction cases.

And the error has been under a certain number of cases when they're conceptualized that way considered to be waived and you agree to the law that is submitted in the instructions of definitions; it's the Allen case. You run into confusion as to whether you have that kind of case or whether you have a case that's covered by the deeming principles over here in the last part of old Rule 279. And you can make -- you can make an argument that procedurally is sound where the result ends up being different. By having it be in harmony with the verdict, the problem disappears. The problem of having two different sets of rules coming to different conclusions goes away and that's another motivation that I would have. We eliminate other procedural problems by doing it the way Luke says.

MR. MCMAINS: Well, I have another inquiry along the line of Judge Pope. What happens if both parties -- since we're talking about a bunch of incompetents trying a lawsuit -- what happens if a party submits his theory of recovery, since you are revising it so that it's

deemed consistent with the answer to which it is referable, leaves out an element and the theory -- and the defendant also leaves out one of his elements. So, now under your rule, we get to deem both of them found consistent with the jury verdict.

Now, what's the Judge supposed to do with regard to rendering a judgment when both the defense is proven by something that wasn't asked the jury and the recovery was proven by something that wasn't asked the jury? The question here is the power and discretion of the trial judge in the abstract. And the extent of the waiver that we are going to have in questions whether we keep the waiver that we've had for 70 or 80 years, or do we extend it further to where you say we waive this right to try it at all, by virtue of having missed the fact that it was omitted either from the recovery or defense.

And it seems consistent that what he has waived is the submission of it to the jury. That's what the Federal rule is. The Federal rule is exactly the same and there are a lot of people who are proponents of the Federal rule, because the Federal rule on omitted elements or anything

that should have been in the charge but wasn't are deemed found by the Judge and are subject to the -- that's right. In a general charge or anything else, if you ain't got something there, we assume we give some credence to the judge's knowledge of these things.

And I just think it's a detraction from the judge in uncomplicated cases. I'm not sure that there aren't going to be efforts to craft instructions, in your terms, for both defenses and claims and sometimes the submission of multiple theories of claims in the same issue. If there isn't going to be left out both sides' elements, and if you start saying that it relates to that issue, then you're going to wind up having as many deemed findings argued in favor against a judgment as you are for it, if you don't have any way out of the box.

Your answer to that -- the only other response that you can have is, well, that's obviously, then, an irreconcilable conflict. So, we're going to find that the deemed findings irreconcilably conflict and a new trial is warranted. Now, that just seems to me to be an awful waste of time. And I think that it is a

burden on the general submission practice and not an improvement.

MR. LOW: I would move that you put it to a vote as to the -- whether we're going to turn it one way or the another -- change the deemed finding one way or the other and bring it to a vote which way.

PROFESSOR DORSANEO: There's really three choices, though.

CHAIRMAN SOULES: Okay. What are they? As I see it, I see two of them.

PROFESSOR DORSANEO: We leave it that it's this draft or something substantially like it where we're talking about elements that are omitted whether they're omitted from issues or whether they're omitted from definitions and instructions, and have the deeming rules that have traditionally been applicable apply such that the omitted element is deemed found in support of the judgment. That's one choice.

Another choice would be one that we really haven't talked about, which is to just say if the problem is one of the propriety of the -- or the accuracy of the definition -- let's say, the definition of fraud, we treat that as a waiver of

law kind of thing. Do you understand what I'm saying? Under prior law, if you define negligence the wrong way, then that's the definition of negligence for your case and you can't complain about it on appeal if you didn't object. So, it's very analogous to defining fraud the wrong way by leaving a part of the definition out, by leaving one element out.

And under case law that exists now, if you characterize the problem as a defective law in an instruction problem, then the law -- then it's waived. I mean, it's not part of this deeming at all. It's another part. It's over in Rule 274. It's not here in 279.

And the third thing is -- the third thing is to do something like Luke suggests that I think dodges the bullet on whether it's over in Rule 274 or here in 279 because you say it is still going to be deemed. We still have to pretend that it's found and there still has to be evidence but it's now going to be in harmony with the verdict rather than with a judgment that came about on some basis or another.

I think those are really the three choices. The problem is presented, as I see it, by us

changing the roles of questions and instructions and definitions. When the roles are changed, the rules like these don't end up meaning the same thing anymore.

MR. REASONER: It seems to me that you really just slide over the issue when you say in harmony with the verdict. I thought Rusty made a very powerful point that in complex cases you're going to have a variety of findings, and if you say, Court, you have no power, you've just got to look and deem for both defendant and plaintiff, everything in support of what the jury did partially find, then I suspect that you're going to help defendants probably more than plaintiffs in cases where defenses are raised, you know, where they have submitted some incomplete defense, and you've got to deem the rest of it.

CHAIRMAN SOULES: You would have to deem an omitted element consistent with the findings of the jury on the necessarily referable submitted issues. Necessarily referable is a concept that we know about. It's a difficult concept.

MR. REASONER: On the submitted affirmative defenses.

CHAIRMAN SOULES: On the submitted affirmative defenses if there was an omitted part of that, that part would be deemed in support of the defense.

MR. REASONER: Which would require a judgment for the defendant.

CHAIRMAN SOULES: Well, to the extent that that defense wiped out the entire plaintiff -- whatever part of the plaintiff's cause of action it went to. On the other hand, if in the same verdict, there was an omission from the plaintiff's cause of action, and everything else was found his way, that omission would be deemed in favor of the plaintiff because that would be an element necessarily referable to his case.

So when you get through, you've got a complete verdict. Now, how it works depends on how the verdict would have worked if it had been completely submitted to begin with.

MR. REASONER: But, you know, I guess my problem -- this seems to me to be a radical -- potentially, a very radical change. I mean, we know that -- at least as far as I know, the Federal rule, which faces basically the same problem that you suggest is now engendered by the

more extended use of instructions, works very well by leaving the discretion with the Judge.

CHAIRMAN SOULES: The discretion with the --

MR. REASONER: -- to make the finding.

CHAIRMAN SOULES: Well, but this is when the Judge fails to make a finding.

MR. REASONER: I understand but that's the way -- as I understand it, that's the way the Federal rule --

PROFESSOR DORSANEO: The Federal rule is copied from our rule. We invented this deeming concept, I believe.

MR. REASONER: But they use the deeming concept together with extensive instructions and my impression is it works well. So, why should we break new ground and invent some new concept where I think a number of potential difficulties have been pointed out today.

CHIEF JUSTICE POPE: Let us assume that the jury comes in and there's a verdict and there's a hole in the instruction about one element that's not there and everybody discovers that fact. So, they go up and they really have

had it before the judge and they argue it to the judge, and the judge says, well, I hate to do this but I'm going to have to find on this other element. There is evidence here, and the overwhelming weight of the evidence, as I view it, is against the verdict whether that verdict be for the defendant or plaintiff, and I'm going to render a judgment the other way. In other words, the judge is performing his function as a judge and he makes his decision.

MR. LOW: Can we put those in categories?

PROFESSOR DORSANEO: I would agree with that. I agree with you on that one, Judge Pope. I don't think anybody can argue with you about it. That's the case where it never comes up until after -- until appeal.

CHIEF JUSTICE POPE: If we start drawing that kind of a line between whether the Judge can rule or can't rule, then we need two rules on this.

MR. LOW: One if it is and one if it's not.

CHIEF JUSTICE POPE: And we are really cutting things fine now.

MR. SPARKS (SAN ANGELO): I've got a little problem right there. You try your case and an element is missing, a fraud case, and in your question there's evidence there, okay, and yet the judge, for whatever reason, just says, well, you didn't submit it and I just don't think there was enough evidence and I rule against you. Okay. But there is evidence. My problem is that at that point in time, I think the appeal is over. You didn't get your element submitted and you've got no right to appeal from that judge's ruling.

Now, if he rules in favor of the verdict, reviews the evidence, says, yes, there's evidence here, I'll find than element along with the verdict, then the other person, the defendants, have got the right to appeal and have an appellate court look and see if there is evidence or not. But if he rules against the person that left it out, there's no appeal from what I'm hearing.

MR. REASONER: Why not? I don't understand.

PROFESSOR EDGAR: This can work the other way, though.

MR. MCMAINS: Works both ways.

PROFESSOR EDGAR: Let's just assume

that fraud is an affirmative defense rather than a theory of recovery. And the omitted element is missing and the jury finds in favor of the defendant on that omitted element. The trial judge might conclude, well, I think that this should be answered -- that the evidence is -- is not adequate to support this missing element so I'm going to find the other way on that.

MR. SPARKS (SAN ANGELO): I understand. I'm just saying --

PROFESSOR EDGAR: It works both ways.

MR. SPARKS (SAN ANGELO): My proposition is what I'm saying, Hadley. It seems like to me that if the Court rules opposite from the rest of the jury's findings, okay, that there is no right of appeal.

MR. REASONER: I don't understand. Why isn't it the same shot whichever way you're coming on that?

MR. LOW: Why is there no right of appeal? Is it statutory that you can't appeal or you just couldn't prevail?

MR. BRANSON: No. I think what he's talking about is the burden that you have on appeal. No evidence versus insufficient --

MR. LOW: -- but certainly there is no rule that says you lose your right to appeal.

CHAIRMAN SOULES: You would have the same rights as if the jury had found that element against you.

MR. LOW: Final judgment. You can appeal for final judgment.

MR. WALKER: Absolutely.

CHAIRMAN SOULES: Okay. Any further discussion?

MR. REASONER: I think your suggestion of reflection over the night to go -- and I would like for our draftsman to reflect on the use of the term "elements" because I think when you get into these questions of law, it seems to me -- which I would presume elements to comprehend, then you shouldn't -- it should be the same rule.

CHAIRMAN SOULES: Let's try to give that some thought. And remind me, Harry, to be sure to get back to that tomorrow whether we should insert "factual" before the word "element" in most places in this rule. Maybe we should do that. But that's not -- as I see the principal issue other than that here is whether we continue to treat omitted elements as being deemed in

support of a judgment or whether we treat omitted elements as being encompassed in a broad issue. And if you do that, then you would say that the verdict controls. You would deem the omitted elements in favor of the verdict.

PROFESSOR EDGAR: May I make a motion? Is there a motion on the floor?

CHAIRMAN SOULES: Well, I was going to do it. I was going to submit it disjunctively since I guess it's got to be one or the other, but I'll be happy to hear yours.

PROFESSOR EDGAR: Well, with respect to the question now before us, I move that we retain the language in the rule as it now reads, that the deemed -- or the applied finding will be deemed in such a way as to support the judgment.

MR. SPARKS (EL PASO): Second.

MR. LOW: I second that motion.

CHAIRMAN SOULES: Moved by Hadley Edgar and seconded by Sam Sparks and thirded by Buddy Low.

CHAIRMAN SOULES: Those in favor of the motion, show by hands.

MR. SPARKS (SAN ANGELO): What?

CHAIRMAN SOULES: This is to deem in

favor of the judgment even if it contradicts the verdict.

MR. SPARKS (SAN ANGELO): Is this yours?

MR. MCMAINS: Well, this is the existing --

PROFESSOR EDGAR: This is the existing rule.

MR. MCMAINS: -- by and large.

PROFESSOR EDGAR: And I don't think you're in favor of that, Sam.

MR. SPARKS (SAN ANGELO): I'm not?

PROFESSOR EDGAR: Not from what you said.

MR. SPARKS (SAN ANGELO): I have heard two theories. One I will call Luke's and one I will call Rusty's.

CHAIRMAN SOULES: This is Rusty's theory.

PROFESSOR EDGAR: This is Rusty's theory.

CHAIRMAN SOULES: 12. Okay. And those in favor of deeming it in support of the verdict that the jury reaches. That's four.

MR. REASONER: Broadus is voting both

ways.

PROFESSOR EDGAR: Broadus voted twice.

CHAIRMAN SOULES: 12/4.

MR. WALKER: So, this rule has been adopted.

CHAIRMAN SOULES: Well, except for some changes, and we're going to come back to it to determine whether the factual elements should be put in.

PROFESSOR EDGAR: Now, as far as the rule in its entirety is concerned, though, Harry had a question -- or Sam, I guess, had a question concerning the implementation of the concepts embraced in the two paragraphs on page 8, so we really haven't dealt with those yet.

MR. REASONER: And I would ask you to reflect on whether the insertion of factual would make it consistent with the prior rule.

PROFESSOR EDGAR: Over here in the paragraph on page 7?

MR. REASONER: Yes.

PROFESSOR EDGAR: It might. Luke wanted to defer that until tomorrow.

MR. REASONER: Yes. I just mentioned that.

CHIEF JUSTICE POPE: Well, wait a minute. Where is it that you would add factual?

MR. REASONER: Judge, what I was suggesting is, as I would understand the prior rule on deeming, all that was really being deemed was factual findings, and it seems to me "element" is a broader term that could comprehend the questions of law as well. So that to make it consistent, you ought to insert the adjective "factual" everytime before "element."

CHIEF JUSTICE POPE: Well, isn't the only thing that a judge makes findings on is factual?

MR. REASONER: Under the deeming rule?

CHIEF JUSTICE POPE: Yes.

MR. REASONER: Under the existing deeming rule?

CHIEF JUSTICE POPE: Well, it says the judge shall file written findings -- written findings, not conclusions.

MR. REASONER: Well, I don't know that that alone -- I mean, certainly you can have, you know, findings on questions of law and findings on questions of fact just as a matter of general

practice.

CHIEF JUSTICE POPE: I'm not seriously resisting what you're talking about. I think -- I just thought it was already in there and the only thing a judge can do is make findings of fact.

MR. REASONER: I think that's certainly true under our present rule and I just -- it seems to me that we ought to make it clear that by using the broader term "element," we're not expanding -- we're not changing the reach of the rule.

PROFESSOR EDGAR: You would suggest, then, that on page 7, fifth line, it says, "Of more than one factual element -- consists of more than one factual element."

CHAIRMAN SOULES: It appears several times.

PROFESSOR EDGAR: If we just put the word "factual" there, then, then everything else talks about such elements so that we only need to put factual in there once.

PROFESSOR DORSANEO: Well, what does it mean when you put it in there?

PROFESSOR EDGAR: Well, trying to distinguish between legal elements -- between

definitions that are -- of legal terms as distinguished from factual elements.

MR. REASONER: Isn't that the way -- the present rule just says admitted issues and the issues are simply questions of fact.

PROFESSOR DORSANEO: That's what I'm trying to say. There's an ambiguity -- by putting an ambiguity that leads you in two different directions if that's a problem depending upon what you think the problem is. By saying it's factual -- by saying it's factual, I think you exacerbate.

MR. REASONER: I suggest to you that you answer the question of whether -- when you fail to object purely legal matters as to whether you have a second bite on the deemed finding. I think if you limit this to factual, you made it clear you don't.

PROFESSOR DORSANEO: If you leave out scienter or one element of fraud, would that be a legal element problem?

MR. REASONER: Whether scienter exists is a question of fact for the jury.

PROFESSOR DORSANEO: But if you leave it out of the definition, would the deeming rule

apply or wouldn't it apply?

MR. REASONER: If it's not comprehended in the issue submitted to the jury.

PROFESSOR DORSANEO: You're answering me with riddles.

MR. REASONER: No, I'm not. I gave a clear answer.

PROFESSOR EDGAR: Let me ask a specific question. Maybe this will get to it, Harry. Let's assume that the instruction to the jury is based upon what the party knew or should have known and those words are embraced in the definition.

MR. REASONER: Right.

PROFESSOR EDGAR: And there is evidence -- oh, no, that won't work.

PROFESSOR DORSANEO: That won't work.

MR. REASONER: See, I've looked at this Allen case and it's really not this problem.

PROFESSOR EDGAR: No, it's not that problem but I --

MR. REASONER: Now, the more interesting question is if all they ask -- if it only contained did he know when the law is should have known.

PROFESSOR EDGAR: All right. Let's assume that the law -- that is asked did he know but also it could support -- under the law it could support if he should have known and there is evidence that he should have known --

MR. REASONER: But no evidence that he knew.

PROFESSOR EDGAR: -- but there is no evidence that he knew. Now, can the Court, then, deem a finding on that? Is that what we're talking about as an element? I don't think it is. I think that's an improper definition that could only have been corrected by a proper objection. And I think that's where we're hung up on which is which.

MR. REASONER: I would be inclined to think you're right in that instance because really you have submitted the element of knowledge. You just --

PROFESSOR EDGAR: That's a legal definition -- this is more like a definition rather than a factual element or whatever you want to call it.

MR. REASONER: But putting in facts would make it clear you couldn't deem it in those

circumstances.'

PROFESSOR EDGAR: I think it would make it more clear than it is now.

MR. REASONER: Well, I agree with you.

MR. LOW: But any findings of the jury is a fact finding based on instructions of the law. So whatever the jury finds or does find is a fact. And it's guided because jury doesn't deal with the law. They are instructed to be guided by the law that the Court gives them as their instructions but whatever a finding -- is a fact.

MR. REASONER: I'm just troubled by the term element which is a new objection.

(Off the record discussion ensued.

CHAIRMAN SOULES: Okay. What are we focusing on now?

PROFESSOR EDGAR: We're on page 8, Luke.

CHAIRMAN SOULES: We're really talking about harmless error at this point, aren't we?

PROFESSOR EDGAR: Pardon? We're on top of page 8.

CHAIRMAN SOULES: Let's worry about that factual thing overnight and see if we can -- see if it becomes any clearer.

PROFESSOR EDGAR: Obviously, we're going to have to say if a contention is made that the submission of a question --

MR. SPARKS (EL PASO): Yes.

PROFESSOR EDGAR: -- rather than all this other because of our rule 277.

MR. MCMAINS: Do you want "question" or do you want "question, instruction or definition"?

PROFESSOR EDGAR: Well, let's see what we used over here, Rusty.

MR. MCMAINS: I mean, because there's an awful lot now that -- I mean, we're just carte blanche: You could go -- you can include a lot of stuff in the instruction.

CHAIRMAN SOULES: I think it's a submission of a question or an instruction.

MR. MCMAINS: It can be definition, too.

MR. REASONER: What's the matter with omitted from the charge?

CHAIRMAN SOULES: Let me see here.

I'm probably not following with you.

PROFESSOR DORSANEO: For what?

MR. REASONER: I thought that's what Hadley was talking about changing to question where it says "from the charge."

MR. SPARKS (EL PASO): He's on the next page here.

PROFESSOR EDGAR: I'm on page 8.

MR. REASONER: Oh, I see. Oh, okay.

PROFESSOR DORSANEO: All three would make it.

MR. MCMAINS: What?

PROFESSOR DORSANEO: All three would be all right, wouldn't it?

MR. MCMAINS: Yes.

PROFESSOR DORSANEO: That's because my bias -- whenever you say instruction, you say definition because it really does mean the same things anyway.

MR. MCMAINS: Yes. Because if you left it out, otherwise, somebody might claim the adversary rule didn't apply.

MR. LOW: Still, you've got to change the caption. It refers to questions.

PROFESSOR EDGAR: But, can you -- let

me -- let's think through this for a minute. Can you have a definition that is lacking in factual sufficiency or legal sufficiency? Now, it might be inadequate. It might be incorrect, but is it lacking in legal and factual sufficiency of the evidence? I think only findings are lacking in those particulars.

MR. MCMAINS: What do you think of show cause inclusion in the definition of proximate cause is? Is that a definition or an instruction?

PROFESSOR DORSANEO: It is a finding, though. It should say finding. It really is a finding. It just lacks -- it's not supported by factual or legal sufficiency in the evidence. It's not the question, either. It's not the question; it's not the definition; it's not the instruction; it's what comes out at the ends, what goes in at the front.

CHAIRMAN SOULES: Why aren't all errors subject to the harmless error rules in the charge?

MR. MCMAINS: I believe they already are.

CHAIRMAN SOULES: Why don't we just

say this, as I put to you in my letter: "Errors in the charge shall not form the basis for a new trial or reversal unless the complainant can show that the same was calculated to and probably did cause a result in an improper verdict" and go through all these steps and kinds.

PROFESSOR EDGAR: Maybe we've eliminated the reason for this but the reason I included is because of the language in the case out of the Dallas Court of Appeals -- it's a case in which the Court concluded that -- that was a limiting -- a broad issue followed by a limiting instruction was submitted. In other words, do you find the party was negligent to consider brake, speed and lookout? And the Court found that there was inadequate evidence on lookout, and thus said that the entire answer was tainted, even though -- because the Court said that it could not be ascertained whether or not the jury answered that issue based upon the element which was lacking in factual sufficiency, and, therefore, said the case was being reversed and remanded.

The case then -- I've forgotten the style of it. The case then came to the Supreme Court and it was settled and dismissed for want of

jurisdiction. But what in the hell is the name of that case?

CHAIRMAN SOULES: Even the case, I think, Judge Pope was talking about earlier where they gave an erroneous instruction on the law, just flat misstated the law -- it was a banking case -- the Supreme Court talked about Rule 504, said it was harmful. If you --

MR. MCMAINS: Gulf State Bank versus Iminizer (phonetic).

CHAIRMAN SOULES: That's it. Why don't we just say errors in the charge?

MR. BRANSON: Aren't you then opening the door for all those instructions that we talked about earlier and coming back in, and there's really no appellate opinions for it?

CHAIRMAN SOULES: Well, of course, the Supreme Court in the cases that it's patterned has said what's proper and that's the end of it.

MR. BRANSON: If it's not proper, is that automatically harmful?

CHAIRMAN SOULES: Lemos talks about harmful error -- finds the error to be harmful to include an extra charge. I mean, they all talk about it, 504.

CHIEF JUSTICE POPE: I thought that the harmless error rule applied to everything.

MR. MCMAINS: Well, we have the Rules of Appellate Procedure that specifically deals with harmless error.

CHIEF JUSTICE POPE: The harmless error rule has a life of about five years and then it's gone. And then it's gone for about 10 years, and then our court writes another opinion on harmless error and then it goes on.

CHAIRMAN SOULES: Is there a consensus that errors in the charge are subject to the harmless error rule of all errors?

PROFESSOR EDGAR: Well, they are except for that kind of problem and the Court held to the contrary because you can't -- the theory is that you can't tell whether or not the jury answered the issue based upon the element which was lacking in factual sufficiency. That question doesn't arise in a broad -- in a totally broad form submission but only where you have a limiting instruction. It doesn't arise in a checklist either.

CHAIRMAN SOULES: Sam Sparks, El Paso.

MR. SPARKS (EL PASO): If that's the

case, then, and we've got the harmless error rule in another rule, why do we have to include that paragraph in this one?

MR. JONES: If it's any help to the committee, Mr. Chairman, the subcommittee included this in this rule for the specific purpose of taking care of broad form submission or the general charge and so that we wouldn't get into the situation where we got up on appeal and the Court said we're not going to be able to tell whether the jury has found on this issue or that issue and, therefore, we're going to reverse.

And we wanted it explicitly understood, the inclusion of this rule, that it would not have reversible error on appeal for the conclusion of an improper element unless harm could be shown, and we were not comfortable with the other harmless error rule to get it.

PROFESSOR EDGAR: Particularly in view of Judge Gatard's opinion to the contrary.

MR. REASONER: Where is the other harmless error rule that you're talking about?

MR. MCMAINS: 81.

MR. REASONER: Thank you.

MR. MCMAINS: 81-B, actually.

MR. JONES: It was my impression, Mr. Chairman, this was debated and voted on the time before last.

CHAIRMAN SOULES: Well, but we've got these different things, Franklin. I'm just trying to get to the issue, do we try to rewrite and address all these very specific things that are in the top paragraph on No. 8, or do we just put in language "errors in the charge shall not form the basis for a new trial or reversal unless the complainant can show that the same was calculated to and probably did result in improper verdict."

MR. JONES: I'm perfectly comfortable with that proviso.

PROFESSOR DORSANEO: I'll so move but I don't think that deals with -- so moved if -- just to move it along.

CHIEF JUSTICE POPE: What's the motion?

MR. MCMAINS: Second.

CHAIRMAN SOULES: It's been moved and seconded that the paragraph at the top of page 8 be revised to read as follows: "Errors in the charge shall not form the basis for a new trial or reversal unless the complainant can show that the

same was calculated to and probably did result in an improper verdict." Discussion?

MR. REASONER: Is the rule the same on new trial as it is on appellate reversal -- I mean, should it be?

PROFESSOR DORSANEO: What are you asking? Yes, it is.

CHAIRMAN SOULES: For remand as opposed to rendition?

PROFESSOR DORSANEO: New trial is the same standard as remand on factual insufficiency.

MR. SPARKS (EL PASO): But we're talking about any error now.

PROFESSOR DORSANEO: The problem is that this isn't an error in the charge problem at all.

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

PROFESSOR DORSANEO: So the charge is right. It's a problem in the standard of review and how you evaluate the evidence.

MR. MCMAINS: What you're really dealing with is that the broadness of the question is not going to be grounds for reversal.

PROFESSOR DORSANEO: That's exactly right.

MR. MCMAINS: I'm not talking about the errors of the charge because that assumes this error to be broad and we're trying to tell them any error.

PROFESSOR DORSANEO: What Rusty is saying is right. The fact that the question was a broad question will not be a basis for reversal merely because it wasn't proved in all of it's breadth.

CHAIRMAN SOULES: I see what you're saying.

MR. SPARKS (EL PASO): Why isn't it covered by 81-B?

MR. JONES: Because there are countless cases in the Federal system and the State also that reverse -- let me back up on that. The cases we were worried about were Federal cases.

PROFESSOR EDGAR: Haney versus Hurst (phonetic), that's the case out of Dallas.

MR. MCMAINS: I'm not sure that's the case you're really thinking about. I know that's the one you were describing but there is another one out of Dallas, which I think is Dawson versus Garcia (phonetic).

PROFESSOR DORSANEO: I think there's a split of authority in other jurisdictions that have gone to broad form submission on how you're going to deal with this problem of brake, speed and lookout covered by general negligence and there's no evidence of brakes, so what do you do? Do you assume that the jury found the other two or is it not a problem? Do we just kind of go on? Or do we, say, we have to go back to go? I think we ought to go on.

MR. BRANSON: Mr. Chairman, due to the lateness of the day, can we call the question?

MR. MCMAINS: I have one question about the wording that you have.

CHAIRMAN SOULES: I think so. We're going to have cocktails in the lobby at 5:30 for those of you-all that want to do it.

MR. JONES: Mr. Chairman, since I've said that I've had no objection to your amendment, I think that I have been persuaded that perhaps --

CHAIRMAN SOULES: It doesn't really get to the same problem, Franklin. I missed it.

MR. JONES: I think we ought to adopt this rule as it is written.

PROFESSOR DORSANEO: Well, this

doesn't get to the problem either, that's the other point. This doesn't get to it either because it assumes that it's an error in the charge problem which is not what it is at all.

PROFESSOR EDGAR: Well, it really is an error in the charge problem because an element has been submitted that has been lacking in legal sufficiency. Now, factual sufficiency has got to be submitted but the standard of review requires you to think about factual sufficiency, see. But would you say a broad form question couldn't be submitted if there was some element -- speed in the pleadings? No, you wouldn't say that.

CHAIRMAN SOULES: What about this? "If a contention is made that a submission contains an element that's lacking in legal sufficiency," and not get into all these different kinds of submissions.

PROFESSOR EDGAR: I would say, "A contention is made that a submitted question contains an element."

CHAIRMAN SOULES: But you've got instructions and definitions.

MR. MCMAINS: But you've got instructions and definitions.

CHAIRMAN SOULES: That's what I said. A submission contains an element.

MR. REASONER: But you're trying to say even if there is an objection that there is no evidence and the judge overrules it, submits it to the jury, the jury comes in with a finding, that that's just too bad.

MR. JONES: Yes, sir.

CHAIRMAN SOULES: Suppose it's an immaterial element.

MR. SPARKS (EL PASO): Suppose it's material.

CHAIRMAN SOULES: Then it's -- it shouldn't be too much trouble to show harm.

MR. REASONER: I don't agree with that.

MR. SPARKS (EL PASO): I want a quote.

MR. REASONER: I mean, I think we ought to be realistic about it. What you're really doing is saying that there is no review.

MR. JONES: No.

CHAIRMAN SOULES: No, I'm not either.

CHIEF JUSTICE POPE: What we're really saying is that what we said over here in Rule 81,

we really mean.

MR. REASONER: No, but, you know, I agree with that, Judge, but let's take -- if you'll forgive me if I screw this up, since I've never tried a brake lookout and speed case, but --

PROFESSOR DORSANEO: We try them all the time in law school.

MR. REASONER: But let's say that there's no evidence of lookout and there's an objection made that, you know, that should not be submitted to the jury. The trial judge says, well, I think I'll let them have it anyway. The jury comes in and makes a finding, then that's it. There's no review of the judge's actions under this formulation.

MR. JONES: Well, I would think, Harry, to take the devil's advocate on the other side of that, the evidence on brakes and speed were very, very weak and not on the other and the appellate court got a hold of it, they could look at it and say, well, this was harmful.

CHIEF JUSTICE POPE: When you're evaluating this calculated and probably did result in an improper verdict, the first thing that you have to do is to look at the whole record. If the

record is just full of all the other stuff that would support the verdict and there's a mistake over here, why, then, you go up on that judgment even though there was an error, but you look at the whole record. You don't look for an error and then reverse. If you did, why we would reverse them all.

MR. REASONER: I understand that, Judge. But, you know, to me, the trouble is when you have a weak A, weak B, no C, over objection C is submitted, jury comes in, you know, and you've lumped them together broad form, then there's no review. In fact, you know, marginally -- at the margin factually sufficient on A and B, maybe C is very inflammatory but just no review.

MR. BRANSON: Does he have an NOV, Harry?

MR. REASONER: Well, if this is the same judge who submitted it over a proper objection.

MR. BRANSON: Well, what kind of judge would say, I'm going to submit that and let the jury take a bite at it but I'm going to rule in favor of the defendants?

MR. MCMAINS: You can't NOV part of

it.

CHIEF JUSTICE POPE: If there's some evidence, you can't NOV it.

MR. JONES: I think Judge Pope answered your question and that is that if it's harmful, there's review.

MR. REASONER: I don't agree with that, Franklin. What I think is -- under this formulation you can never prove harm. If you submit 20 grounds and one of them is sufficient, you can't get to the other 19.

PROFESSOR EDGAR: Well, that gets to the whole basic concept, though, Harry, about if you can't show harm, why should you distinquish between errors in the charge and errors anywhere else during the course of the trial? I mean, why should we have a different standard -- why should the harmless error rule be inapplicable here but applicable everywhere else?

MR. REASONER: Because it does not apply uniformly across the board. If there is an erroneous instruction of law, you may be able to show harm. If you are submitting a group of independent grounds, some of them over objection, then under this formulation as long as you can

pick one out of the group, you can't really logically prove harm on the others.

MR. LOW: Well, I think they have been trying to get away from reversing the case except really on two grounds, the evidence doesn't support it, or you say, well, you have to prove intent and that's not really the elements, you know, just completely wrong standard of law that the case was tried by. And in those cases, you know, they would reverse them but just for kinds of technicalities or errors in the charge and they look at it as a whole, I think they reverse the case that it's kind of gone because as Judge Pope said, they would all be reversed.

MR. REASONER: My real problem -- I don't mean to beat a dead horse on this, Judge Pope, it's not in the personal injury area where I think the rule that you articulate works pretty well. Where I get into problems is when -- if I'm a plaintiff and I can plead six theories of fraud and mix them together, and maybe I know five of them are shaky or worse, but if you'll let me throw the bunch in and then hang on to the best, that's the way I'm going to try the case.

CHAIRMAN SOULES: Sam Sparks, San

Angelo.

MR. SPARKS (SAN ANGELO): Your suggestion was that you stop at the end of the word "submission" and then pick up with "contains"?

CHAIRMAN SOULES: Right. I think Hadley has given a good suggestion, though, that we say "if a contention is made that a matter submitted in the charge contains an element." That really gets at what this is intended to get at. How you vote is up to you.

MR. MCMAINS: The problem I have goes back to Frank's concern earlier about the proliferation of instructions which works both ways because one of the bases, for instance, in Lemos versus Montez that the reverse was that since there was not any evidence justifying the unavoidable accident submission, that it was harmful -- and I have a problem, you know, if you start just throwing in all the instructions that everybody wants on a theory that you're going to have to show some kind of independent harm, I'm not -- I'm not understanding exactly how -- we've tried to delineate that the Judge doesn't have the right to comment directly on the weight of the

evidence and doesn't have the right to submit improper instructions that are legally incorrect, but the more that we start emphasizing "but we're not going to reverse you for it." I'm not sure we'll get back to encouraging -- if that's true -- if the whole question of how broad a question is, it ain't going to be reversed without showing harmful error, then that's equally true with how narrow it is, I suppose.

And we're basically -- if we do that, we emphasize right here that, Judge, we really mean it when we say broad form questions but we're not going to reverse you unless you show harmful. Now, how am I going to show harmful if I have to submit lookout, speed and brakes separately?

PROFESSOR EDGAR: Rusty, this is relating to legal and factual insufficiency arguments, not whether or not it's erroneous valnon.

MR. MCMAINS: Well, except that we were really talking about -- I mean, we were talking earlier about the fact that what we were really trying to deal with was that it wasn't error.

PROFESSOR EDGAR: Well, no, that's

what --

MR. MCMAINS: In terms of the breadth of the submission.

PROFESSOR EDGAR: That was originally Luke's suggestion that we simply say "errors in the charge shall not." But I think this is more narrow than that because we're talking about any matter that's submitted as it relates to legal and factual insufficiency. We're not talking about other types of errors.

CHAIRMAN SOULES: The Supreme Court essentially in the push to reform --

MR. MCMAINS: The legal insufficiency is what has amounted to a comment on the weight in the proliferation of instruction area. It is the mechanism -- yes, it is -- it is the mechanism by which the Court found harm in Lemos versus Montez. It is a mechanism in the Houston Court of Appeals opinion which is the first case that reversed a medical malpractice case for giving sole cause instruction that I handled. It is -- there are examples in Roper which is the first time that they have reversed for giving a sole cause instruction in a products case that didn't belong, based on the fact that it wasn't raised by

the evidence.

PROFESSOR EDGAR: No, no.

MR. MCMAINS: And that, therefore, it amounted to a comment on the case as a whole. Now, that's the exact -- that's basically the exact language used in the Roper case.

PROFESSOR EDGAR: Not that it wasn't raised by the evidence.

MR. MCMAINS: Yes.

PROFESSOR EDGAR: It's just that it's an improper definition. It has no place in the charge whether it's -- whether there's any evidence on it or not.

MR. MCMAINS: That's not true in Roper. Sole cause was taken straight out of the BJC in Roper, and they said that it wasn't defensive and it's not -- even though it's properly submitted in terms of it reads right but there's no evidence to support it. I guarantee in Lemos versus Montez that it's the absence of evidence of unavoidable accident which argues the comment on the weight, that it was argued that it was a comment on the weight to give the definition of unavoidable accident even though they also gave it wrong, different issues, different grounds, but

it shouldn't have been given at all and, therefore, constitutes a comment on the weight.

And that's what Roper holds in the sole cause issue, and so -- I mean, all I'm saying is the more we keep trying to say we're not going to reverse you for how you submit it --

MR. JONES: Mr. Chairman, all we're trying to do here is help the appellate courts separate the milk from that other element that I don't want to talk about.

MR. SPARKS (EL PASO): Cream.

CHAIRMAN SOULES: Judge Pope.

CHIEF JUSTICE POPE: There's something more serious than that about this sentence, it seems to me. If the contention is made that a submission on a broad form question in a general charge, a question containing a combination of elements or limiting instruction following a broad form question -- all right, contains an element -- now, we're not talking about leaving something out. We've got now an instruction that correctly includes all of the elements for anybody to make out a cause of action -- contains an element that is lacking in the legal sufficiency. All right, here, he did not prove his case. Then we say it

shall not form the basis for a new trial and so forth unless the complainant can show that the same was calculated to and probably did result in an improper trial.

If it is a necessary element to the case and it's zero on proof, that is reversible error. Otherwise, we just simply say we've -- we've got a justice of the peace sort of a thing here where we're going to throw our hats at the things. But here we've got all of the necessary elements and the plaintiff fails to prove his case or the defendant fails to prove his defense, and there is no evidence, perfect void, and we say that is an area for harmless error. I don't think so.

PROFESSOR EDGAR: No. No. What we're talking about there, Judge, is a question that contains more than one element. You see, in which -- and one of the other elements that was submitted would support the verdict and there is factual evidence to support it. We're talking, now, where you have alternative grounds A, B and C, any one of which will support the verdict, but one of them is lacking in legal or factual sufficiency.

MR. REASONER: It seems to me --

CHIEF JUSTICE POPE: That can't be the way a judge would read this because if there are three independent --

PROFESSOR EDGAR: Well, that's what's intended.

CHIEF JUSTICE POPE: Because if there are three independent bases for a judgment and one of them is proved, that's the end of the lawsuit.

PROFESSOR EDGAR: Well, that's what's intended here and it's the language, then, which we must correct.

MR. MCMAINS: The element is very clear.

CHIEF JUSTICE POPE: Surely, you don't have to tell a judge that the plaintiff has to win his case more than once.

PROFESSOR EDGAR: Well, the problem is when you ask -- when you ask if the party was negligent and the jury is then told in answering this question, consider only brakes, speed and lookout, the jury answers "yes," but it later develops that one of those elements is lacking in legal or factual sufficiency, then Haney versus Hurst said the case must be reversed because you cannot tell whether the jury answered the "yes"

question based only on that element which was lacking in sufficiency, and it's that vice that this is attempting to correct.

CHIEF JUSTICE POPE: Well, I can understand that that is a vice because the burden of proof is on the appellant. He has to prove the reason for reversing this case, and he should carry that burden. But this rule is subject to the very illustration that I gave you. Now, look at it and see if it isn't so. And if that be so, it's just wrong law.

PROFESSOR EDGAR: Well, it needs to be changed then because obviously that's not the intent. That's not what I intended when I drafted it.

PROFESSOR BLAKELY: Well, Judge Pope, if it is that sort of case, doesn't the last phrase down there -- clause -- unless the complainant can show that the same was calculated to and probably did result in an improper verdict -- that's automatic in your hypothetical.

CHIEF JUSTICE POPE: That's right. The plaintiff doesn't have to prove -- he has proved without regards to the harmless error, when he proves that there are five elements and on

element 3 there is a zero of proof, he has discharged his burden. And this part up here that says that if that element -- the three elements which is zero, even though it's lacking in legally sufficient evidence; nevertheless, we have to go and determine, well, should we anyway give -- uphold the judgment. You can't uphold the judgment if it's a necessary element of a cause of action that is not proved, I don't think that's a case for harmless error.

CHAIRMAN SOULES: But, Judge, in the operation of harmless error in general, which does spread all through the practice, whenever you have something that's that obviously erroneous and leaves that much of a hole in the case, the harm is self-evident. You don't really go into a big analysis of how that harm -- how that has harmed. It's self-evident harm.

I mean, we've all -- we operate under the new rule number. We've had, what, 434 and is it 503, forever, and there are some things -- and I'd say most of the opinions that are written don't really ever go to the worrying about 434 and 503 because by the time they are through writing about the case and why they're going to reverse it, it's

self-evident that the error they've written about and recognized is harmful, and in your case it would be but --

CHIEF JUSTICE POPE: This is what I'm afraid -- I know you don't intend to do this, but what this is saying is a plaintiff or a defendant doesn't have to prove his case if the appellate judge thinks, well, it's all right for him not to prove his case.

PROFESSOR DORSANEO: That's what it says right now, what Judge Pope says it says.

PROFESSOR EDGAR: It's not at all what it says.

PROFESSOR DORSANEO: It does too.

MR. REASONER: Yes, but, Hadley, I mean, the problem is that apparently element means something to you. To me, I think of element as the way Judge Pope does, elements of a cause of action. If the elements -- if there are four elements to a cause of action, then you have to prove four elements to prevail on that cause of action. I think that's the traditional way to use the term "elements."

CHAIRMAN SOULES: That's right. But doesn't -- that is the way that this is meant --

intended, and element 3 has no proof and it's a material element, then the harm is self-evident as it is in most of the opinions that are --

MR. REASONER: But, you know, if the Supreme Court adopts a rule and says that while, you know, for however many centuries you think the common law has existed, you have to prove the elements of cause of action to prevail on it, but that's no longer true in Texas.

Now, in Texas you don't necessarily have to prove the elements of a cause of action. You apply an additional clause -- you apply the harmless error rule to a failure to prove a cause of action. People think, well, that's not a meaningless act. The Supreme Court meant to do something. It couldn't --

CHAIRMAN SOULES: Let me show you how No. 3 can have zero evidence and not be material to be harmless.

CHIEF JUSTICE POPE: Well, if it's not material --

CHAIRMAN SOULES: All right. First it's not material. It's in the charge. It was submitted as an element, but on appeal the appellee says that was not material. The only

material elements were the ones that we had proof on. So, that No. 3 -- there's no harm to the appellant because there was no evidence on No. 3. Okay. Even though there is no evidence on No. 3, there is no harm, you affirm the judgment.

Also, you have a multiple -- you have a multiple cause of action case where one of the elements and one of the causes of action has zero proof. So you've got a situation where you have an element in the charge, there's legally insufficient evidence, but you still have to show harm, and the fact that two other aspects of the cause of action have been proven makes it harmless.

CHIEF JUSTICE POPE: Yes, but, Luke, your rule doesn't say contains an immaterial element that is lacking in legal or factual sufficiency. It says you've got a lawsuit that you've got to try and this lawsuit has got certain elements and even though it, quote, "Contains an element," now, I take it from that that means a bona fide, grown-up element, not an immaterial. And if it contains an element on which there is no proof -- it doesn't make any difference -- go this extra step to see if they approximately got it

right and if it does, let the case go. I know that's not what you intend but that's what the rule said.

PROFESSOR EDGAR: Judge Pope, you're right. You're right. You and Harry are speaking within the concept of an essential element of a cause of action or theory of defense, and in that light, you're absolutely right. What I was talking about when I said "element," is an element that is an alternative ground of recovery or defense. And that's the difference. It's the problem we're having in defining this term "element," and you're absolutely right.

CHAIRMAN SOULES: Frank Branson and then El Paso Sam.

MR. BRANSON: If we don't follow the recommendation, Your Honor, how do we deal with the Haney case that Hadley was describing where you get -- where you submit a broad form issue of negligence and it turns out as you look at the record, you had evidence on brakes and you had evidence on speed and lookout, but the only evidence on brakes was it took a half a second -- that the man only had a half a second to apply his brakes and as matter of law, you have

three-fourths of a second to consume the reaction time, so as a matter of law, there is no approximate cause on the brakes. And under Haney, how do you solve that problem on broad form submission?

CHIEF JUSTICE POPE: I'm not familiar with that case, but is that case on appeal?

MR. BRANSON: Well, that's the one Hadley was describing where they had one alternative issue that had no support.

MR. REASONER: You know, I would suggest --

MR. BRANSON: And it required reversal of the entire issue.

CHIEF JUSTICE POPE: Well, I fall back on the Scott case where A, B, C, D, E and F were pled and none of them were proved; G, H, I and J and K were -- were not pleaded but they were proved, and we held that there was a gross variance between the proof and the pleadings but that also that and one other case are the only cases in a hundred years that the Texas Supreme Court has reversed on account of a variance.

CHAIRMAN SOULES: El Paso Sam.

CHIEF JUSTICE POPE: It's the degree.

MR. SPARKS (EL PASO): One of the things that we've done to improve on the rules in the last several years is to try to put one rule that covers situations such so that we don't have to go from one rule under one circumstance to another, and all of the illustrations we're talking about on appeal are covered by 81-B, all of them.

CHAIRMAN SOULES: That's true.

MR. SPARKS (EL PASO): This is something that we can't even agree on here whether or not it's a secondary rule. I also have one other point, and that is, it looks to me like the rule was proposed to mean to be infringing on the discretion of the trial court to grant a new trial. I just think it's -- I think we're just asking for trouble. We've got 81-B. Anybody that appeals must deal with the appellate court in 81-B. To add this in, I think, it's just asking -- just asking for trouble. But it's asking for trouble in the sense that some people are going to argue for specific submission, some general submission. I just think it shouldn't go in here. I think we ought to rely on 81-B. Anybody that's going to appeal has got 81-B and that's

it.

CHAIRMAN SOULES: Well, the Supreme Court and the -- well, the Courts of Appeals and Supreme Court in reviewing charge problems in the past cite 503 and 434. 503 and 434 are now in the appellate rules. They take care of the problem. They have in the past taken care of the problems, no doubt they will in the future. It's in the Amenheizer case; it's in Lemos where the harmless error view is used to review charge problems. And we don't need to add this into the trial rules, really, historically, to get harmless error involved in the charge review because it's been involved in the charge review as a result of the presence of 434 and 503 for a long time and that 434 and 503 -- or 180 -- what is it 2-B.

PROFESSOR DORSANEO: Well, I closed the book again.

CHAIRMAN SOULES: Well anyway -- okay. So, we may not need this.

MR. WELLS: Trial judges act on applications for new trials and the judges at that level ought to understand that harmless error is not a reason for a new trial.

CHAIRMAN SOULES: That's true.

PROFESSOR DORSANEO: We're going to have to develop -- we've gone to broad questions, we're going to have answers to broad questions. If you can imagine a really broad question, we're going to have to develop law on how the jury's answers to really broad questions are interpreted. I presume that law will end up being that they are interpreted in the light -- in a favorable light rather than in some sort of a critical light. I mean, that's the issue here.

MR. REASONER: But, you know, I would suggest to come back to the confusion of elements that what you're really talking about is independent grounds of recovery, and when you combine several independent grounds of recovery in one broad question, you sustain, take your brake, speed and lookout; you know, those are independent grounds.

PROFESSOR EDGAR: They're not anymore.

MR. REASONER: No, no. Each of them would stand alone but you -- under our practice, you can now combine them in one issue. The real thing you're trying to get at is that one of them proves to be defective or two of them prove to be defective and the other one is valid. You want

that to sustain the verdict. I mean, which is fine, but you shouldn't confuse that with elements of a cause of action. You really have three separate causes of action.

CHAIRMAN SOULES: Is there a consensus that we should omit the first paragraph on page 8 from the suggested rule and just let the --

MR. MCMAINS: The harmless error rule.

CHAIRMAN SOULES: -- let the harmless error rule take care of it?

MR. BRANSON: No.

MR. WELLS: No.

CHIEF JUSTICE POPE: I move that we omit that paragraph because it is adequately covered by Rule 81-B.

MR. BRANSON: Your Honor, I may be wrong, but I believe there is a question on the floor going back sometime -- there was a motion made --

CHIEF JUSTICE POPE: I'm sorry.

MR. BRANSON: -- and a question called and then debate started after the question was called. Should we adopt it as presented?

CHAIRMAN SOULES: All right. We're talking about this paragraph.

MR. BRANSON: The entire section, it's my understanding. You might check the record, but I thought about an hour ago when that came up we made a motion and seconded it.

CHAIRMAN SOULES: No, we never -- we've never voted on the rule as a whole because we've never even addressed the last paragraph of of it, Frank. There's been no motion about that.

PROFESSOR EDGAR: I don't think we could adopt this as it's now worded because it contains language which we have already eliminated in Rule 277.

CHAIRMAN SOULES: Well, let's vote on the motion.

MR. BRANSON: Let's vote on Judge Pope's motion then, excuse me.

CHAIRMAN SOULES: All right. Judge Pope, the motion -- previous motion -- we're going to allow you to make a substitute motion, and yours is that we omit this paragraph --

CHIEF JUSTICE POPE: That's right.

CHAIRMAN SOULES: -- in favor of 81-B, controlling the problem.

CHIEF JUSTICE POPE: Right.

MR. WELLS: I have a question. You

would omit any direction to a trial court to observe a harmless error rule? I might vote for your motion with respect to the way this is written now, but I think there ought to be something in the rules to make the trial courts understand that harmless errors don't subset a verdict.

MR. LOW: In other words, you think this rule should refer to rule -- a charge should refer to the errors in the charge to be governed by Rule 81-A or something like that.

MR. WELLS: Well, I hadn't thought the language through but I just -- the trial judges ought to understand that harmless error is harmless error.

PROFESSOR DORSANEO: Well, under the rules -- we have harmless error rules that are analogous to the ones that used to be in 434 and 503. They're worded a little differently. As a matter of fact, we never had a harmless error rule in the rule book -- placed in the rule book where it said that the trial judge is supposed to follow those same things, but it's in -- in my judgment, it's in the "no new trial unless good cause" part of the new trial rule. So, it's in there as much

as it's ever been in there already.

CHAIRMAN SOULES: Without adopting this.

PROFESSOR DORSANEO: Without adopting this.

CHAIRMAN SOULES: Or any part of it.

MR. JONES: Mr. Chairman, in all due respect to everybody, we're not talking about the trial court here. We're talking about when the case gets to the appellate court and you've got three elements of a negligence case, brake, speed and lookout, you've got overwhelming evidence on brake, you've got overwhelming evidence on speed, and for some reason your lookout submission fails.

What we're trying to stop from happening is the appellate court looking at that verdict and saying, well, there was plenty of evidence on speed, there was plenty of evidence on brake, but because this little old error here in submitting lookout was made, this whole damned case has to go back. Now, that's what we were addressing ourselves to and that's not -- I mean, that doesn't have anything to do with trial courts.

CHAIRMAN SOULES: Is there a second to

Judge Pope's motion?

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

CHAIRMAN SOULES: Sam Sparks seconded it. Anything new? Those in favor of Judge Pope's motion show by hands, please. Nine. Those opposed? Nine. Well, I'm going to break the tie in favor of the motion because I think it's covered by 81-B because the Supreme Court cases are coming down --

MR. MCMAINS: May I --

CHAIRMAN SOULES: Yes, sir.

MR. JONES: Do we have to listen to him some more now that we've lost this?

CHAIRMAN SOULES: But the record will reflect that that was a tie vote.

MR. SPARKS (SAN ANGELO): Luke, since it's a tie, how about Buddy's suggestion that you just have something right there that says the harmless error rule shall apply to the charge?

MR. MCMAINS: Luke?

MR. SPARKS (SAN ANGELO): -- just so we make sure --

CHIEF JUSTICE POPE: Mr. Chairman, if we're going to do that, I think we ought to do it every step of the way, striking the jurors,

peremptory instructions to the jurors, the motion for new trial. I think every step should have the same admonition to the judge about observing harmless error.

MR. MCMAINS: I have a point of information about the vote.

CHAIRMAN SOULES: Yes, sir. Do you want a recount?

MR. MCMAINS: I'm assuming that the vote was to reject the language as it was written. I do not -- and I'm not sure that the committee as a whole rejects the concept of solving the problem that has been articulated. I voted against this language because I don't think it does it. And I think it creates more problems than -- and does not solve that precise problem. But there is a place in this rule in my judgment to deal with that problem, and I think that we should address it. But I did not anticipate it and I don't think that the judge intended his vote to mean that we don't address the problem.

CHIEF JUSTICE POPE: Mr. Chairman, if I can see something else, well, I'll pass -- and make judgment on that when it arises. But on the basis of this, I agree; it creates more problems

than it solves.

MR. MCMAINS: But I am not in any way opposed and I don't think most -- a lot of people that voted against it were opposed to clarifying that if you've got three independent grounds of recovery, you don't get reversed just because it's submitted in broad.

CHAIRMAN SOULES: I think the current court will take care of that if it comes up there. I don't know how the trial judges are going to get the signal.

MR. MCMAINS: I think we can draw a rule that deals with the problem much more articulately than --

CHIEF JUSTICE POPE: In that rule when you say that you have to look at the whole record because that's the way you evaluate --

CHAIRMAN SOULES: That's right.

CHIEF JUSTICE POPE: -- harmful error.

CHAIRMAN SOULES: Okay. 8:30 in the morning. Cocktails are served.

(Recess until 8:30 in the morning.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS X
COUNTY OF TRAVIS X

I, Chavela V. Bates, Court Reporter for the State of Texas, do hereby certify that the above and foregoing typewritten pages contain a true and correct transcription of all the proceedings directed by counsel to be included in the TEXAS SUPREME COURT ADVISORY BOARD MEETING, and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that my charge for preparation of the statement of facts is $1875.00.

WITNESS MY HAND AND SEAL OF OFFICE this, the 2nd day of October, 1986.

Chavela V Bates

Chavela V. Bates, Court Reporter
316 W. 12th Street, Suite 315
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