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ORIGINAL

SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
Austin, Texas 78701
June 27, 1987

(VOLUME IV)
(Afternoon Session)

APPEARANCES

MR. LUTHER H. SOULES, III, Chairman, Supreme Court Advisory Committee, Soules, Reed & Butts, 800 Milam Building, East Travis at Soledad, San Antonio, Texas 78205

MR. GILBERT T. ADAMS, Law Offices of Gilbert T. Adams, 1855 Calder Avenue, Beaumont, Texas 77001-1619

MR. PAT BEARD, Beard & Kultgen, P.O. Box 529, Waco, Texas 76703

MR. FRANK BRANSON, Allianz Financial Centre, LB 133, Dallas, Texas 75201

PROFESSOR NEWELL H. BLAKELY, University of Houston Law Center, 4800 Calhoun Road, Houston, Texas 77004

PROFESSOR ELAINE CARLSON, South Texas College of Law, 1303 San Jacinto, Houston, Texas 77002

JUDGE SOLOMON CASSEB, JR., Casseb, Strong & Pearl, Inc., 127 East Travis Street, San Antonio, Texas 78205

PROFESSOR WILLIAM V. DORSANEO, III, Southern Methodist University, Dallas, Texas 75275

PROFESSOR J. HADLEY EDGAR, School of Law, Texas Tech University, Lubbock, Texas 79409

MR. FRANKLIN JONES, Jones, Jones, Baldwin, Curry & Roth, Inc., P.O. Drawer 1249, Marshall, Texas 75670

MR. GILBERT (BUDDY) I. LOW, Orgain, Bell & Tucker, Beaumont Savings Building, 470 Orleans

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Street, Beaumont, Texas 77701

MR. STEVE McCONNICO, Scott, Douglass & Keeton, 12th Floor, First City Bank Bldg., Austin, Texas 78701-2494

MR. RUSSELL McMAINS, Edwards, McMains & Constant, P.O. Drawer 480, Corpus Christi, Texas 78403

MR. CHARLES (LEFTY) MORRIS, Morris, Craven & Sulak, 600 Congress Avenue, Suite 2350, Austin, Texas 78701-3234

MR. TOM L. RAGLAND, Clark, Gorin, Ragland & Mangrum, P.O. Box 239, Waco, Texas 76703

JUDGE RAUL RIVERA, 288th District Court, Bexar County Courthouse, San Antonio, Texas 78205

MR. ANTHONY J. SADBERRY, Sullivan, King & Sabom, 5005 Woodway, Suite 300, Houston, Texas 77056

MR. BROADUS SPIVEY, Spivey, Kelly & Knisely, P.O. Box 2011, Austin, Texas 78768-2011

MR. HARRY TINDALL, Tindall & Foster, 2801 Texas Commerce Tower, Houston, Texas 77002

JUSTICE JAMES P. WALLACE, Supreme Court, Supreme Court Bldg., P.O. Box 12248, Capitol Station, Austin, Texas 78767

June 27, 1987

(Afternoon Session)

CHAIRMAN SOULES: There was something in 88. No, that's not right. 88 is a different -- 88 --

PROFESSOR EDGAR: What page are you on?

CHAIRMAN SOULES: I'm on page 252. Rule 88, as it's now written, says that if there's been a motion to transfer -- actually, this goes back to the concept of venue and it's predated -- changed to 1995. I guess it goes all the way back to the original rules. But it starts out, "Reasonable discovery is permitted on any issues relevant to a determination of proper venue," prior to determination of the motion.

The case law uniformly says that limitation -- that's not a limitation. You can go on with discovery on the whole case pending -- with a motion to transfer pending. This just changes the rule to state what the law is. General discovery can proceed in the face of a motion to transfer, and it changes -- and it talks about a motion to transfer, whereas old Rule 88 didn't.

Is there any controversy over this? Any discussion about it? It doesn't change anything, just a textural update. Okay. Those in favor say "I." Opposed? Then the only -- this 166a change only would come into play if we stopped filing depositions. And all it does is say that a deposition can be considered in a motion for summary judgment even if it's not filed because we're not going to file them any more if the subsequent rules pass.

Now, Rule 206, which is on page 255, 256, 257 and all the rules that follow there up through 262, mechanically eliminate the filing of anything pertaining to depositions. You don't file your notice. The deposition itself doesn't get filed. The original deposition is delivered to the attorney who asks the first question in the deposition so that the -- that's for the purpose of telling the court reporter you've only got to look one place and you can't be confused. And that attorney has the duty to maintain it for trial.

Now, there is a provision in here, so that we won't get into maybe something like we got before, that any procedure that's spelled out in these

rules, or the deposition and custody and so forth, can be changed by agreement of the parties so long as that agreement appears in the transcript of the deposition. So, it sets up a procedure to eliminate the filing of depositions and a way to handle the details of that, but it permits the lawyers to agree on the record to do it any other way they want to.

MR. LOW: Can they file it? Can they agree to file it?

CHAIRMAN SOULES: No, because there's not going to be any place in the clerk's office to file them. The clerk won't receive them for filing. That's why -- that involves the clerk. I mean, they could agree to it but the clerk probably wouldn't do it.

MR. JONES: We don't have any statutes to worry about on this?

CHAIRMAN SOULES: No. There are no statute problems. Any motion?

MR. RAGLAND: I have a question.

CHAIRMAN SOULES: Yes, sir, Tom.

MR. RAGLAND: I can't read this small print too well. Does it have any provision in there that the custodian of the original

transcript must make it available for examination and copying by any other parties to the lawsuit?

CHAIRMAN SOULES: Yes. Let me see where it is.

PROFESSOR CARLSON: Page 258(5).

MR. RAGLAND: Well, that talks about me paying for a copy to the court reporter.

CHAIRMAN SOULES: Well, you get your copy from the court reporter. It doesn't say that a party holding a copy has to make it available to copy. I think we probably --

MR. RAGLAND: Well, I think that should be in there. There are many instances when I may not want to buy a copy of it. I may want to look at a copy. Sometimes the original has exhibits attached to it where a copy doesn't come out as well. I mean, the deposition is in the lawsuit. Anybody that's a party to the lawsuit ought to be able to look at the thing.

MR. LOW: Reasonable access to any interested party.

CHAIRMAN SOULES: Okay. There is a reasonable access provision and I'm trying to find it.

MR. LOW: Yes.

MR. JONES: Mr. Chairman, when you get through with that language, I'm ready to move the adoption of the rule.

CHAIRMAN SOULES: Okay. Provided that we insert that the attorney in whose custody the original is kept shall make that available on reasonable notice, and Tom noting that, in other words --

MR. RAGLAND: What paragraph are you speaking from?

CHAIRMAN SOULES: Well, I haven't got it in here. I'm going to try to work on it while you-all are talking about something else. But provided that we put a provision in there that says the attorney in whose custody the original is kept must make it available for inspection and copying on reasonable notice -- provided I put that in there, those in favor of this series of rules, please say "I." Opposed? And then we would take out the requirement in the summary judgment rule that the deposition be on file, because it won't be on file. We can use it but it's not on file. Those in favor say "I." Opposed? Okay. Those changes are made.

Now, who -- there's a textural change, and

I'm running on this -- on the -- in the supplement on page 38, in retyping 204(b), it got garbled in the Court's order, and that's probably my fault. All I'm doing in this is restoring exactly what this committee voted to do before it went to the Court. And what happened, if you want to know what happened, see where it says, "The Court shall not be confined to objections made at the taking of the deposition", at the very bottom, that got made into a separate sentence when it was retyped and it absolutely doesn't make sense. And the first half of (b) was just left hanging, so you've got to put them back together for it to make sense, and that's what I've done. Any objection to that? A change is in order. That's the only reason I'm even bringing it back up again.

MR. RAGLAND: Is (4)(a) open for discussion?

CHAIRMAN SOULES: No. That's already been promulgated by the Court.

MR. BRANSON: Let me ask you a question, Luke. Since you don't file depositions now, let's assume there are some corrections to the deposition. How are they handled?

CHAIRMAN SOULES: That is spelled out

in here pretty much the same way. The corrections go to the reporter and the reporter distributes them. Let me see where that is.

PROFESSOR EDGAR: It's on page 257, isn't it -- no, that's exhibits.

CHAIRMAN SOULES: Oh, I know. What happens, Frank, that takes place before -- that takes place before it would be filed. See, there's a procedure in the rules right now about how it goes to the witness for corrections and changes, and the corrections come back to the court reporter and so forth. None of that has changed, because that's all done before you get to the point of filing it. This just says now that you're at the point of filing it, what disposition do you make of it.

MR. BRANSON: Okay. But let me --

CHAIRMAN SOULES: The changes become a part of the deposition.

MR. BRANSON: But we've all been sitting here on Friday afternoons having your case mostly ready when your opponent delivers his party's deposition to you and there's a hundred corrections in it.

CHAIRMAN SOULES: Here it is,

"Certification," 256, "The officer must file -- the officer must attach as part of the deposition transcript a certificate duly sworn by the officer which shall state the following." And a part of that is that the deposition was submitted to the witness and so forth, and that changes, if any, made by the witness in the transcript and otherwise are attached thereto or incorporated therein, that is in the certificate of the officer.

MR. BRANSON: Timing wise, when is that done? That's my only question.

CHAIRMAN SOULES: It's got to be done within the 20 days prior to which a copy can be used. In other words, that's the same; none of that has changed.

MR. BRANSON: Within 20 days prior to trial?

CHAIRMAN SOULES: No, within 20 days after the deposition transcript is delivered to the witness for signature.

MR. BRANSON: Any changes have to be made?

CHAIRMAN SOULES: Right. Now, some judges will permit them to make them later.

You've seen them probably made in trials. But there's no change in that practice resulting from these rules changes.

MR. BRANSON: Except used to, you always had the filing. If they tried to correct it after the filing, you had that to hammer over the head with it.

CHAIRMAN SOULES: Well, you've got a certificate from the court reporter that all the changes that were made are attached to a certificate at the time it goes over to the original --

MR. BRANSON: That solves that problem.

CHAIRMAN SOULES: All right. We have -- Bill, do you have any more to your report? Oh, there's 175 -- Rule 175 and I don't know where it is.

PROFESSOR DORSANEO: It's in the supplement.

CHAIRMAN SOULES: Okay. What page?

PROFESSOR DORSANEO: It begins on page 21. And the rule itself -- or the proposed rule is on page 26. Basically, what we have is a modified version of Federal Rule 68, I believe,

which is also entitled "Offer of Judgment." And the rule provides, as redrafted, that one party may make an offer of judgment including costs and attorneys' fees accrued at the time of the offer, and if that offer is rejected, the rejecting party can be penalized. The difference between the draft on pages 26 and 27 of the supplement and the federal rule is that it is clear under the proposed rule that the penalty can include the offering party's attorneys' fees.

The federal rule has not been interpreted that way except in cases in which attorneys' fees are part of costs under the applicable federal statute that is the subject matter of the claim in the litigation. Several other adjustments were made to the federal rule to deal with other problems, but they're self explanatory.

CHAIRMAN SOULES: And it goes both ways; either side can make an offer.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: The federal rule, I think, is a one sided rule --

PROFESSOR DORSANEO: One sided.

CHAIRMAN SOULES: -- where the defendant can make an offer, but under this rule

either side can make an offer and put the other side at issue on that.

PROFESSOR DORSANEO: One other thing I should point out, with respect to the "can be penalized" aspect, the rule says in making that decision, the Court may consider among other factors -- well, pardon me, "attorneys' fees will not be awarded to the offeror unless the Court in its discretion determines that the losing party did not act reasonably in refusing the offer. In making that decision, the Court may consider among other factors the differential between the offer and the judgment and the importance of the issues involved." And that is the language that came to our subcommittee from you, which I understand came from the COAJ.

MR. ADAMS: What's the importance of the issue involved? What does that refer to? What types of issues are we talking about there?

PROFESSOR DORSANEO: I'm not really sure. I think it's meant to be open ended to provide a lawyer an opportunity to contend that I didn't accept that -- I didn't accept that offer and I was reasonable in not doing so given the complexity of the issues of the case, the

importance of the issues.

MR. ADAMS: In other words, he can say it was just important for my client not to settle this case?

MR. McCONNICO: Bill, who instigated or proposed that we adopt this?

CHAIRMAN SOULES: It came initially from the COAJ, but it's very similar to Federal Rule 68, as he said, but it's a better work product. This is mutual.

MR. LOW: I'm just basically against that. I mean, either side, I think, can take care of itself.

MR. SPIVEY: I'm concerned that this is a big old step toward technicality.

CHAIRMAN SOULES: Well, of course, it's designed to help settle cases.

MR. SPIVEY: Yes. I don't have any objection to any --

CHAIRMAN SOULES: Because the party has got to respond to an offer. You've got to respond to an offer, and you've got to have somebody who can test the reasonableness of that some day, whether you made a reasonable response to an offer. And if we're --

MR. LOW: I'd move to reject that.

MR. JONES: I second the motion.

CHAIRMAN SOULES: The motion has been moved and seconded to reject. Any further discussion? Those voting to reject say "I." Otherwise?

MR. SADBERRY: No.

MR. SPIVEY: There was a real quiet one over here.

CHAIRMAN SOULES: Okay. It's house to one -- that's house to two, Tony, because I kind of like it myself.

PROFESSOR DORSANEO: I'd like to commend the draftsman for the fine report and all the work, but I don't have any particular enthusiasm for the proposal either.

MR. McCONNICO: It's a very good draft.

PROFESSOR DORSANEO: What?

MR. McCONNICO: It's a very good draft.

PROFESSOR DORSANEO: I thought so.

CHAIRMAN SOULES: Bill, you've got something on page 310 of the materials that's left, and I think that's the last item. I don't

know what it is, something from Judge Schattman. Why don't we take up Broadus' at the same time because they both deal with exclusion of witnesses? Broadus has passed out and written up --

MR. LOW: Proposal (f), where he added (f), the spouse of a party may not be excluded under this rule or Rule 614, Texas Rules of Civil Evidence, and I move for that adoption.

CHAIRMAN SOULES: It's been moved that Broadus' suggestion be adopted.

MR. JONES: Second.

CHAIRMAN SOULES: We've discussed it. Any further discussion? Those in favor say "I." Okay. That's adopted.

This just wants to take the Witness Exclusion rule to the deposition room. Now, in deposition, in discovery, the question comes up, what about experts? What about those people that you need there to help you in discovery that -- you're supposed to be able to do it a little bit -- it may be more sacrosanct in the courtroom if we're going to have the rule to exclude, which we already have. But there are a lot of reasons why you need some help in that deposition and you

don't want people excluded.

MR. McCONNICO: I don't want to -- I propose that we do not exclude -- include the rule of excluding witnesses to depositions. I'm not in favor or that.

CHAIRMAN SOULES: You're moving that this Rule 204 recommended by Judge Schattman be rejected?

MR. McCONNICO: I am.

CHAIRMAN SOULES: Is there a second? Bill, do you want to discuss it?

PROFESSOR DORSANEO: Well, I would like to discuss it. I have noticed over the years that some federal courts have extended Federal Rule 613, which is the rule to depositions. And I have encountered lawyers in Dallas County who use the deposition as an intimidation tactic by inviting a host of people --

MR. LOW: Right, or the man's employer.

PROFESSOR DORSANEO: -- to come and cause difficulties for the opponent requiring the opponent to seek protective order relief from the Court. It's usually someone like an employee or a sick person. And I have thought as a result of

that that it might be a good idea to have some version of the rule applicable to depositions rather than leaving the matter to protective orders. But I'm open to being convinced either way.

MR. McCONNICO: My problem is -- it's like what Luke was saying. What are you going to do in an oil and gas case where you're taking the deposition of a petroleum engineer or geologist? You can't take an effective deposition of that type of expert without having another petroleum engineer or geologist at your elbow. You just can't do it.

MR. LOW: Well, how do they make them in the courtroom? We set them in there and let them listen to testimony. How do we do that? Ask for the Court to make an exception.

MR. SPIVEY: Yes. And in nine out of 10 of those cases, don't you resolve that by agreement?

MR. LOW: If you don't, you do it by court order.

MR. McCONNICO: Not necessarily. Because I've been in a lot of depositions where the other side has said I brought in my petroleum

engineer and my geologist and they've said I invoke the rule. And I say you cannot invoke the rule for a deposition. I can think of four or five occasions where that has happened.

MR. LOW: I would apply it to a deposition under the same rule, that you can get an exception like for an expert. But I would sure apply it for depositions because that can be quite abusive. I'm deposing seven witnesses to this accident, and this person wants all these people to sit in on there so they can hear each other testify and come up with the same thing, and I don't want it that way. I want each one of them to tell what he says and I don't want seven of them to sit there and by the time I get through the seven, the same thing just rehash. That's not right.

MR. JONES: I'm agreeing with both of you. Excuse my ignorance. I thought it was the law that you would try to invoke the rule in a deposition.

PROFESSOR DORSANEO: It may be under Rule 613 in the Rules of Evidence.

MR. JONES: But I believe there's a case to be made, of course, for excusing an expert

witness from the rule. But, on the other hand, whereas you've got all these fact witnesses and somebody wants to bring them in there so they can all get their story together, that frustrates the entire concept of the adversary system, really.

MR. McCONNICO: I agree with that.

CHAIRMAN SOULES: I'm up in New York and I've taken my petroleum engineer with me to help me take the deposition of their expert.

MR. LOW: You've either gotten clearance from the other lawyer that you're going to do that or you've gotten a court order.

CHAIRMAN SOULES: So, I've got to go to court and get an order. No one has even suggested that they might invoke the rule to exclude witnesses until I walk into the room, but I'd better cover myself.

MR. LOW: Unless you want to go to New York for nothing.

MR. BRANSON: But that's only if you're going to use your engineer at trial. You take whatever consultants --

CHAIRMAN SOULES: You may not know.

MR. McCONNICO: Generally, you do not know.

CHAIRMAN SOULES: I think it ought to be the other way around. I think if you're going to invoke the rule to exclude, it ought to be done on some kind of notice prior to the deposition commencing.

MR. BRANSON: You can make it part of --

CHAIRMAN SOULES: You don't even know it's an issue. Make it an issue at least before the deposition commences if it's going to be.

MR. BRANSON: You could make it a part of the notice rule.

MR. ADAMS: But that's the unusual event of where you're going to bring somebody. And if you're going to do that, then you ought to get the relief either by agreement or by the Court.

MR. BRANSON: But I think if you have purely consultants you don't need it.

MR. LOW: You don't need it. I don't know, I've always just worked it out. I just tell them, look, I'm going to bring so and so. Do you have any objections? No, I don't. I'm going to ask the Judge -- you know, as Mr. Adams said, I thought like Franklin, I just thought that was the

way it was.

CHAIRMAN SOULES: Well, this gives a person who doesn't want to go on with the deposition an absolute -- if there's somebody else sitting there, an absolute way to block you at the deposition when the court reporter is there and everything is going on. Now, if that's what we want to do, I just want to be sure everybody understands that's the tool we're providing.

MR. JONES: Well, Luke, he doesn't block the deposition. What he does is block the frustration of the witness rule.

CHAIRMAN SOULES: I'm there and I need my guy to help me and you-all invoke the rule. That means if there's any possibility he's ever going to be a witness, I'm shut down right there until I get a Court order that relieves this man from the rule.

MR. JONES: How often are you confronted with that situation as opposed to how often you're confronted with a situation where you've got a bunch of fact witnesses that are going to be deposed and --

MR. LOW: He might not even be called at trial; the deposition is going to be read.

CHAIRMAN SOULES: In my practice it's more what I'm saying than what you're saying. I mean, there are not a whole lot of people that come to these business depositions. But I've nearly always got to have somebody there helping me and it's usually a witness. And sometimes it's my party representative and his bookkeeper who are helping me go through this business and trying to understand what the other guy is telling me.

And I've got maybe a couple of people from my corporate client there who know enough of the facts to help keep me rolling whenever the corporate witness on the other side starts squiggling. And I've got them there so that they can keep me making discovery; whereas, otherwise, I'm not going to be able to make discovery.

MR. JONES: You've just got the wrong kind of law practice.

CHAIRMAN SOULES: And it is a problem. This would be a problem for me. I mean, the majority of this committee is going to control it, but --

MR. BRANSON: Let me ask you a question. Can you designate one corporate representative for the deposition and another

corporate representative for the trial?

CHAIRMAN SOULES: Yes. And you can designate a corporate representative --

MR. BRANSON: You shouldn't be able to do that.

CHAIRMAN SOULES: Well, you can. And you can designate a new one every hour, for that matter.

MR. BRANSON: Well, but if that's the case, then the rule really doesn't apply to corporations.

CHAIRMAN SOULES: You only get one in there.

MR. BRANSON: What?

CHAIRMAN SOULES: You only get one person.

MR. BRANSON: Well, hell, but you get one every hour, from what you just said.

CHAIRMAN SOULES: Well, you can. You can change -- you're entitled to have a representatives there at all times.

MR. BRANSON: Mr. McMains says that's a rare occasion behalf of the Chair. For those --

CHAIRMAN SOULES: Do you think you get one representative named and that's it for the

course of a trial? I don't think so.

MR. McMAINS: I think you can designate a representative. I don't think you can change.

MR. LOW: I don't think so either.

CHAIRMAN SOULES: I think you can. I do.

MR. SPIVEY: Judge Wallace, would you like us to vote on this so you-all would have some guidelines?

MR. BRANSON: For those of us who are in the unwashed masses, could we at least get a consensus on what you can do on this?

CHAIRMAN SOULES: Sir?

MR. BRANSON: I said for those of us who may be in the unwashed masses and who do not know the answer to that, do you think we could get a consensus of this opinion as to whether you can only have one or you can have one every hour?

CHAIRMAN SOULES: Well, I change them in court all the time. Maybe I'm getting away with something I shouldn't be getting away with, but I do.

MR. BRANSON: Nobody complains about that?

CHAIRMAN SOULES: Sometimes, but I say that guy is busy and this one can help. But, anyway, what do we want to do about this 204?

MR. LOW: What page is it on?

CHAIRMAN SOULES: It's on page 312. And I request at least if we're going to do it that we put some kind of notice provision, "At the request of any party" --

MR. LOW: Are we going to put the burden on the -- most depositions are taken by agreements. You're going to put the burden on which party to notify that you're going to do that? Or should it be an automatic thing with a party that wants an exception to obtain it either by agreement or by Court order? Because the one that's going to want the exception is the one that's going to know about it, and it's not going to be the other one.

MR. JONES: I have a problem acknowledging to the Court, the problem showing good cause could exclude a party from the deposition.

CHAIRMAN SOULES: If we can do this: "On notice to all parties a reasonable time prior to the commencement of the deposition all persons

shall be excluded," so that you know in advance that somebody is going to plan to do it.

MR. JONES: I think you ought to burden the party that's taking the deposition.

MR. McCONNICO: Well, but if --

CHAIRMAN SOULES: What I'm trying to -- I'm going to go up there and take my help and I get up there and I'm shut down.

MR. JONES: No, what I'm saying, Luke, is let's say that the guy in New York wants the deposition. Well, then, I think he ought to have to notify you that he's going to invoke the rule.

CHAIRMAN SOULES: Yes. That's what I wrote in here.

MR. McCONNICO: That's what he's saying.

MR. JONES: All right.

CHAIRMAN SOULES: We would say, "On notice to all parties a reasonable time prior to the commencement of the deposition all persons shall be excluded from examination," and that just will give you a reasonable notice.

MR. JONES: I've got a big problem with the last sentence in this rule.

CHAIRMAN SOULES: And what does that

say?

MR. JONES: It says, "Parties may not be excluded from a deposition except by leave of Court upon a showing of good cause."

MR. SPIVEY: Yes, but where are you going to keep a party out of a deposition?

MR. JONES: No court ought to ever have the right to keep a party out of anything.

CHAIRMAN SOULES: Okay. Just strike that.

MR. RAGLAND: Luke, I suggest that we strike the last line. I think it ought to be perfectly clear that parties may not be excluded from deposition.

CHAIRMAN SOULES: That's what we just did.

MR. JONES: Put a period by deposition.

CHAIRMAN SOULES: Tom, I agree with you. Everybody agrees that we strike the last line? Okay. So, this Rule 204 will read, "On notice to all parties a reasonable time prior to the commencement of the deposition, all persons shall be excluded from the examination room during a deposition except the parties, their attorneys,

the deposition officers and the deponent and his counsel, if any. A corporate party to the suit may be represented by an officer or other representative of such corporation." Those in favor say "I."

PROFESSOR BLAKELY: Wait, wait.

PROFESSOR EDGAR: Read the beginning language again.

CHAIRMAN SOULES: "On notice to all parties a reasonable time prior to the commencement of the deposition" --

PROFESSOR BLAKELY: You haven't taken care of your expert.

CHAIRMAN SOULES: -- "all parties shall be excluded -- all persons."

PROFESSOR BLAKELY: But don't you want your expert in there at your elbow?

MR. McCONNICO: He will be unless they give you notice.

CHAIRMAN SOULES: Then that gives me the opportunity to go to court and get a Court order relieving me.

MR. McCONNICO: That's right.

CHAIRMAN SOULES: And it should say "witnesses," all witnesses shall be excluded,

because the rule excludes witnesses; it doesn't exclude persons.

MR. McCONNICO: That's right.

CHAIRMAN SOULES: Okay. Any further questions or discussion?

(Off the record discussion ensued.

CHAIRMAN SOULES: Yes, Franklin.

MR. JONES: Do you want to add a provision in there --

PROFESSOR EDGAR: I can't hear.

MR. JONES: Do you want to add a provision to take care of the expert, which the Court clearly has the authority in the trial to allow an expert to sit in the trial. Now, it would seem to me that we ought to -- I don't know that we need to expressly say it in this rule. But I think we all ought to at least agree that the Court has that authority with respect to an expert at a deposition.

MR. SPIVEY: Franklin, I think you might ought to put it in there because I've run into courts that won't let an expert be excused from the rule and the reason is I don't have

authority to do that.

CHAIRMAN SOULES: I've got you. Let's say, "On reasonable notice to all parties" -- "On notice to all parties a reasonable time prior to commencement of the deposition," comma, I guess, "except as provided by court order," comma, "witnesses shall be excluded." Does that fix that? Not very well.

MR. ADAMS: I've got a problem about just naming the witnesses. Because what if someone brings the guy's banker to the deposition just to intimidate somebody? He's not going to be a witness in the case. He doesn't have anything really to do with the case except as there for intimidation of the witness. Shouldn't we make it clear that --

MR. McMAINS: Who should be in there other than --

MR. SPIVEY: Couldn't you take care of that by just preping your client?

CHAIRMAN SOULES: By what?

MR. SPIVEY: Can't you take care of that by just preping your client?

MR. ADAMS: Well, you're not going to know until you walk in the deposition that the

banker is going to be there.

MR. BRANSON: What you do is throw their ass out of your office and have a hearing.

MR. ADAMS: Well, they may not be in your office.

MR. BRANSON: Well, throw them out of their office then.

MR. JONES: Gilbert, you can sympathize with their problem, but now you can't keep them from bringing them back there to the court.

MR. ADAMS: Well, what's he there at the deposition for?

CHAIRMAN SOULES: What's he in court for?

MR. BRANSON: Probably for a bad faith reason that would get you something under that other statute.

MR. LOW: I've always had the feeling to exclude people that just walked in off the street that had no direct relationship to this case. I just have taken the position always they have -- they've got no business being here.

PROFESSOR EDGAR: Well, I think this all bears out to the fact that we need to have a

rule on it.

CHAIRMAN SOULES: I'm changing my mind about witnesses to persons because, you know, we have -- there's a right to keep compelled discovery proceedings private even from the press.

MR. LOW: Well, that's what I'm going to say. What about newspapers?

CHAIRMAN SOULES: "Persons" is probably the right word in this rule. For all these reasons, "persons" is probably the right word here in this rule.

MR. LOW: I agree.

MR. JONES: Let's go back to it.

MR. LOW: Luke, could we also take care of the expert and say "except expert witnesses pursuant to Court order or agreement of the parties"?

CHAIRMAN SOULES: Because the Court's discretion to relief -- to grant relief from the rule is not limited to experts at trial, and it shouldn't be limited at depositions. Whatever reason you need an exception, you go to the Court and ask for it, expert or otherwise.

MR. BRANSON: But the rule really

doesn't help on Gilbert's problem because the rule doesn't apply to the banker. He's not going to be a witness.

CHAIRMAN SOULES: It does now because we put "persons" back in. We put "persons" back in.

MR. BRANSON: Now, wait a minute, let's think about that a minute. If the purpose of the rule in the first place is so that people who are going to testify cannot sit and listen to the other testimony, now, if you go back to "persons," you've just abrogated the entire basis for the rule itself.

MR. LOW: You've just made it broader, the deposition rule broader.

CHAIRMAN SOULES: How many feel we should use "persons" or "witnesses"? I'm going to take a poll on that. How many feel "persons" is the proper word? How many feel "witnesses" is the proper word? The whole house says use "persons."

MR. BRANSON: Well, what are you going to do about consultants though?

CHAIRMAN SOULES: You've got to go get a Court order.

MR. McCONNICO: You've got to get a

Court order.

MR. McMAINS: If you get the notice.

CHAIRMAN SOULES: If you get the notice.

MR. BRANSON: Well, now, wait a minute. I take another -- I take my nurse with me who's not anything but my helper, my paralegal with me --

CHAIRMAN SOULES: If you make it to the deposition with her and you don't have a notice that she's to be excluded, she can't be excluded. You've got to give reasonable notice -- a reasonable time -- your opponent has to give you notice a reasonable time prior to the commencement of the deposition that the rule will be invoked. At that point you can go get a Court order if you want your nurse there, or you can call him and say I want my nurse there, but otherwise she can't be there.

MR. BRANSON: But aren't we passing a rule that would allow an argument that she shouldn't be there?

CHAIRMAN SOULES: No.

MR. McCONNICO: No, unless they give you notice.

CHAIRMAN SOULES: If they give you notice --

MR. BRANSON: Well, let's say they say, "Okay. This person -- I've been in depositions with Branson before. This person helps him and I don't want him to have any help," and they give you notice. Are we passing a rule that gives them authority for some trial court to grant that?

MR. McCONNICO: Yes, because that's what I didn't like about the rule but I think that's where we are. Because then if they give you notice, you walk into the deposition room with your nurse and they say, "She's out of here. I've given you notice I was going to invoke the rule. I've invoked the rule. The only person that can be here is you."

MR. BRANSON: I'm not talking about where you screw up and don't respond to it. That can happen to anybody. I'm talking about where you get the notice and you ask for a hearing. We are passing a rule that will give the other side authority for an argument that you're not entitled to have a consultant in the room with you because they don't want them there.

CHAIRMAN SOULES: That's right.

MR. BRANSON: That's malarkey, and that's absolutely ludicrous.

CHAIRMAN SOULES: That's what this rule does.

MR. McCONNICO: I don't agree with that.

CHAIRMAN SOULES: What?

MR. McCONNICO: If they didn't give you notice and then you walk in there with your consulting expert, whether it's a nurse, petroleum engineer, anything, they can't argue that person can be excluded.

CHAIRMAN SOULES: That's not what Frank said. You do have notice -- you do have --

PROFESSOR EDGAR: You're assuming the notice is given.

MR. McMAINS: He's invoking it. He's saying you're at the hearing.

MR. BRANSON: You're before the Court and they now have a rule they can hammer you over the head with some trial judge. And it really makes the process less efficient. Why not let people take consultants with them? You've just created a hammer against that concept.

CHAIRMAN SOULES: See, that's the problem I had from the very outset. It's not only business cases that are going to get affected by this; it's also personal injury cases.

JUSTICE WALLACE: How are you going to know who to take with you -- how does that guy know who you're going to take until you get there?

MR. BRANSON: But historically in many -- I mean, I take the same people everytime. I've got staff people to go. And if you try lawsuits against the same people and they sit and see you passing notes and say, "Hey, the consultants that he uses are helping out so we'll just exclude them." And you get before some trial court who is not particularly interested in getting the process expedited, and they may grant it if we pass this rule. And it really goes contrary to what I think this committee is trying to do, and, that is, make it a more efficient system.

CHAIRMAN SOULES: I'm not saying I like the rule. I don't like this rule. I'm just trying to get it fixed.

MR. MORRIS: All of our notices are going to have that we invoke the rule. I think we

are creating a bigger problem than we're solving.

MR. BRANSON: I agree with you.

CHAIRMAN SOULES: I agree.

MR. MORRIS: We're creating a bigger problem than we're solving. If I go in there and I don't want someone in there, I'll say, "We're not having a depo today. I'm going to have to go have a hearing -- I'm going to get this banker out of the room."

CHAIRMAN SOULES: Go file a motion for protective order.

MR. MORRIS: Yes. We're creating too big of a problem.

CHAIRMAN SOULES: That's right, Lefty.

MR. BRANSON: Now, I think if you try to put it back to witnesses it's legitimate. But if you make it persons and not witnesses, you've really created a multiheaded monster.

MR. MORRIS: But, Frank, you're creating a problem anyway because it's going to go in the notice automatically and then if you're going to bring your nurse, you're going to have --

MR. MCMAINS: You have to do a motion everytime.

MR. BRANSON: Look. I want to change my vote. Could we get a revote?

MR. MORRIS: Well, we haven't voted on it yet.

MR. BRANSON: I thought we just did.

MR. MCMAINS: No. We just voted on whether you prefer persons or witnesses.

CHAIRMAN SOULES: Is there a motion that this be adopted? Did somebody make a motion that this be adopted?

MR. LOW: I don't know. I have a question. I think that very thing could be taken care of. I see nothing wrong with -- on depositions make an exception without even going to court that a person has a right for an expert or a consultant and just exclude that out of deposition. You don't have to bring them, but automatically on a deposition, you're entitled to bring one if you want to. And then apply all the other persons but just make a consultant, whether he be a testifying consultant or a bare consultant, excluded from the rule. And then you've got -- you take care of that situation. You take care of the situation where you're trying to bring in people that are intimidating and just

automatically let them bring one if they want to.

CHAIRMAN SOULES: Lefty Morris.

MR. MORRIS: I move this rule be rejected.

CHAIRMAN SOULES: Lefty has moved that Rule 204 as it appears on 312 be rejected. Is there a second?

MR. BRANSON: Second.

CHAIRMAN SOULES: Further discussion? Those voting to reject say "I." Otherwise? Unanimously rejected. And, Bill, that's the end of your report, isn't it?

PROFESSOR DORSANEO: Yes, sir.

PROFESSOR EDGAR: I've got one question.

CHAIRMAN SOULES: Hadley Edgar.

PROFESSOR EDGAR: We passed Broadus' request a moment ago to Rule 267 as subdivision (f). And it doesn't any more belong in subdivision (f) than the man in the moon.

CHAIRMAN SOULES: Where does it go?

PROFESSOR EDGAR: It's just a matter of organization. I'm not questioning whether or not a spouse should be included, but it seems to me that we could perhaps better take care of that

by saying in subsection (b) this rule does not authorize the exclusion of a party who is a natural person or the spouse of such party, rather than using that as a subdivision (f).

MR. SPIVEY: I've got suggestions both ways and I'll go both ways on it, either way.

CHAIRMAN SOULES: We'll use Broadus' language as a tag on 267.

PROFESSOR EDGAR: We'll just say under 267(b)(1), "a party who is a natural person," and then add "or the spouse of such party."

CHAIRMAN SOULES: Okay.

PROFESSOR BLAKELY: Mr. Chairman, we haven't voted on that, have we?

CHAIRMAN SOULES: No.

PROFESSOR BLAKELY: Then let me add to it. The rules of evidence ought to have precisely the same thing in its (d) ruling, 614.

CHAIRMAN SOULES: Which is 614. That's what I'm trying to get to now.

MR. JONES: I so move we change 614 also.

CHAIRMAN SOULES: Okay. We have our word processor here, Tina. Where does she put this and what -- what and where does this go, this

Spivey's -- tell me again.

PROFESSOR EDGAR: 614, or --

CHAIRMAN SOULES: I'm looking now at -- well, let's see. We changed 267, didn't we?

PROFESSOR EDGAR: Look at page 358.

CHAIRMAN SOULES: I've got that.

PROFESSOR EDGAR: All right.

CHAIRMAN SOULES: Did we change 267 to track that language sometime back? Or what 267 are we looking at?

CHAIRMAN SOULES: I'm looking at it.

PROFESSOR EDGAR: All right. Well, that says as Rule 267.

MR. MCMAINS: That is Rule 267.

CHAIRMAN SOULES: I'm sorry.

PROFESSOR EDGAR: And I'm saying (b)(1) in that rule, Luke, should simply read "a party who is a natural person or the spouse of such party."

CHAIRMAN SOULES: Okay, I've got it.

MR. JONES: Mr. Chairman, I'm trying to get a motion to suggest that the chair appoint a subcommittee to figure out where this ought to go and let's move on.

PROFESSOR EDGAR: Well, the reason

I --

CHAIRMAN SOULES: I've got to type it up next week, this young lady does, and I want to get it done right now, please.

PROFESSOR EDGAR: Well, the reason I brought that up -- if we don't get it now it will wind up there as (f) and it doesn't belong there. It doesn't make any sense there.

CHAIRMAN SOULES: It won't get in the rules. I can tell you it won't get in the rules. All right. I've got that correction made at 267, which means that we're going to have to take this up in a few minutes, of course. Let's do it right now. Whoever is going to report on this 267 on page 358 --

PROFESSOR EDGAR: It's already been reported and approved. I did that earlier. And then Broadus added the amendment to it which we voted on a few minutes ago.

CHAIRMAN SOULES: Okay. We looked at it on a different page. Now I've got to find the page that we looked at during the report because that's where I have my tag. Some of these are in here several times. I've got it. Okay. It's on page 320, "a natural person or the spouse of a

natural person." Okay. Thank you.

Now, what do we do to 614? And one reason I couldn't follow you with looking at page 358 is because that's the page in the rule book. I was looking at 358 but a different page.

PROFESSOR BLAKELY: You probably don't have it in --

CHAIRMAN SOULES: The same place.

PROFESSOR BLAKELY: But the same thing.

CHAIRMAN SOULES: The same thing, okay.

(Off the record discussion ensued.

CHAIRMAN SOULES: Okay. What's next?

MR. SPIVEY: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir.

MR. SPIVEY: We're fixing to lose some people. And I'd like to move the chair to appoint a special subcommittee to study Rule 51(b), which that provision says this rule shall not be applied in tort cases so as to -- this is the parties rule. "This rule shall not be applied in tort cases so as to permit the joinder of a liability

insurance company unless such company is by statute or contract directly liable to the person injured or damaged."

CHAIRMAN SOULES: Okay. That is assigned to -- as of this time -- as of this moment, that is assigned to the standing subcommittee that embraces those rules. And if anyone wants to work with them -- let's see, who's the chair of that? The chairman of that is Sam Sparks, El Paso, and if you want to work with him, write him. And Tina will get out a letter that that is being assigned to him for study within his standing subcommittee.

MR. SPIVEY: Okay, thank you.

PROFESSOR DORSANEO: Mr. Chairman, there are a number of other rules that are companions to 51(b) that contain that same concept, and they all need to be examined together.

MR. BRANSON: Mr. Chairman, I would urge that's a large enough problem -- Chairman Sparks has his hands full with all those rules and would urge the chair to appoint a subcommittee directed specifically to that problem.

MR. SPIVEY: That is sort of a special

problem. And I don't think it's going to divide the plaintiffs and the defense lawyers as much as it's going to be a controversial matter.

CHAIRMAN SOULES: That's fine. Broadus, do you have a standing subcommittee? I don't know what your current assignments are. Let me look and see here. You had a special subcommittee to handle that.

PROFESSOR EDGAR: Well, Sam ought to be on it.

CHAIRMAN SOULES: What I'd like to do is keep the first assignment within the standing subcommittee for overall control. And, of course, anyone can generate work -- you know, work product for Sam and feed that, and if it gets to be -- in other words, let him decide whether it needs a special subcommittee. I'm not trying to be argumentative with you, Frank, but I am trying to keep as much organization. Even the COAJ now knows who on their committee keys to what rule numbers. So, they can consult with --

MR. BRANSON: Well, my only concern is this is a rule that I would urge probably is going to require some study and a pretty extensive report. And with all deference to Sam, he's in El

Paso and there's one airplane on Saturday that goes to El Paso. If you could --

CHAIRMAN SOULES: For purposes of this rule, I appoint Frank Branson, Franklin Jones and Broadus Spivey as special members of that subcommittee and ask them to take the initiative with Sam to get him the work product that they want considered by that committee.

MR. JONES: Can I make a comment, Mr. Chairman, which I think might let the chair know where we're coming from?

CHAIRMAN SOULES: Yes, sir.

MR. JONES: I don't know about Broadus or Frank, but I've had four members of the Court tell me that they wanted the committee to look at this rule, and that's where we're coming from on this.

CHAIRMAN SOULES: Okay. Well, it's going to be looked at now. And the three of you-all are special members of Sam's subcommittee to take the initiative to get to his subcommittee what you want him to look at. And if he wants some of you-all to handle the report, you know, he's got that prerogative and you-all certainly can ask him. And he may want you to specially

handle that particular part of his report next time.

Okay. We've still got a lot of rules to work through, so let's go on with our agenda. We've got Rusty McMains, Tony Sadberry, Steve McConnico and Professor Carlson. Now, since Steve and Elaine are both Austin residents and Tony and Rusty are going to have to travel, I would propose that we take the two out-of-towners first in case they must go. Is that okay with you Elaine and Steve?

PROFESSOR CARLSON: Yes.

MR. McCONNICO: Yes.

CHAIRMAN SOULES: Rusty, between you and Tony, flip a coin or discuss who wants to go first. What are your travel schedules?

MR. SADBERRY: I'm driving, Luke. And mine is probably not --

CHAIRMAN SOULES: Tony, go ahead.

MR. SADBERRY: Okay.

CHAIRMAN SOULES: While Tony is tuning up, I've got a repealer in here of 164 which we failed to do last time after we combined 164 into 162. So, all in favor of that, say "I." Okay.

MR. SADBERRY: Okay. Mr. Chairman,

this report begins on page 429 of the large book and addresses certain rule or change proposals regarding the justice court practice and the appeals from the justice court decisions.

The first matter on 429 is really a final work of the COAJ that was delivered to us only for information and has not been addressed specifically by the subcommittee. It has the effect of requiring a three-day notice. This is in JP justice court actions for trial of the request for jury trial. And, as I understand, the current rule does not so provide.

And the reason for this change proposal is on page 431, a letter addressed to Justice Wallace indicating the use of this tactic to delay trial, which may have some impact on the parties wanting to go to trial. So, I present that as a matter that's presented to us by the COAJ without comment. But in order to move it on, I would, Mr. Chairman, move the adoption of this change.

CHAIRMAN SOULES: Second?

-PROFESSOR EDGAR: I second with this comment: Prior to yesterday, the rules recognized the jury fee for the JP court and the county court to be exactly the same, three dollars.

MR. McMAINS: Well, it's been changed. They changed this to five, too.

PROFESSOR EDGAR: Well, it says three here on page 429.

MR. SADBERRY: Well, I'm sorry, Professor, I should have done this. On 430, the proposal would have the effect of changing it, and I was just going to deal with them separately. But that should be pointed out that you may want to deal with them both at the same time.

CHAIRMAN SOULES: The court reporter can't concentrate on what's being said by the reporting committee with side conversations going on.

MR. SADBERRY: The Professor pointed out that the jury fee needed changing as well and that would be covered by the proposal in rule on 430 which did travel through the subcommittee with a favorable recommendation. So, if it's appropriate, Mr. Chairman, I would combine those two recommendations and take a friendly amendment to the proposal on page 429 to change the words three dollars to five dollars.

MR. BRANSON: So moved.

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: It's been moved and seconded that we make the changes that are shown on 429, and also change the fee from three to five dollars. Discussion? Elaine.

PROFESSOR CARLSON: Yes. Luke, I had sent you a letter -- and, Tony, I'm sorry, I didn't send it to you because I didn't have a list of subcommittees yet.

CHAIRMAN SOULES: I can't hear you, I'm sorry, Elaine.

PROFESSOR CARLSON: I had sent you a letter because we had dovetailed in the 700 series of the rules a proposed modification of change on the demands of the jury trial and the forcible entry and detainer cases before the justice court, which I really don't want to get to quite yet.

But in speaking to justices and in recognition that 28.035 of the Government Code now provides for a one-day period for a jury demand when the justice court sits as a small claims court, these JPs are just ready to throw their hands up in the air because there are so many different time periods now scattered for criminal and civil demands depending on whether it's a regular case or forcible entry or -- I think if

we're going to adopt the three-day rule here, we need to recognize that there's a one-day rule in the Government Code if the justice is sitting in the small claims court, and now their jurisdiction is concurrent up to the thousand dollar mark.

CHAIRMAN SOULES: Why don't we make this one day, so it's all one day?

MR. SADBERRY: I think the whole idea is just to give some advance notice. I don't know that three days is that much more significant than one day, and I don't see --

CHAIRMAN SOULES: Thank you. Will you accept that amendment, Tony, that we make this one day?

MR. BRANSON: How do they get their jury panels in the JP court? I don't know.

PROFESSOR DORSANEO: The same way, post cards.

CHAIRMAN SOULES: They can get them.

PROFESSOR EDGAR: I'll accept that as a second amendment.

MR. SADBERRY: Now, this doesn't create any problems with respect to yesterday's work?

PROFESSOR EDGAR: No.

MR. SADBERRY: It was only the amount of the jury fee.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: All in favor say "I." Opposed?

MR. SADBERRY: Mr. Chairman, the next provision is on page 433. You might want to take a minute to read that. Again, this came directly from the COAJ, delivered to us without study. It is a proposed new rule. And it was not accompanied by committee notes that I know of --

CHAIRMAN SOULES: I'll tell you what it is. It's the -- there was something taken out that left a need for this to be put back in. Let's see if I can get there. If you'll look at 590, in a certiorari context -- and I don't know what that is -- appeal from the justice to the county court, you have exactly what's proposed here in 574a as being the standard for pleading on appeal.

We took something out of the appeal provisions, which is the next section behind, the 571 through 573 -- 74, I guess -- in the past that gave a standard for pleading. And what this does is make appeals and certioraris exactly alike when

they go up from the justice to the county courts by putting this language back in the appeal process. And apparently they all know what it means because that's the way it's done. But it needs to be restored.

PROFESSOR DORSANEO: It needs to be back in both.

CHAIRMAN SOULES: It's just exactly what's over in 590. And 590 is now being used as the standard for pleading an appeal because there's not one over in appeal. And they say, well, let's put it over there so it says both ways, either type of appeal is the same way. And that's what the COAJ -- that's why they recommended this.

PROFESSOR EDGAR: We came into this in our subcommittee in another fashion because we earlier repealed rules of civil procedure 264 effective January 1 of 1988, which provided that cases brought up from inferior courts shall be tried de novo. That was repealed.

And the question came before our subcommittee that forcible entry detainer cases are governed by their own rules, small claims cases are governed by the Government Code, and the JPs were

wondering what type of appellate process would be available for other types of justice cases after January 1 of 1988. Now, we just want to make sure that we have coverage for those other types of cases. So, it's going to be under 590?

CHAIRMAN SOULES: There are only two kinds, appeals and cert. Cert has 590, which takes care of it. But appeal didn't have the right -- it didn't have a provision.

PROFESSOR EDGAR: What about small claims? That's governed by the Government Code.

CHAIRMAN SOULES: Well, we don't even have rules on that, see.

PROFESSOR EDGAR: Well, I know that.

CHAIRMAN SOULES: But this makes the -- this puts the trial de novo expressly back into the appeal when we put this 574a in because it's the same standard as the cert.

MR. SADBERRY: Well, actually what has to happen is move one page ahead, and that's going to be page 434. And that's how the COAJ dealt with the trial de novo. Now, I guess that raises the question whether that language could perhaps come in 574a and 574b proposal.

CHAIRMAN SOULES: Well, they wanted

them separate, and I don't know why or what difference does it make, I guess.

MR. SADBERRY: They wanted them separate.

PROFESSOR CARLSON: That just mirrors rule 590 and 591.

CHAIRMAN SOULES: It puts in the appeal practice what needs to be over there unless you're going to extrapolate from some place else. And it makes the rules cleaner and neater to have it both places, is their thinking.

MR. SADBERRY: So long as they're separated in the rules under different sections --

CHAIRMAN SOULES: Do you recommend their adoption?

(Off the record discussion ensued.

CHAIRMAN SOULES: That's because they run parallel to 590 and 591. They're separate over --

MR. RAGLAND: Right. I understand the provision. I don't have any questions about that. I'm just wondering about the necessity of having two separate rules when they deal with the

same thing. It seems like to me it would simplify the matter if proposed 574b was added under 474a.

CHAIRMAN SOULES: Tom, the reason we did it that way was to parallel 590 and 591, just not to do it different, just to go ahead and make them just like the other rules.

MR. RAGLAND: Okay. I just questioned that.

CHAIRMAN SOULES: Okay.

MR. SADBERRY: Before we vote, Mr. Chairman, I just want to point out that as to trial de novo, there are two drafted versions of that, and the second one you see on page 434. The other one is on page 435 which is the draft that our subcommittee had seen and did -- and I don't think there is anything other than a drafting difference, but I wanted to point that out to see if this committee prefers one over the other.

MR. BRANSON: It doesn't make sense to me, Mr. Chairman, if you're going to try it de novo, to limit the litigants to what they tried in the court below.

CHAIRMAN SOULES: We know very little in this committee about the justice rules, but I know they work. And where they're going for

guidance is 590 and 591, but they're having to extrapolate from appeal to certiorari to get there. What we're saying is take 590 and 591, which is what they're using right now, and legitimize it as a part of the appeal by putting it over there in the appeals rules, and that's all we're doing. We're really not changing anything.

MR. BRANSON: But my question still is, if you're going to try a case de novo with the county or district court, the term "de novo," to me, means you begin all over. If you're beginning all over, you cannot be limited, in my estimation, to pleadings and theories of recovery tried below.

CHAIRMAN SOULES: Okay, fine. There's a motion that we adopt it. Is there a second?

MR. RAGLAND: I second it.

CHAIRMAN SOULES: Those for adopting them say "I." Opposed? Okay. Let me see the hands on that. Those for adopting these rules as proposed 574a and 574b in the appellate process, show by hands. And those opposed? Okay. That's five to three that it carries. Tony, do you have anything else in your report?

MR. SADBERRY: That's all we have.

CHAIRMAN SOULES: Okay. Next then will be Steve McConnico -- I'm sorry, will be Rusty McMains. We start on page 399, I think, Rusty.

MR. McMAINS: On what?

CHAIRMAN SOULES: Page 399 of the big materials.

MR. McMAINS: Are you ready?

CHAIRMAN SOULES: Yes, sir, Rusty, thank you.

MR. McMAINS: The proposal is -- and basically they stem from the COAJ and plus, I think, the table votes -- suggestion by Justice Wallace at the last meeting -- regards to trying to deal in some manner with the problem of Courts of Appeals who will answer one or two points of error, which, in their judgment, is dispositive of whatever they want to do and then kick it upstairs. The Supreme Court then is faced with the problem that the opinion or judgment may be wrong as to why they did it, but it's totally undeveloped as to the other points of error. They can either -- the Court then has the option of remanding to the Court of Appeals to consider it or considering it themselves, either one of which

is taking up the Supreme Court's time.

I think this probably has been -- this change has been made more imperative by the amendment to the Government Code, which you got yesterday, on jurisdiction in the Supreme Court, which, as I read it, now means that the Supreme Court does not have to grant writ even if a judgment of the Court of Appeals is erroneous. Am I correct in that interpretation, Judge?

JUSTICE WALLACE: That's what it says, unless it is of great significance to the jurisprudence of the state.

MR. McMAINS: Right, unless it's of significance. So, if the first time, we appear to have at least written down what we've always suspected might have been going on, that the Supreme Court, just because even the judgment is erroneous; does not have to correct the Court of Appeals decision. So, I think it is even more imperative that you get at least one chance at some point in the appellate process to have all your points of error considered. And the amendments that are proposed to Rule 80 and 90 are on page 400.

401 is 80. That is an amendment to section C

on final judgment. It says, "The final judgment of a Court of Appeals shall contain a ruling on every point of error before the Court." Now, that's designed basically probably -- and could be satisfied by saying all points of error that have been considered are overruled for reasons stated in the opinion, or something, if there's going to be affirmance.

You know, from a jurisprudentia standpoint, I'm not really sure this belongs in the judgment, but that is one way to handle it, certainly. And then in the amendment to Rule 90, which appears on 401 on the decision and opinion, requires -- it says, "The Court of Appeals shall hand down a written opinion which shall be as brief as practical but which shall address every issue raised and necessary to final disposition of the appeal."

Argument, I think, can be made perhaps that maybe that language doesn't quite get us there unless we have done what we did in 80. That is, 90 alone, I don't think -- I think they kind of have to be voted on at the same time. Because 80 requires a rule on every point of error; 90 says necessary to the disposition of the appeal, if you

see what I mean. So, in reality, if you only -- unless you have both of them, you're not going to get accomplished what it is you want to get accomplished.

Now, the alternative recommendation with regards to 90a which is somewhat a scratched up, scribbled version that has not been, unfortunately, reduced to a more legible form, is in Rule 90a that appears on page 403. This is the recommendation that came out of the COAJ. And as much as I have been able to interpret it, I basically favor and would promote the changes in 80 and 90 that we -- that are on the preceding pages, because I'm not sure that it is still dispositive of the problem.

CHAIRMAN SOULES: Are you recommending that we adopt Rule 80 and 90 changes that are shown on 400 and 401?

MR. McMAINS: Yes, that we modify 80 and 90 as reflected on pages 400 and 401.

CHAIRMAN SOULES: Is there a second?

MR. BRANSON: Second.

CHAIRMAN SOULES: Who seconded it?

PROFESSOR EDGAR: Frank did.

CHAIRMAN SOULES: Frank, okay. Thank

you. Frank Branson seconded it.

PROFESSOR EDGAR: So then the appellant -- pardon me, the petitioner in the Supreme Court is going to not only have to be careful that the Court of Appeals in its opinion addresses every issue, but is also going to have to look to the judgment of the Court of Appeals so that it contains the magic language, quote -- something that pertains to a ruling on every point of error.

I mean, because I can see how the opinion might address every ruling, but the judgment of the Court of Appeals may not. And this is going to -- for the appellate practitioner, it could be a trap and we need to be cognizant of it. That's all I'm saying.

MR. McMAINS: Well, I agree. The alternative that was proposed, I think, the last time by Justice Wallace, which, frankly, I opposed, was -- just in terms of the approach -- the alternative approach is incorporating a presumption, essentially, that all points not specifically ruled on are overruled. The problem with that presumption is in some respects a similar problem to this proceeding here, except at

least here you're supposed to be able to tell that the Court has ruled on everything.

The problem with the presumption is that if there are -- say there are 38 grounds. Let's say there are 38 rulings on evidence for a remand that are claimed to be errors that resulted in an improper verdict or an improper judgment and they want to remand the case for that, and the Court writes and grants one of them -- and that's all they have to do now -- and reverse the case for that reason. If you take a presumed overruling of everything of all the other points of error, if you take a presumption like that, which is the alternative prospect that we had, then in order to get a writ granted, you've got to win all 38 arguments. You've got to assume the Court -- you know, I mean, if you're going the other way -- if they just deal with one of them or something else, you've got to deal with all the points of error that are dealt with. The same thing is true with regards to cross points.

PROFESSOR EDGAR: Yes. And on the other hand, I want to make sure I understand --

MR. McMAINS: The question here is whether or not this affects the finality of the

judgment such that maybe you don't even have jurisdiction to go to the Supreme Court. Now, that's an issue that is a question because it says final judgment, it shall be dispositive of all issues.

PROFESSOR EDGAR: Let's assume that you have those 38 points and the Court of Appeals addresses only 37 of them. Then in your motion for rehearing, if you fail to point out to the Court of Appeals its failure to decide the 38 points, then you have not properly invoked the jurisdiction of the Supreme Court on application.

Or if the Court addresses all 38 points in the opinion, but the judgment of the Court does not in some way reflect a ruling on all 38 points, then you, again, by motion for rehearing, must call that to the Court's attention; otherwise, you have not properly preserved your application for review. And it seems to me that that is greater trap for the appellate lawyer than perhaps requiring him to address all 38 points.

MR. McMAINS: Well, in reality it may be even worse than that because it may be within the final judgment rules that -- when it says a final judgment, and that's what it's defined --

and you can only appeal to the Supreme Court for final judgment -- that it must dispose of all points of error. An argument could readily be made that if it doesn't, it's not a final judgment so you don't have any time running on your motion for rehearing.

PROFESSOR EDGAR: That's true.

CHAIRMAN SOULES: And that's the concept that applies to a trial court judgment. If it doesn't dispose of all issues of parties and it's not final, you don't have anything running.

MR. McMAINS: But it was supposed to be. So, I mean, there are problems with both directions in terms of what is trying to be accomplished here. I'm not suggesting this is a perfect fix. The problem -- what I suspect will happen at some judge's conference or something, it will be suggested that a form paragraph be included in the judgment that says all points not expressly granted by the opinion which is incorporated by references are overruled or something of that nature.

MR. BRANSON: But in the meantime, you're going to have a lot of people who are not appellate practitioners who are going to fall into

this great crevasse and be covered up with substantial manure.

MR. McMAINS: Except that I think it works the other way worse. And the problem is if you do it the other way -- you've got two issues here. Either you deal with it or you ignore it. If you deal -- I mean, if you deal with it, if you make the Court of Appeals deal with all the issues before taking up the Supreme Court's time, you can only do that by requiring them to deal with all the issues or by presuming that they did. And I guarantee you that a presumption is a greater trap. So, it is merely the lesser of the two evils. I don't frankly like either one of them, but I'm not sure what the alternative is in view of where we are now.

MR. BRANSON: Well, having heard Rusty's argument, Your Honor, are you still of the opinion that the presumption would be the better way to go?

JUSTICE WALLACE: No. I was convinced after our last discussion the presumption was not a just way to go.

MR. McMAINS: And I think this is -- you know, this is an effort to do something that's

relatively simple --

MR. BRANSON: Can anyone think of a fix so that we don't create another hole for people to fall in, because I think that's what we're trying to avoid?

PROFESSOR EDGAR: I guess part of my concern is that we not only require that the opinion of the Court of Appeals address these issues, but that the judgment of the Court of Appeals also reflect that those issues had been addressed. And if you have a hiatus between the two -- and, you know, there are a lot of lawyers that never think about looking at the judgment of the Court of Appeals. They look at the opinions of the Court of Appeals and they assume that that's the judgment. And we have now superimposed another requirement on them that I feel might create a problem. And I'm wondering if we can, in some way, eliminate that additional potential trap.

CHAIRMAN SOULES: The reason, Hadley, that this concept is here is there have been a lot of discussions and efforts to try to make the Court of Appeals write on every point and then say they shouldn't have to write on every point

because they don't have time to write on every point. We've been through all that over on Rule 90 on opinions. And we just can't get to disposing of all the points other than by presumption in the purview of Rule 90.

And so what we finally came up with is we are going to have to have another piece of paper in the process besides the opinion, because the opinion will never accomplish this and probably -- and some people think it shouldn't even accomplish this. What is going to be the other piece of paper? That's the judgment that gets appealed. So, now you go back to the judgment -- that's what's really being appealed.

PROFESSOR EDGAR: I understand that.

CHAIRMAN SOULES: You make something happen in the judgment. And we're going to have to learn, I guess -- the practitioner is going to have to learn to read that now because it's the only place that we can make it happen other than by presumption. Now, whether it's a good idea or not, I don't know, but that's the reason for it.

PROFESSOR EDGAR: Well, I understand. I know that.

MR. McMAINS: Luke, let me make one

comment as to how to solve half of that problem. But it doesn't solve the problem that -- it doesn't matter what we seem to say, the courts don't do it. But the problem of it being in two different rules and two different documents, you could take (c) out of 80 essentially altogether and over here in 90 you could add the requirement and you would have to deal with, however, differently and say hand down a written opinion. It shall be as brief as practicable which shall address and rule upon every point of error raised in the appeal.

CHAIRMAN SOULES: And here is one other one.

MR. McMAINS: You know, that requires them to do it in the opinion.

CHAIRMAN SOULES: Here's the other way, is to add to (c) -- to put this language: "The final judgment of the Court of Appeals must contain a ruling on every point of error before the Court, otherwise the judgment is not final or appealable." And you tell them that the time hadn't started running, then you put it in the rule.

MR. BRANSON: But then all you're

going to do is have some court -- and I won't mention the Texarkana court -- but there are some courts that would then consider themselves the court of final -- the resting place for that by just not including all that.

CHAIRMAN SOULES: That's where you get a mandamus. That's what you do right now. Whenever you can't get a trial court to enter a judgment, you get a mandamus from the Court of Appeals to make him rule. And that's easily handled.

MR. ADAMS: I think, Rusty's suggestion was a good suggestion.

CHAIRMAN SOULES: Except it won't happen. It just won't --

PROFESSOR EDGAR: Well, except that -- except judgments -- the provision on judgment really should be in Rule 80 because that Rule 80 is talking about judgments, while Rule 90 is talking about opinions. And I don't have any problem -- and maybe Luke's suggestion is better by saying must rule --

CHAIRMAN SOULES: Otherwise it's not final and appealable.

PROFESSOR EDGAR: -- otherwise it's

not final and appealable.

CHAIRMAN SOULES: And that says it all.

PROFESSOR EDGAR: Yes, that does. That may be the better way to do it.

CHAIRMAN SOULES: Now the Court of Appeals knows.

MR. BRANSON: Why not do it twice?

CHAIRMAN SOULES: Well, except you don't want to make --

PROFESSOR EDGAR: You don't want a lawyer to get trapped here.

CHAIRMAN SOULES: I think if they dispose of all the issues in the judgment, why should we make the case not appealable because they don't also do it in the opinion? Let's dispose of all the issues in one place, wherever it should be -- I say the judgment one time -- and then you have appealable judgment, no matter what the opinion says. And opinions --

MR. BRANSON: Read with me for just a minute.

CHAIRMAN SOULES: Okay.

MR. BRANSON: Let's assume we amended it so that if it wasn't in there it wasn't final.

And you get a case where the Court of Appeals enters a judgment dealing with 36 of the 38 points. The trial counsel, in looking at it, doesn't pick that up -- or the appellate counsel. And there is no -- within the time frame allotted by the appellate rules there's no appeal. And someone goes out and executes on that judgment. And in the process of the execution it is discovered that it was not a final judgment that was being executed on. What kind of monster have we then created?

CHAIRMAN SOULES: It's not any different than the monster you've got right now if the trial court judgment wasn't final, and you thought that on the 30th day you could go execute, and you go out to execute and you realize that there is a party not disposed of. It's just an interlocutory order. You have to go get the judgment finalized by disposing of the issues.

PROFESSOR EDGAR: At least you haven't cut off your right to appeal because it's not final yet. See, the time hasn't started running on your application for writ of error.

CHAIRMAN SOULES: It's really not a new problem. It's happening in a new place.

Because now we're talking about it happening up in the Court of Appeals judgment. But the problem has always been at the trial courts and there are all sorts of ways to handle it, and you just handle it in the same way. This way you're getting a crisp clean judgment everytime or you're not in jeopardy on appeal. And you're saying you're not in jeopardy on appeal until you've got a judgment that disposes of all parties and issues, which is a concept that we live with.

MR. McMAINS: I think if the idea is to force the Court of Appeals to rule, which is what I think is the --

JUSTICE WALLACE: I don't think that's going to be too much of a problem. If we do this, a few repeat offenders, they're going to get the message pretty quick. If it takes a couple of mandamus actions to get to it, then so be it, but it will get crossed.

MR. McMAINS: I mean, I think it may initially be a problem but it doesn't come into effect for six months, and I think by then they probably will have figured out a way to handle it. The only real problem about dealing with judgments is that we know by experience by and

large most judgments in the Court of Appeals are written by clerks or staff and not by the Court anyway.

JUSTICE WALLACE: One problem they've been having in their defense is the Court of Criminal Appeals tell them to keep your cotton picking hands off these points. If there's a dispositive point, write on it and leave everything else alone.

MR. McMAINS: That's right.

JUSTICE WALLACE: And I wasn't aware of that until a few months ago.

MR. McMAINS: Well, then let me ask you this then: The one problem with our fix then, is this just with civil? See, right now our T.R.A.P. rule purports to deal with the Court of Criminal Appeals too. I'm afraid that is a problem that I have ignored. I ignored the criminal jurisprudence altogether.

JUSTICE WALLACE: Just put "in civil cases" in front of it and we'll be safe.

PROFESSOR EDGAR: "In civil cases a final judgment of the Court of Appeals shall be" --

MR. McMAINS: That's probably why we

should leave the opinion rule alone as it is, necessary to disposition. I mean, this change makes it clear, but I think we'll also not counteract the Court of Criminal Appeals' determination. And why don't we do final judgment -- (c) should probably be labeled "Final Judgment in Civil" -- what do we say, "cases"? In civil cases. The rule should probably start with "In civil cases the final judgment of a Court of Appeals shall contain a ruling on every point of error before the Court" --

PROFESSOR EDGAR: Must contain.

MR. McMAINS: I said "shall."

PROFESSOR EDGAR: But I think Luke said "must," though, and then we're going to say otherwise it's --

MR. McMAINS: Okay. "Must contain a ruling on every point of error before the Court" -- by any party? I mean, I assume we want cross points.

PROFESSOR EDGAR: Semicolon, "otherwise it is not" --

MR. McMAINS: "Otherwise such judgment" --

CHAIRMAN SOULES: "The judgment is not

final and appealable."

MR. McMAINS: "Otherwise the judgment" --

MR. BEARD: You mean they're just going to be able to sit there and do nothing?

CHAIRMAN SOULES: No. You've got to get a judgment just like you do in the trial courts.

MR. McMAINS: What you do is you file a motion for -- you know, you file a motion for rehearing, if you will, in which you complain about that.

CHAIRMAN SOULES: Give me your lead in again, Rusty. I missed that.

MR. McMAINS: In civil cases -- first of all it's labeled "Final Judgment in Civil Cases."

CHAIRMAN SOULES: Final Judgment in Civil Cases.

MR. McMAINS: Then it is, "In civil cases the final judgment of the Court of Appeals must contain a ruling on every point of error before the Court"--

PROFESSOR EDGAR: By any party.

MR. McMAINS: -- "by any party."

PROFESSOR EDGAR: Semicolon, otherwise.

MR. McMAINS: "Otherwise the judgment is not final and appealable."

MR. BEARD: Well, Rusty, the Court hands down and it's got its order and you say it's not final. You don't file a motion for rehearing; you just sit there. Everybody thinks it's gone and a year from now you just come back and --

MR. McMAINS: That's a problem that exists right now in a nonfinal judgment.

PROFESSOR EDGAR: That's right, just like at the trial court right now. If you have a judgment that's sitting there that's not final, it's just not final.

MR. BEARD: But the trial courts -- lawyers are going to be shocked at that.

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

MR. McMAINS: Right now, basically, you've got two -- when you've got one of these judgments, one of two things is going to happen -- or three things. They're either going to pay you, you're going to settle or somebody is going to be trying to appeal. And when they don't get a

chance to appeal and they say it's not ready to be appealed, then you get it fixed. At least nobody -- the litigants aren't getting hurt by the Court not doing their job. And that's the real thing I was concerned with.

MR. BRANSON: There's no telling where Dean Friessen is going to put these final judgments.

JUSTICE WALLACE: Well, either party can file a motion for rehearing to the Court of Appeals to make the Court go ahead and dispose of it.

PROFESSOR EDGAR: And should.

JUSTICE WALLACE: So the guy who loses can't just say it dies because the other side can say let's get this moving.

PROFESSOR EDGAR: And if the Court refuses to act or something like that, then you've got a writ of mandamus available to you.

CHAIRMAN SOULES: Do you move that change for Rule 80 as we've now stated it?

MR. McMAINS: Yes.

CHAIRMAN SOULES: Is there a second?

MR. BRANSON: Second.

CHAIRMAN SOULES: Seconded by Frank;

is that right?

MR. BRANSON: Yes.

CHAIRMAN SOULES: Those in favor say "I." Opposed? Now, then, you were suggesting that maybe Rule 90 might not need anything or should not have any work done on it.

MR. McMAINS: No, we can leave Rule 90 written -- I don't mean -- well, I like the additional change that we made because it doesn't really require them to do what we require over here. It still says hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition.

CHAIRMAN SOULES: You're recommending that be passed as well?

MR. McMAINS: Yes. I don't think that is going to impair the -- in the criminal cases.

CHAIRMAN SOULES: Is there a second?

MR. BRANSON: Second. This does away with unpublished opinions? Is that what --

CHAIRMAN SOULES: No, because this is -- this is an issue raised and necessary to final disposition. They do have to write in criminal cases on what's necessary to final disposition,

don't they? Necessary to final disposition?

JUSTICE WALLACE: Well, the way they've been interpreting it all the time, why they haven't been doing it, is that you've got one dispositive issue and that's all that's necessary for final disposition.

CHAIRMAN SOULES: So this gets there.

MR. McMAINS: That's what I'm saying. I don't think this actually changes the practice. That's why I thought the change alone was sufficient.

CHAIRMAN SOULES: It's been moved and seconded that we adopt the changes to Rule 90 that appear on page 401.

PROFESSOR EDGAR: There's no problem now with the criminal cases? This won't have any --

JUSTICE WALLACE: If it does, if we get a lot of flack out of the criminal people, I can just put -- we can put "in civil cases" in front of it.

PROFESSOR EDGAR: Yes. Well, should we do that now, though?

CHAIRMAN SOULES: Well, we don't think it changes, because it says necessary to final

disposition. And their instruction in the Court of Criminal Appeals is to write just on the points that are necessary to final disposition and not on any others. Okay. All in favor say "I." Opposed?

PROFESSOR BLAKELY: Are we going to start getting an order from the Court instead of an opinion? Are we going to get that order the clerk enters? Is that what's going to arrive?

MR. McMAINS: Well, you're supposed to get both now.

PROFESSOR EDGAR: You should. The clerk of the Court of Appeals should send you a copy of the order and the opinion.

CHAIRMAN SOULES: Next, Rusty. Page 404.

MR. McMAINS: The next rule which is a problem addressed in -- by Professor Wicker on 404 -- and this is one of those -- I can't explain this case. Judge Wallace is here. I'll let him.

The Supreme Court -- essentially what we did -- and we had an actual debate, I believe, that was fairly active and voted on the question of making Flanigan versus Carswell, which is the lead precedent on how you review a trial court's act of

remitting, which the Supreme Court said was done on abuse of discretion standard, but it did not parallel when the Court didn't remit. The Court of Appeals just got to operate from the beginning without an abuse of discretion standard or any presumptions.

That dichomoty was done away with when we amended Rule 85 to require that any action of the trial court, either remitting or not remitting, be reviewed on an abuse of discretion standard by the Court of Appeals.

But the Court of Appeals just didn't have the power to come in anew and remit. But the Supreme Court in this Larson versus Cactus Utility Company case basically has now held that the trial court is bound by the same rules the Courts of Appeals are and that nobody has an abuse of discretion standard. So they made Flanigan equal by abolishing it. So, the inclusion of the abuse of discretion review standard has essentially been repudiated by the jurisprudence.

I think by making the change here -- which now will read as reflected on 405. It says, "If such court is of the opinion that the trial court erred in refusing to suggest a remittitur and that

said cause should be reversed for that reason only." At least that fixes the problem of the abuse of discretion being in the rule.

If the Court ever decides to resurrect abuse of discretion, they could do it and we could import it by that's what the basis for the error is. But at least we don't have a rule that conflicts with what the Supreme Court says the standard is for reviewing that issue. Now, the other question, however, is -- it just occurred to me.

CHAIRMAN SOULES: That's the only change that appears in the rules.

MR. McMAINS: Yes.

CHAIRMAN SOULES: What's your recommendation on that?

MR. McMAINS: What I was getting ready to say is that the problem that we have is the reason that it was done this way was to make it appear -- obviously there is provision in the rule which I think we just imported in the -- who did that report? Broadus? Where we just imported the section of rule -- in the 320s.

PROFESSOR DORSANEO: That was Harry Tindall's report.

MR. McMAINS: Okay. That's what deals with the right to complain of a remittitur. And the problem at the present time is that Rule 85(b) deals only with the suggestion of remittitur by the Court of Appeals and deals with one half of it. It doesn't deal with the other question. I'm not sure that -- I just wanted to check that. It's on -- page 377 is what we, I think, already voted on and adopted, and it is 85a.

PROFESSOR EDGAR: Well, (a) doesn't have anything to do with the standard, though. So, I don't think that that change we adopted is any way -- any way impacts on --

MR. McMAINS: Yes. We didn't ever put the standard in here because it was already -- been read in by the Supreme Court.

PROFESSOR EDGAR: That's right. So that doesn't create a problem for us.

MR. McMAINS: Except that it's -- it is renumbering it. It at least deals with both halves of the problem, is all I'm saying.

PROFESSOR CARLSON: This is now 85(c).

CHAIRMAN SOULES: Yes, this will be 85(c), won't it, Elaine?

MR. McMAINS: Right. The one that we're talking about will now be (c). I'm trying to see here -- I'm not sure that this one should -- the cross point of remittitur should be (b) rather than (a). What do you think?

PROFESSOR EDGAR: Yes, I think 85(a) should remain (a).

MR. MCMAINS: I think (a) needs to be where (a) is. We did this yesterday.

CHAIRMAN SOULES: Yes, okay.

MR. McMAINS: The proposal on 377 that we already voted on should be (b) rather than (a).

CHAIRMAN SOULES: Okay.

MR. McMAINS: And the proposal that I'm just now moving should be relettered (c).

PROFESSOR CARLSON: And (a) stays (a).

MR. McMAINS: Right.

CHAIRMAN SOULES: Then we're going to reletter (c) to (d), (d) to (e). And we're going to have the current (a).

MR. McMAINS: Correct.

CHAIRMAN SOULES: We're going to insert from page 377 a new (b). And then we're

going to use 405 as (c). And we're going to reletter the old (c) to (d) and the old (d) to (e).

MR. McMAINS: Right.

CHAIRMAN SOULES: And that's the way we'll organize the new Rule 85.

MR. McMAINS: Yes, Luke.

CHAIRMAN SOULES: Then with that, you recommend these changes?

MR. McMAINS: Yes.

CHAIRMAN SOULES: Second?

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: All in favor say "I." Opposed? That's unanimously recommended.

MR. McMAINS: Okay. The next problem that was generated by my colleague to my right --

PROFESSOR DORSANEO: It was not.

MR. McMAINS: When we re-did the -- rewrote the damages for delay rule, we put it in the Court of Appeals rules and didn't put it in the Supreme Court rules.

CHAIRMAN SOULES: What page are we on?

PROFESSOR DORSANEO: This is 408.

CHAIRMAN SOULES: 408, thank you.

MR. McMAINS: 408 is where we start.

CHAIRMAN SOULES: Okay.

MR. McMAINS: Bill has, I think, done some drafting essentially between 408 through 13. These are alternatives -- I'm sorry, 408 through 410. These are really -- the alternative -- no, this -- I mean -- the current rule -- we have two options endemic to it. One is we can put a damages for delay provision in the general rules much like it is currently labeled, because our current rule was really designed to deal with both the Supreme Court and the Court of Appeals. It just happens to be stuck in the Court of Appeals rule.

We can either put that in the general rules or we can modify Rule 84 and put an identical rule in 182(b), which is what is on page 409, and that just gives both courts the same place. I think that's probably the easiest way to do it.

CHAIRMAN SOULES: Isn't that the easiest way to do it, the most direct way to do it?

MR. McMAINS: Yes. I think that's what we should do, partly because our general

rules apply to civil and criminal unless we designate it otherwise.

CHAIRMAN SOULES: Okay. You recommend that we make the changes in Rule 84 and in Rule 182(a) that appear on page 408, 409 and 410 of the materials?

MR. McMAINS: There was no substantive change in any of the rule itself.

CHAIRMAN SOULES: Second?

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: Those in favor say "I." Opposed? That's a unanimous approval for those changes to those two rules.

MR. McMAINS: Now, the next subject is a housekeeping measure on -- in part, on the direct appeal rule, which is Rule 140. It's on page 411, which involves the deletion of the current (b), the substitution of the new (b) and the changes that are reflected by the strike-throughs and additions in (c) and the new (d) in lieu of the other (d). That is all to reflect the changes in the Government Code that we missed the last time.

PROFESSOR EDGAR: Are you moving their adoption?

MR. McMAINS: Yes.

PROFESSOR EDGAR: I second it.

CHAIRMAN SOULES: Okay. The motion has been made and seconded that we adopt the changes on pages 411, 412 and 413, the changes being to T.R.A.P. Rule 140. Any further discussion? Those in favor say "I." Opposed? Those are unanimously adopted.

MR. McMAINS: Luke, I may make one observation that is distressing to me, but I think it's also endemic to the Government Code and to these changes. That is, it would appear that if you take the option of a direct appeal, that you have thereby lost your option of going to the Court of Appeals -- I mean, this is not a situation where you have a right to go back to the Court of Appeals or where the Court merely dismisses and sends it back to the Court of Appeals.

If you elect to go to the Supreme Court and you've got a factual matter that you don't belong in the Supreme Court, basically you've already blown your times to get to the Court of Appeals. But that's unfortunately the way the Government Code is written. I mean, there isn't anything we

can do about the statute. But I think we probably do need to -- and perhaps I should take a look at that and see if there is some way we can make a recommendation to the legislature. I personally find that somewhat offensive.

If the Supreme Court determines that there is a factual matter, it seems to me what should happen is the Court should remand it to the Court of Appeals. You should treat everything they did to perfect it as being perfected and then send it to the Court of Appeals. And if there's more records or whatever that need to be supplied, they should be able to do it there. I don't know whether -- how many of these the Court has.

JUSTICE WALLACE: I don't recall having one in the last seven years.

MR. McMAINS: Did they go straight to you, Judge? Did the Attorney General go straight to you in the pass or play?

JUSTICE WALLACE: Yes.

MR. McMAINS: They did go to you then?

JUSTICE WALLACE: Yes.

MR. McMAINS: So that's -- it's the only one -- that's the only line of cases I'm

familiar with. It's not that many of them. But at any rate, it is an inequity that --

CHAIRMAN SOULES: That we have noted. What about Frank Baker's suggestion now?

MR. McMAINS: I have the last suggestion on the agenda, and it is a problem -- there are two more, one of which is uncontroversial. Let me deal with the uncontroversial one first. That's on page 423. This is a unanimous recommendation of the COAJ, which is to merely take the time to file the record rule in the Court of Appeals and change it from 100 days to 120. And the basic reason for that is to give 30 days after perfection of the appeal so that it's the same amount of time for perfecting the record you're given if you don't file a motion for new trial.

Right now the effect is that you have to file your appeal bond or notice of appeal 90 days after the judgment if you file a motion for new trial. But you only have 10 days left to get the record filed. At least this gives you 30 days, whereas -- now, also it creates another -- I mean, it solves one other little problem in that under the current plenary jurisdiction rules, the Court

actually has jurisdiction five more days -- can have five more days -- the district courts can have five more days of jurisdiction after the record is already due or filed in the Court of Appeals, because it has a max 105 days. So, that's not a big problem.

But the real problem is that the rules on requesting the record and everything else are all geared to perfecting the appeal, meaning the filing of the appeal bond, so you're asking the clerk -- basically our rules say that if you ask the clerk before the expiration of the 90 days, then that triggers everybody's obligation and your own time. And there isn't anybody that can get a record filed in 10 days, at least not a statement of facts. So, I recommend that we extend the time to file the record to 120 days.

CHAIRMAN SOULES: Second?

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: Hadley Edgar seconded. Discussion? Those in favor say "I." Opposed? That's unanimously recommended.

MR. McMAINS: Okay. Now, Baker's suggestion which appears on -- discussed on page 414 -- and these are merely the federal rules that

where attached with regards to the record on 416 and 417 -- is frankly something that I have not had time to work on, and I think it is something that the committee -- we have discussed it before, frankly, and rejected the approach. And that is the general question of whether or not the party litigants should, in fact, be the ones responsible for getting the record filed or whether it should be the responsibility directly of the court reporter and the clerk of the district court.

Now, we actually have amended our rules to reflect that the district clerks actually are the ones who transmit the records now. So, even though the party has the burden of making a request for an extension of time if a record isn't transmitted by the clerk, the burden of actually filing it is on the clerk. That is not true, of course, with the court reporter. And I've just been into a situation -- I'm into a situation now where I'm on my second mandamus trying to get a record filed. And it is a constant battle of mandamusing and moving to extend and worrying about blowing my 15 days for one or the other and --

MR. BEARD: The fifth circuit, they've

got a schedule that reduces the pay of the reporter. If so many days late you're paying so much and it goes down. And they tell you you are not to pay that reporter any more than you're ordering.

MR. McMAINS: I have not had that problem -- you know, had the problem of any lack of cooperation with the Courts of Appeals trying to help me get records. The question is simply that -- as a broad philosophical question, is whether or not it is -- if the litigants had made the request and are doing everything in their power, they're the ones who are going to suffer by nonfiling of the record, and they constantly are having to go to the Court and incur expense and do things.

The suggestion, as I say, has merit from the standpoint of perhaps it should not be a burden on the litigant, but historically that's the way our practice has always operated.

MR. BRANSON: Well, and if you take it off the litigant and put it on the court reporter and the clerk and they don't fulfill their function, what occurs?

MR. McMAINS: Well, see, what happens

in the fifth circuit is it is doesn't affect your appeal. They do various and sundry nasty things to the court reporters or clerks up to and including holding them in contempt directly and so on.

MR. BEARD: Penalizing the court reporter in the fifth circuit, how does that work? I've only had one case where the reporter had to cut his pay. He didn't like it.

MR. McMAINS: No.

MR. BEARD: He said he wished he never left the state court.

MR. McMAINS: Well, I've had -- I know that there are a number of courts, again, in Houston -- the Houston courts are having great difficulties with the reporters getting their records in anywhere close to on time. And it's not unusual for six, seven, eight extensions.

And the problem that I think that Baker is really addressing and is directed to is the holding, which I think the Court is correct on. If you move for an extension of time to "X" period and the Court grants it and your record isn't ready, you've really got to file your motion for extension again. And you've got to do that --

you've only got a 15-day leeway in there.

And if for some reason you blow that 15-day period, then all of a sudden you've lost your right to a record. And the burden is not shifted. Even though it's the reporter who filed the affidavit and did all the other things, you've got to keep on track, moving for extensions and keeping tabs on which ones have been granted. And so it's a little bit nerve racking, I guess is what it amounts to in that type of situation.

MR. BRANSON: My concern, though, is you take the impetus off of the litigant and put it on the party to whom it rightfully belongs, and it gets lost. And what you've done is the litigant is sitting there two years later, and the Court of Appeals hadn't noticed they don't have their records yet, and you're still sitting without your record and you still can't get to it. I mean, how do you build in some mechanism to do what the litigants do now?

MR. McMAINS: Well, that's, as I say -- you know, we can short change this. My basic recommendation is that we not try and do this now because it requires an amendment to a lot of our rules. This is an overlap. It's not just to

appeal --

MR. BRANSON: Justice Wallace, do you have any thoughts on that?

JUSTICE WALLACE: If you take the burden off the person who's got a financial interest there, you're not going to get anything done.

MR. BRANSON: That's what I was concerned about. Well, not only the burden, but the right to do it.

JUSTICE WALLACE: Right.

PROFESSOR EDGAR: Well, I move we reject the proposal.

MR. McMAINS: Second.

CHAIRMAN SOULES: Moved and seconded that we reject this. Those voting to reject say "I." Otherwise say "I." It's unanimously rejected. Frank has had a lot of concern about this for a long time. He discussed it with me, and I wish there was a way to respond, I really do.

PROFESSOR EDGAR: Well, I wish there was a satisfactory solution to it, but it's a no win situation.

MR. McMAINS: You know, the Courts of

Appeals are working with everybody. And I've just been through the process, as I say, on several occasions, but --

CHAIRMAN SOULES: Can we keep thinking about this in your general committee, Rusty, and see if there is some way to come up with this?

MR. McMAINS: Yes.

CHAIRMAN SOULES: We've carried this and discussed Frank's suggestion several times. And this is April 1985, and he, of course, sent us this Sanchez case, and Sanchez got to do one in the jail over in Corpus Christi. He got to complete his record -- he was complaining because the sheriff would only let him work from 7:00 to 3:00 and he had to go to roll calls and he had to go to meals. So, he wasn't getting much done over there in the jail and he was getting tired of being there, but Judge Kilgarlen left him there.

MR. McMAINS: The Corpus court doesn't mandamus; they just throw them in jail.

JUSTICE WALLACE: And then they moved to revoke his certification, come to find out he had never been licensed to start with.

PROFESSOR EDGAR: Well, I really don't guess that he was really in contempt then if he

wasn't certified.

CHAIRMAN SOULES: He didn't have the authority to make a record.

JUSTICE WALLACE: Because he was last seen crossing the Rio Grande going south.

CHAIRMAN SOULES: All right. Let's see, do you have one other item, Rusty, or does that complete your -- oh, I know what -- I wanted to get -- I want to go ahead and give you the opportunity if you can get it done here to go back to the not discoverable vice protected from privilege. Have you had a chance to do a markup on that?

MR. McMAINS: No, not yet. But I'm not leaving right now.

CHAIRMAN SOULES: You're not leaving?

MR. McMAINS: No.

CHAIRMAN SOULES: Could you do a markup on that while we hear the next two reports?

MR. McMAINS: Yes.

CHAIRMAN SOULES: And do you need a clean copy of that to work from? If so, I've got one here. Is that in the big book?

MR. McMAINS: It is in the big book.

Okay. Steve and Elaine, are either one of you under any time constraints for the next hour or so? You, Steve?

MR. McCONNICO: No, I'm not.

CHAIRMAN SOULES: Elaine? That's the obvious choice, isn't it? Please proceed first, thank you.

PROFESSOR CARLSON: We looked a little bit earlier when we were considering Tony Sadberry's report and the letter from Judge Murphree wherein she indicated that the will of the JP -- or at least expressed through her JP legislative committee -- that the civil rules be amended to provide the ability to demand a jury trial -- the requirement that a party demand a jury trial in JP courts and civil cases before the day the case is set to go on a nonjury docket. And, in fact, we voted earlier to amend -- I think it was Rule 544 -- to require in the general civil case that a litigant now in the JP court give at least one day notice on this demand for jury trial and pay the fee. And we did that to be consistent with the Government Code provision when the JP is sitting at the small claims court.

My committee was requested to look at Rules

739 and 744 which deal in particular with the citation and the demand for a jury in forcible entry and detainer cases in the JP courts. Set forth in your book on page 455 is the proposal of the COAJ of which my subcommittee, for reasons that I'll discuss in a moment, has a variant suggestion.

You'll see the opening paragraph to Rule 739 is really the key to why we have a variance. As the rule now stands, when a party aggrieved or his agent files a written complaint with the justice, the justice is to immediately issue citation directed to the defendant or defendants, in either forcible entry or detainer cases, demanding him to appear before a justice at a time and place named in the citation, such time being not more than 10 days nor less than six days from the date of service of citation.

It's a lot of verbage, but I'm told by the JP's that I discussed this with that they indeed send out in their citations this language. And many JPs interpret this to require that. FE&D cases that they actually proceed to trial within that six to 10 day limit. There is a disagreement among the JPs as to whether or not that's what the

rule requires. My opinion is it does not, for what it's worth. Nonetheless, that is the current practice. And with that caveat I'll go to the next paragraph.

We now wish to include a notation on the citation that the defendant can request trial by jury and to give the requisite time period. The recommendation of the COAJ was that that period be three days in advance to the date set for trial of the FE&D case.

The problem with postulating the rule in that format is the reality I just discussed, that many JPs don't really have the trial docket set up in this manner. The day that the defendant comes in is the day that they go to trial. And so they're saying a litigant will not be able to tell from the citation, necessarily, when the case is going to be tried in those justice courts where they're trying them simultaneous with the appearance, if you will.

So, what I could gather from the justices who have the practice, what would be most helpful to them in the forcible entry and detainer cases is that the jury demand date be triggered from the date the citation is served. And so if you'll

turn the page to 456, you'll see in our proposal, the subcommittee proposal, second paragraph, "The citation shall inform the parties" -- and, again, this is forcible entry and detainer -- "that upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case may be heard by a jury."

It's very long-winded to tell you that from what I could tell talking to the JPs who proceed to trial within the six to 10 day window and feel that they're required to do so in these cases, and also in talking to lawyers who practice in that area, they're able to deal with that expeditious disposition of an FE&D case as required, and it's desirable. Having this second paragraph on page 739 would not disrupt the current practice other than require that the demand for a jury come earlier. It wouldn't disrupt the current docket practices, I guess, of JPs in the FE&D cases.

Similarly then, Rule 744, we would propose on page 458 to be consistent with the second paragraph which is located in Rule 739, provide now that either party -- any party will have the right to demand a jury trial in FE&D cases if their demand is made within five days from the

date the defendant is served with citation, and they pay what is now the five-dollar jury fee. So, the subcommittee moves the adoption of those two rules as set forth on page 456 and 458.

CHAIRMAN SOULES: Second?

MR. SADBERRY: Second.

PROFESSOR EDGAR: Question.

CHAIRMAN SOULES: Discussion?

PROFESSOR EDGAR: On page 456 Elaine, the case "may" be heard by a jury or "shall" be heard upon the payment of a jury fee?

PROFESSOR CARLSON: It really should be a "shall."

PROFESSOR EDGAR: I would think so, yes.

CHAIRMAN SOULES: Thank you.

PROFESSOR CARLSON: We would accept that.

PROFESSOR EDGAR: One other question, we were talking a few minutes ago about three days versus one day to have something consistent. Now, that doesn't in any way interfere with this, does it?

PROFESSOR CARLSON: And we could have stuck with that one day rule and our committee

considered that, except for the reality that we're told by JPs is that they're trying these FE&D cases so expeditiously.

PROFESSOR EDGAR: Okay.

CHAIRMAN SOULES: And if it's filed on the sixth day it amounts to a one day rule because you've got up to five and they can start on the sixth. So, it sort of closes anyway, doesn't it? Rusty.

MR. McMAINS: I have a question in terms of, is there some way that we should fix this rule where the justices don't believe they have to try them within 10 days?

PROFESSOR CARLSON: I suppose we could. I could not garnish -- first of all, let me tell you that I've never tried a forcible entry and detainer case in my life. So, with that wealth of ignorance behind me and the subcommittee didn't seem to be able to shed much light on this, in talking to the judges, we really could not garner a consensus among us.

MR. McMAINS: Well, the reason that I am concerned, there is a case pending in Corpus, one of which I'm aware, though not associated directly as counsel, and one of the problems that

they have, as I understand, which is a fairly recent development, is that there is no right to appeal the issue of possession. You've got one shot at it and it's right there at the JP court.

Now, for you to get 10 days and the right of possession -- and what happened in this case was -- that's the issue that's up, I think, before the Court -- is they go in and let it all hang out in the trial. The Court's not a court of record. There's no appeal and there's no nothing. The possession is determined. It's absolute -- it's final. And then they sue them for tortuous interference with their possession in the district court, and the right of possession is held by the Court to be res judicata having been determined.

PROFESSOR DORSANEO: That's wrong.

PROFESSOR EDGAR: That's wrong, Rusty.

MR. McMAINS: I'm not disagreeing.

MR. EDGAR: Well, but it's wrong.

CHAIRMAN SOULES: One at a time.

MR. McMAINS: What I'm telling you is that the interference with possession has then been pyramided into a five-million-dollar punitive damages claim. And all I'm saying is that since

you don't have a right to appeal --

PROFESSOR EDGAR: Yes, you do.

PROFESSOR DORSANEO: You do have a right.

PROFESSOR EDGAR: The right to possession is not final in the JP court. You do have a right to appeal.

PROFESSOR DORSANEO: It's final in the county court.

PROFESSOR EDGAR: That's the point I'm trying to get at; it's not final in the JP court.

MR. McMAINS: Oh, in the county court it's final?

PROFESSOR EDGAR: Yes.

PROFESSOR DORSANEO: And it's not res judicata.

MR. McMAINS: It shouldn't be.

PROFESSOR DORSANEO: It's not.

MR. McMAINS: But if you don't appeal it to the county court, then you're stuck, right?

PROFESSOR EDGAR: Well, if you don't appeal it to the county court, then it's res judicata.

PROFESSOR DORSANEO: The possession issue is not res judicata in a separate lawsuit

involving this kind of a matter.

MR. McMAINS: Well, anyway, all I'm saying is it just seems to me just because of the various things quickly that can happen to you, that at least the justices ought to not have to try what may be a very substantial issue in 10 days. This particular one, I think, deals with something involving the leasing of some dock facilities and stuff on an oral lease and all kinds of nonsense.

CHAIRMAN SOULES: Elaine, will you continue to work on that aspect of it then in the interim?

PROFESSOR CARLSON: We certainly can. I just really don't feel I'm positioned to make an intelligent recommendation on the desirability or not, but my subcommittee can look at that further.

CHAIRMAN SOULES: You'll continue to serve as our chair of this standing subcommittee and address that problem. See if there is a way it can be fixed. I think Rusty sure raised a good point.

PROFESSOR CARLSON: Well, I guess we need to vote on that.

CHAIRMAN SOULES: Okay. Those in favor of the changes proposed on pages 456 and 458 to Rule 739 and 744 respectively, say "I." Opposed? Those are unanimously approved.

PROFESSOR CARLSON: Okay. In that case, we might want to consider modifying the entering sentence or the introductory sentence to Rule 544 that we passed earlier.

CHAIRMAN SOULES: Can you give me a page number?

PROFESSOR CARLSON: Yes, just a second. Page 429.

CHAIRMAN SOULES: Okay.

PROFESSOR CARLSON: We may wish to modify that to say -- in the second sentence, to begin that by saying, "Except in forcible entry and detainer cases," and that might give the JPs a shot at realizing they have a very limited time frame here.

CHAIRMAN SOULES: And that would come after the word "jury."

PROFESSOR CARLSON: Yes. Begin the second sentence of that paragraph, "Except in forcible entry and detainer cases," comma.

PROFESSOR EDGAR: "The party desiring

a jury"?

PROFESSOR CARLSON: (Nod affirmative.) Would that be acceptable?

CHAIRMAN SOULES: All in favor of that change to 544 say "I." Opposed? That's unanimously adopted too. That's a good suggestion. Elaine, I think you've got something on -- does that wrap up those rules and get us to 461?

MR. RAGLAND: I've got a question, Luke.

CHAIRMAN SOULES: Oh, I'm sorry, Tom. I didn't hear you.

MR. RAGLAND: There may be a good answer. And I'm on the subcommittee and I don't know the answer to it. On this Rule 544 that we, I think, adopted earlier on page 429, it talks about a demand for jury which is good, but it appears to be an oral demand to be sufficient. Yet Rule 744 on page 458 requires a written demand for a jury.

CHAIRMAN SOULES: I think that should be deleted. There's a lot of practice in justice courts oral, and I think it should not be required written request, Elaine. Frankly, we've dealt

with whether or not oral and writing in justice courts, and we basically have just left it open. Oral is good enough because of the nature of the practice. Do you have any problem with that?

PROFESSOR CARLSON: I have no problem with that.

CHAIRMAN SOULES: Okay. That means we will delete "written" in the second sentence of what we previously approved.

PROFESSOR EDGAR: On what page?

CHAIRMAN SOULES: This is page 458. "Written" in the second line would be deleted, otherwise our vote stands. Any correction to that? Okay. That's the way it is.

Bill, do you mind if we refer to the interim study committee this question about whether we should repeal trespass to try title? That's a fairly -- that can be complicated.

PROFESSOR DORSANEO: No, I don't mind.

CHAIRMAN SOULES: I'm not doing that in the interest of time. I'm just -- I don't know whether we're really ready to take that on.

PROFESSOR DORSANEO: I think that's the appropriate thing to do, actually. I

personally do not think that those rules are needed in light of modern discovery practice, but I'm not sufficiently familiar with the practice to be ready to vote myself.

CHAIRMAN SOULES: Would you take that job on then, Elaine, as well to study whether or not we should just repeal the trespass to try title?

PROFESSOR CARLSON: I'm sorry I didn't report on that. Our committee has been in the process of educating ourselves in this area of practice as well. And we are getting a real diversion of opinions from property professors and practitioners, but we are studying the proposal, and in particular trying to determine if we were to recommend a repeal, what other rules or areas might be affected. We really feel that would be not responsible to make a recommendation without that complete of a study.

Finally, Luke, Rule 752 on page 459 you've included as a COAJ proposal that really was not forwarded on to my subcommittee and we have not considered it as yet. Apparently, it's just simply -- assuming dovetails the provision of property code for attorneys' fees?

CHAIRMAN SOULES: Yes. That is something Jeremy Wicker sent, I imagine. Let's look at 452 in the book.

PROFESSOR EDGAR: 452?

CHAIRMAN SOULES: 752, I'm sorry.

PROFESSOR CARLSON: Page 459, Rule 752.

CHAIRMAN SOULES: There is a limitation in the Government Code. I was at the COAJ and they indicated that this needed to be put in there to give notice of that provision of the property code, I mean, because without compliance you weren't entitled to attorneys' fees. And this just fixes that omission. Any opposition to that change in 752? That will stand unanimously approved. Does that complete all of your rules?

PROFESSOR CARLSON: That completes my report.

CHAIRMAN SOULES: Okay. Thank you very much, Elaine, for that good report. And that gets us to Steve.

MR. McCONNICO: Luke, I'm reporting on the application for writ of attachments and orders. My report starts on page 439, the big supplement. Like Elaine, I came to this area with

absolutely no knowledge, tried to educate myself with the help of some of the members of the committee, a bit. And the first rule that we took up was Rule 592.

And the first proposal was by Judge David Cave who is a district court judge of Spur, Texas. And he stated that he wanted the Rule 592 to provide for a deposit for all costs incurred in connection with carrying out writs of attachment. The reason he wanted this is, he said, because of the poor state of the West Texas farming and oil and gas economy, that sometimes they'd have to go out and attach a very large piece of oil and gas machinery or drilling rig or whatever, and then the storage of that drilling rig could be very expensive. They could go out and attach a herd of cows and the storage of that herd could be very expensive.

After discussing this, I believe that we are -- I know I'm ready to report that this proposal should be rejected. And we have lined out the proposal on page 441. And in this we state, "The order may expressly find the estimated cost of court" in 592. And then in 592a we stated "No writ of attachment shall issue until the party

applying therefcre has deposited the estimated costs as found by the Court or as certified by an officer authorized to execute the writ in the absence of an express court finding with the clerk."

The reason I don't support these additions is that, first of all, Rule 592 already provides that the Court in its order should provide for the estimated costs of court. And the estimated costs of court should include the attachment.

Second, we think that there will be a problem with the sheriffs who will be the people who will end up making this estimate on how much these attachments are going to cost. They're going to want to be bonded prior to certifying the estimated attachment cost. And they're going to ask for a very large bond, and they're probably also going to make a very large estimate for the attachment cost. And until they have that bond, they're probably not going to go out and serve the attachment. So, I move that this proposal and that the rule change on page 441 be rejected.

CHAIRMAN SOULES: Second?

MR. BEARD: Second.

PROFESSOR EDGAR: Steve, to carry the

scenario, though, on just a moment, if the Court, as it now has the power to do, sets an estimated cost of a substantial sum of money, the sheriff is nevertheless going to require a bond which reflects that substantial sum of money before issuing a writ of attachment.

MR. McCONNICO: That's correct.

CHAIRMAN SOULES: Before executing.

MR. McCONNICO: Before executing.

PROFESSOR EDGAR: Before execution. So, there really isn't any satisfactory solution to this problem then, is there?

MR. BEARD: Let me tell you one of the problems. See, all of these things are subject to generating civil rights cases. And I had a client file a bond -- gave a bond to the sheriff who demanded on final judgment to foreclose on a mobile home. It ended up a civil rights suit, and we ended up paying the sheriff's attorneys' fees for defending the case that the plaintiff won nothing in. And the higher you get that bond, the more damages are going to come out of it or can come out of it.

PROFESSOR EDGAR: Well, then that refortifies my statement a moment ago that there

really isn't any solution to this problem.

MR. McCONNICO: There isn't. That's the conclusion I got.

PROFESSOR EDGAR: Okay.

MR. McCONNICO: We don't have a solution to that problem.

CHAIRMAN SOULES: Next item.

MR. McCONNICO: Okay. This is rule --

CHAIRMAN SOULES: Oh, I'm sorry. Maybe we didn't vote. I guess I lost track there. Those voting to reject these changes to 592 and 592a say "I." Otherwise? They're rejected.

MR. McCONNICO: The next proposed change is in Rule 667a. This proposal came out of a bill that was introduced in the last legislature. And it was introduced because the Texas Bankers Association asked that it be introduced. And basically what the bill provided was that where there was a judgment of default against the garnishee and the garnishee does not file an answer through a writ of garnishment at or before the time directed in the writ, the Court at any time after the judgment is rendered against the defendant can render judgment by default

against the garnichee for the lesser of the full amount of the judgment against the defendant with all interest and costs that have accrued in the main case or the amount of any indebtedness owed by the garnishee to the defendant with all interest and cost that have accrued. That's saying a lot. That's the bill. I just read it.

The bottom line is the bank wanted to say, look, the only thing we owe is what we have; we don't owe the full judgment. There was some discussion between members of the Court and Luke, as the representative. And they said we'll take this up in our June meeting, and that's why we're taking it up.

Prior to our conference today and yesterday, the Committee on the Administration of Justice drafted a proposed Rule 667a that they state takes care of this problem, or they think takes care of this problem, and it appears on page 442 of the big supplement or the big book. This proposal also allows the Court to only hold the garnishee responsible-for whichever is the less, the amount they have that the debtor owes or the judgment. But the difference in this, what the COAJ has done and what the bill did, is the COAJ's proposal

states during the period of the trial court's plenary power on motion of the garnishee and hearing thereon, then the judgment of default can be modified to provide for whichever these sums is the less --

CHAIRMAN SOULES: Must be modified.

MR. McCONNICO: Must be -- shall be, and that's important. It has to be modified for whichever of the two sums is the less. There are some problems with this. I think this is superior to the bill. But, at the same time, you've got the question of when the bank holds hard property and not cash. For example, if they have jewelry, then how much is that worth? What's the value of that? That's one problem. Pat sees other problems with it and I'll let him explain that.

CHAIRMAN SOULES: Pat Beard.

MR. BEARD: Well, I think what -- this is just setting aside a default judgment. I think we have a lot of ways to do that. I think what the bankers want is the ability to send the money to the clerk and say this is all we've got and walk away and not go hire lawyers, and go through all that. And I don't see anything all that wrong with it. But they get very careless with these

things and end up with a default judgment. But they simply can go down to move to set aside the default judgment, and that's not much of a problem getting it set aside.

CHAIRMAN SOULES: Well, you're saying do nothing?

MR. BEARD: I don't see how this -- this doesn't really -- this is just another method of handling default judgments and I don't see any reason why the bank should be any different than anybody else.

CHAIRMAN SOULES: It's not just that. I was through the discussions with the COAJ and read that bill. The impossible thing about the bill is that when the garnishor goes in for a default judgment, he hasn't a notion what the bank is holding and he doesn't have any way to prove it. He's taken a default judgment against the bank. The only figure that he can put in his judgment is what the debtor owes the garnishor -- owes him. That's the only number he can come up with.

Now, the bankers want, I guess, us to reach into thin air and learn something else that we can't know. What this rule does -- and, to me,

the fairness of it is if the bank gets in while the plenary power is still available, the trial court must reduce that judgment to the amount the bank owes. And if it has to do with value, if it's jewelry, they'll have to prove that. But it's the -- the burden is on the garnishee at that point to say this is all I owe. And when that's done, the Court makes a finding of what it is. It may be contested, but the Court would make a finding of how much that is. The Court cannot hold the garnishee liable beyond that amount if they get in there in time for the Court to change the judgment. Of course, if you can't change the judgment; it's final and it's over. That's the end of it.

So, this spells out about the maximum relief that a garnishee can get, if the garnishee ever gets there in time, and it makes it mandatory. But it is responsive but not as responsive as they would want it to be. That's the reason for this, Pat, doing it. Whether we want to do it or not is a different-deal, but that's why.

MR. BEARD: Well, I just -- you know, if they get a default judgment taken against them, they have their methods to set it aside and they

ought to look to that. They really want to simplify the way to turn it in and forget about it.

CHAIRMAN SOULES: Well, this gets them there. If they get there within the plenary power, they come in and say, here it is, and I want out of the trap and the judge must --

MR. BEARD: They've got to hire a lawyer and have a hearing and they don't want to --

CHAIRMAN SOULES: They can come pro se.

PROFESSOR EDGAR: Well, can't they interplead?

PROFESSOR CARLSON: That's what I was going to say.

MR. BEARD: That's another question where the corporation can come pro se.

CHAIRMAN SOULES: That doesn't reduce it to the value of the property that they hold is to interplead.

PROFESSOR EDGAR: Well, I know. But if they interplead, the owners say --

MR. McCONNICO: This is it.

PROFESSOR EDGAR: -- this is it.

CHAIRMAN SOULES: If they do that, within the 30 days, the trial court has to reduce the judgment against them to that --

PROFESSOR EDGAR: Well, then they avoid the problem, it seems to me, if they interplead.

MR. McCONNICO: But, Hadley, they say now from the correspondence that it's cheaper for them to take a default judgment and then come in and get it set aside rather than to hire a lawyer to answer and file an interpleader or whatever they're doing at the first.

JUSTICE WALLACE: Well, how can they get into court without a lawyer at any time?

PROFESSOR EDGAR: They get attorneys' fees on interpleader. I don't understand why.

MR. BEARD: They really want an easy way to turn over the money without hiring a lawyer and going through that. That's what they want.

PROFESSOR CARLSON: But, Pat, if they interplead and they don't claim an interest in the funds, they can get their attorneys' fees. So, in essence, you can't get much cheaper.

MR. BEARD: Well, they don't want -- in a lot of these cases the attorney gets all of

it or maybe more. It maybe costs them more than that. They want an easy way -- I had a default case in which the bank got served and sent the money to the clerk. The clerk sent it back and the lawyer took a default judgment for three times the amount of money they had. And they say they didn't get the notice of the default. So, we had to have -- finally got the matter resolved.

PROFESSOR CARLSON: I have a couple of questions.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: Why is there a problem with the default? Is it an intentional decision on the part of the the garnishee not to come in? Or is it really lack of notice or some other problem?

MR. BEARD: Carelessness are the ones that I have or ignorance.

PROFESSOR CARLSON: And was there an intent to encourage the garnishee to come in by this provision for attorneys' fees for the garnishor modification of default?

CHAIRMAN SOULES: That's just motion for new trial practice. If you want a new trial, you've got to pay the other side's attorneys'

fees.

JUSTICE WALLACE: Well, I went over and talked to Ray Valigura and he didn't know what was behind it. And he referred me to the guy representing -- I think he's a lawyer for the Bankers Association. And he called me and he didn't know what was in it, said some of the banks were unhappy. And that's all I could get out of anybody about the reason for it.

MR. BEARD: Well, I think all they want is an easy way to send the money to the clerk. Most the time it's money. Very seldom do they have any property. Just send the money and forget about it.

PROFESSOR BLAKELY: Is that an argument -- what you're saying, Pat, is that an argument for or against 667a?

MR. BEARD: Well, I don't think you should have this amendment. I don't know why bankers need a special law for letting default judgment taken against them.

MR. McCONNICO: I second.

PROFESSOR CARLSON: So, it's a recommendation to reject?

PROFESSOR EDGAR: Yes, reject.

MR. McCONNICO: Yes.

MR. RAGLAND: I second that.

CHAIRMAN SOULES: All right. Motion has been made and seconded that this be rejected. Those voting for a rejection say "I." Otherwise? That's unanimously rejected.

MR. BEARD: Now, let me point out to the committee once again, Matt Dawson and I pretty well drafted these rules. And garnishment, there is no preliminary hearing on final judgment. Not long after we adopted it, Pennsylvania held that to be unconstitutional because there are -- without notice and finding there are so many proceeds that are exempt, workmen's comp proceeds, homestead, you've got a list of them. And then we really should modify the rule and require the parties to get another -- make his affidavit stating he acknowledges the proceeds ordering exempt. Because we really had the question whether the --

CHAIRMAN SOULES: The best I could tell except for the work we need to do to rewrite 166b to take care of the loose end that we left -- when we left it earlier, and I agreed to put that at the end of the agenda. As best I can tell, our

agenda is complete. Is there anyone who feels that we have not covered something that's on this agenda so that we can get there?

One thing that the chair would like to have the Dorsaneo committee study in the interim is this squib on page 128 out of the federal courts that show how cases get disposed of by final judgment and motion for summary judgment practice. If the parties -- for example, if a party moving for summary judgment comes in and starts putting on evidence and the other side doesn't agree, the federal courts have held that that is a trial by the bench and waiver of the jury trial and the Court can enter judgment.

I don't know why that may not be a good -- I mean, I can understand the feelings about jury trials, but that may be something we should consider, also something that considers putting the summary judgment practice right with the trial so that somehow or other maybe we can encourage a broader use of summary judgment practice in Texas that has been so frustrated since the early calvert (phonetic) decisions. And anyway, just try to see if there's some way to open that up a little bit, and if there's not, there's not. And,

if you could, take a look at that, Bill. Rusty.

MR. McMAINS: Well, not in connection with that, but talking about assignments, I think I'd like to work on -- and I think Bill wants to work on it too -- the redrafting of the computation rules, both in four and five and then the -- putting computation rules changes and stuff into the rules of appellate procedure as well.

CHAIRMAN SOULES: Just a minute. Let me get that assignment.

JUSTICE WALLACE: Luke, you might want to have somebody look at that rule from the legislation -- the legislature passed saying that as of September the 1st the third degree felony for any appellate judge or employee of appellate judge could discuss with anyone, including themselves, any proposed opinions. That means we're going to be out of business on September the 1st because the Governor signed that bill. And so far he hasn't opened a special call to repeal it.

MR. BEARD: Any judge?

JUSTICE WALLACE: Any appellate judge or employee of appellate judge -- or employee of appellate court who discusses with anyone any opinion or proposed opinion is guilty of a third

degree felony.

PROFESSOR DORSANEO: Then you can't have a conference.

MR. McCONNICO: No conference.

MR. BRANSON: Including a judge -- a court's employees?

JUSTICE WALLACE: Right. The Judge --

CHAIRMAN SOULES: Rusty, that's in your bailiwick. That's something having to do with the T.R.A.P. rules. I don't know -- could you get a copy of that to Rusty and let him take a look at it, because that's in his standing subcommittee?

Diana Marshall is not here, sent no report and gave no letter of excuse. I think it's important that she be replaced as the standing subcommittee chairman of the Rules 1 through 14. Since you-all are going to be looking at the real essence of that, do you want to just take that on together? I don't think there's going to be much else to it.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: You've got other standing subcommittees. I don't want to impose on you, but I think what you want to look at is about

all that needs to be looked at.

PROFESSOR EDGAR: Have you made any effort to replace this before the Governor and put it on the agenda?

JUSTICE WALLACE: I understand the Chief Justice has written him a letter.

CHAIRMAN SOULES: Okay. Does anyone want to relieve from their responsibility as a standing rules committee -- subcommittee chairman. It's gone so well, I really hope you'll all stay on board because it's just been great. Okay. Everybody will continue.

MR. BRANSON: Let me ask you a question. I was looking at the minutes of the committee, and I had been appointed as chairman of a standing committee of Rules 1 through 14. And then when the agenda came out I wasn't. And I'm certainly not tempted to take on any more responsibilities, but the minutes showed one thing and the agenda showed another, and I'd be more than happy to --

CHAIRMAN SOULES: How about Rules 1 through 7 then, Frank?

MR. BRANSON: No. Luke, and I'll be glad to abrogate the position -- or give it up or

-- abrogate I guess is the word I'll I'm looking for.

CHAIRMAN SOULES: Well, they want to look at the only tough problem in there. Why don't we just leave it to you-all?

MR. BRANSON: That's fine.

CHAIRMAN SOULES: And then work with the --

MR. McMAINS: Well, we'll serve under him.

PROFESSOR DORSANEO: Yes, we'll serve under Frank.

MR. BRANSON: No, no, no.

PROFESSOR DORSANEO: I think that's a wonderful suggestion.

MR. BRANSON: I just saw that in the minutes and I remember --

CHAIRMAN SOULES: I had just switched it off, now I'm switching it back. Frank Branson will be 1 through 14.

MR. BRANSON: Well, I'd really rather be a water carrier than --

PROFESSOR DORSANEO: You get to be the boss.

MR. BRANSON: Particularly if you're

giving me the job of managing these two --

CHAIRMAN SOULES: It's going to be so much fun hearing Frank talk about the changes and computation of periods of time. That's the report that I want to hear. That's going to be number one next meeting.

MR. BRANSON: I can do that.

CHAIRMAN SOULES: I know you can and I appreciate it. All right. Rusty, have you done a rewrite on that?

MR. McMAINS: Well, this is an attempt at a quick fix to a problem that we have otherwise postponed. And I'm not going to guarantee it is overwhelmingly satisfactory, but it may solve our immediate problem.

CHAIRMAN SOULES: Okay.

MR. McMAINS: This is on 166b.

PROFESSOR EDGAR: What page?

MR. McMAINS: The problem is it's not in your big book because he hadn't been working on the earlier part of the -- well, it is in the book, yes.

CHAIRMAN SOULES: Yes, it's in the big book on page 213.

MR. McMAINS: Okay. The only part I

fixed, or attempted to, where it has exemptions in 166(b)3. I modified that to say that the following matters are exempted from this.

CHAIRMAN SOULES: I'm sorry, I was distracted.

MR. McMAINS: Okay. The following matters -- right now it reads, "The following matters are not discoverable," colon and then it lists all these things. Instead, I put, "The following matters are exempted from discovery by privilege," period. And then these are in essence then just discovery privileges.

Now, under the (a) part, the work product of an attorney, to try and deal with specifically at least what we can deal with, the Kelly problem, which I think everybody agrees Kelly -- Allstate versus Kelly, that kind of thing, you ought to be able to get the attorney work product when it's the thrust of it.

I looked at the rules of evidence and we actually have a fix available for at least that problem, in Rule 503(d) because (d) talks about exemptions from attorney-client -- exceptions to the attorney-client privilege, okay? And specifically under (5), which is joint clients, as

long as it's -- as long as we somehow get that exception into the work product of the attorney privilege under this discoverability rule, it seems to me that we have solved at least that problem. So that what I -- what I did was I put the work product of an attorney under (a) subject to the exceptions contained in Texas Rules of Civil Evidence 503(d).

So actually any of those exceptions, but (5) is the one that fixes a lot of it. Breach of duty by the lawyer is also fixed there. Furtherance of crime of fraud is fixed there. I mean, most of the places, it seems to me, that we wanted to fix probably dovetails. So what we have is an exception, attorney-client -- I mean, attorney work product but subject to the attorney-client privilege exceptions.

Now, the attorney-client -- attorney work product may well be broader than just the attorney-client privilege. We've left that open. But it's still going to be subject to the exceptions which are fraud and all that stuff. And that seems to be to be a fix that's not liable to hurt anything, because that should be where we are now.

The only other change was then to (e) where it says, "Any matter protected from disclosure by privilege," I just put, "Any matter protected from disclosure by any other privilege as provided by law," again basically importing -- an attempt to import generally the common law privilege into our exemption doctrine under discoverability.

Now, that -- I'll defer to Bill to see if he thinks I created more problems. But I know the real place we were concerned about on the work product of an attorney are basically the ones that are excepted from the attorney-client privilege situation, and by importing those exceptions into the (a) portion and converting it to a privilege rule without changing the exemption language.

PROFESSOR EDGAR: I think that will certainly afford the protection, at least temporarily, until Bill can sit down and kind of work through all these other things. But I think for the interim period for the year, well, certainly, I think that will --

MR. McMAINS: And that was my concern. We're talking about two years of living under these rules and we know we have these problems.

CHAIRMAN SOULES: Let me get the text with you.

MR. McMAINS: Okay.

CHAIRMAN SOULES: I said "protected from disclosure by privilege" because I think that's really what it is. They're not -- we call -- we say exemptions --

MR. McMAINS: The reason I said exempted is because there are exemptions used elsewhere in the rule. And so in order to try and not fix anything else and because it's labeled "Exemptions," rather than having to go through each rule and find out whether or not we have used exemption before.

CHAIRMAN SOULES: Okay. In response to that, the reason that I'm favoring "protected" is because you can blow your protection. Everybody knows you can blow your protection.

MR. McMAINS: That's right.

CHAIRMAN SOULES: And I'm worried about "exempted from discovery" being read as not discoverable. I think "exempted from discovery" has more likelihood of being read as not discoverable than "protected from disclosure".

MR. McMAINS: That's fine.

CHAIRMAN SOULES: And that's the reason I was thinking. I don't know whether -- okay?

MR. McMAINS: Okay.

CHAIRMAN SOULES: Is that okay, then? We'll say "The following matters are protected from disclosure by privilege."

MR. McMAINS: Okay.

CHAIRMAN SOULES: All right. And then we've got -- now, what I've got here is "Work product of an attorney subject to the exceptions provided in Texas Rules of Civil Evidence 503 which shall govern as to work product as well as lawyer client privilege," saying that. Because this is really lawyer-client and work product is a different thing. In other words, you don't have any exceptions to work product in 503 unless the work product is the -- is also lawyer-client. And we're saying this -- we're intending to expand it to all work product here. That's the intent.

MR. McMAINS: Yes.

CHAIRMAN SOULES: Okay. We've got it set. Newell.

PROFESSOR BLAKELY: I'm not familiar with that line of cases you people were calling by

name. Now, you mentioned joint client exceptions there.

MR. McMAINS: Right.

PROFESSOR BLAKELY: Is that that problem?

MR. McMAINS: That is the problem of the insured -- the one lawyer that represents the insured hired by the insurance company. And we have essentially Supreme Court decisions now that that lawyer is effectively a dual agent, and that in an action against them for -- that his acts are attributed to the insurance company from the standpoint of excess liability.

PROFESSOR BLAKELY: And you're not talking about a litigant outside of that.

MR. McMAINS: Correct. I mean, you may be talking about him by way of assignment. You get those claims assigned and you are bringing those actions. But theoretically you bring them through them. And I don't know whether or not --

PROFESSOR BLAKELY: Well, the point I was going to make on that joint client thing is it's not protected within the group.

MR. McMAINS: Right.

PROFESSOR BLAKELY: But if the

litigation involves an outsider, then he can't discover. ' It's proved as to them.

(Off the record discussion (ensued.

JUSTICE WALLACE: You need to cover the situation just the opposite of -- where the lawyer is giving good sound advice to the client and the client doesn't follow it, well then he brings a suit against the client. So he can on his part do wrong.

MR. McMAINS: Right. That's why it's not just limited to situations where the lawyer has actually breached any duty, but where the insurance company that is in control has taken advice.

MR. BRANSON: Good encouragement to do right.

JUSTICE WALLACE: We don't want to encourage that.

CHAIRMAN SOULES: Okay. And the not discoverable appears fairly frequently in the balance of this rule. We need to get that altered, don't we?

MR. McMAINS: Well, I didn't think

that -- you're saying the balance of that rule?

CHAIRMAN SOULES: Oh, yes.

PROFESSOR DORSANEO: The reason why it was put in sentence form in each one of those places -- and I don't know whether it's actually necessary to do it that way -- is to accommodate the subtitles.

CHAIRMAN SOULES: If we just take it out it just makes -- you have to go back to get the lead-in tag to make the subtitle make sense, don't you?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: What if we eliminate the subtitles and put it back in the same -- I don't know why we can't have them and have the sentence there too. Why don't we -- let's just take out the not discoverable as it's repeated and it will flow then, won't it, Bill? It looks to me like it does.

PROFESSOR DORSANEO: I think it's better with the subtitles than without.

CHAIRMAN SOULES: With the subtitles with the "not discoverable" removed. Okay. I see it.

PROFESSOR DORSANEO: But then you have

the problem with the (a) now being first.

CHAIRMAN SOULES: That doesn't bother me. You've got to say it.

MR. McMAINS: What do you mean?

PROFESSOR DORSANEO: Well --

MR. McMAINS: Yes, but we didn't vote on that. We specifically -- that was all connected with this. And he said that none of it went --

CHAIRMAN SOULES: No, it's already voted on. That (a) is (a) in the March draft, I think. But why not say the following matters are protected by privilege, first, everything that's privileged; and second, in addition to that, some other things. I mean, it is not really redundant. It reads redundant.

PROFESSOR DORSANEO: No, I mean -- Luke, I was addressing a separate matter, and that's Rusty's suggestion that he change it to say any other matter.

CHAIRMAN SOULES: Let's don't because that puts privilege right up front. And that's where it is in the --

MR. McMAINS: Well, that's right. But what I was trying to do was make sure they

understood that these were privileges. I wanted to have a general rule that said -- you needed a general rule that said any other privilege. I mean, in order to make these privileges, then you had to -- then your general rule should say any other privileges and then -- and that's why to me it makes more sense being back at the bottom again, I guess is what I'm saying.

CHAIRMAN SOULES: That's okay. So (b) becomes (a), (c) is (b). (a) is work product. Experts become (b) witness statements are (c). Party communications are (d). And any others, that becomes (e). And I guess it should say "other privileged information" in the subtitle; is that right, Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: And it would read "Any matter protected from disclosure by any other privilege." Okay. Let me see if I've got all the not discoverables out. I've got it out in the fifth line of (b) -- fifth and sixth line of (b). The next time I pick it up is in the second line of (c). Anybody see it before that?

PROFESSOR DORSANEO: No, that's the only place.

CHAIRMAN SOULES: It comes out of the second line of (c). It's not in (d), is it?

PROFESSOR DORSANEO: Yes, it is.

CHAIRMAN SOULES: It is? Where is it?

PROFESSOR DORSANEO: Second line.

CHAIRMAN SOULES: Oh, yes. No, it's in the fifth line, isn't it? Did you say second? Sixth line. Sixth and seventh line of (d) it comes out. Is it any place else?

Bill, while we're here -- and it's 3:15. We've got one more pretty sizable matter, and then I'd like to have you come back and compare your "upon showing" language to what's in the rule right now, and let's go ahead and if that needs scrubbing up we'll clean it up. Here's a problem: The Court is getting this -- you need the March 3rd order?

PROFESSOR DORSANEO: I have it down here.

CHAIRMAN SOULES: The Court -- the Governor signed this bill that Judge Wallace told us about that gives the Court discretionary review as opposed to -- the thing Rusty was talking about as we suspected was always going on, not to be

facetious but to get back to Rusty's language.

I've read the -- what the Supreme Court can do -- and what rule is it, Judge? I've got so many rules in my mind -- about the NRE notation and refusal and all. And there's discussion about the rules ought to be changed now to provide for cert instead of writ of error.

And this just happens -- and there's no way in the world we could have gotten ready for this at this meeting. We're confronted with if we're going to change all the T.R.A.P. rules -- Rusty, if we're going to change all the T.R.A.P. rules and talk about cert or something else besides writ of error jurisdiction, we've got a lot of work to do. I don't think we can possibly get it done in time for January 1, 1988 effective date because we've got to get drafts out, have meetings, get back to the Court, they've got to pass on them, they've got to be published, we've got to get them to the Bar Journal, they've got to be published and so forth.

Now, as I read the present rules, they will work under this statute. They don't have to be changed. And we can go a couple of years with them and study, and if we then decide -- and the

Court suggests -- wants to decide to make some textural changes or some conceptual changes, we can do it then. Don't you agree, Rusty?

MR. McMAINS: There is one thing that I think probably has to be changed. Bill maybe can -- and Hadley can check me on this. But the NRE rule does say that that's a notation that the judgment is correct. There is now no longer a requirement for the Court to grant writ even when the judgment is erroneous.

CHAIRMAN SOULES: What rule is it? Can you tell me? I want to get to it.

MR. McMAINS: It's 133.

CHAIRMAN SOULES: It's 133.

MR. McMAINS: Notation 133a. You've got repeated. I've got NRE, and that is -- application presents no error which required -- deny the application no reversible error.

CHAIRMAN SOULES: See, that's the standard. No error that requires reversal and that will key here.

MR. McMAINS: That's not really -- historically, though, the view of that is that it makes a difference. What I'm saying is it seems to me the Court might want the power to say to, in

essence, have a new notation that does not require them to say that this is a right result so that you can legitimately impact the precedent -- or the Court could actually say NRE meaning the judgment is right. Or the Court could say whether it's writ dismissed unimportant or whatever. I'm just saying in terms of having the power to do it to where it doesn't affect the judgment.

CHAIRMAN SOULES: Well, let's look at the language of the rule instead of what we think it means about judgment practice, this, that and the other.

JUSTICE WALLACE: Application presents no error which requires reversal.

CHAIRMAN SOULES: No error that requires reversal. It's not an error that impacts the public that much. I realize historically -- but if you just look at the text of this rule, it still works by its very language.

MR. McMAINS: I'm not sure --

CHAIRMAN SOULES: No error of law that requires reversal. No error that requires reversal. We've just got a different test now for what error requires reversal. Used to --

MR. McMAINS: I really don't agree.

PROFESSOR DORSANEO: To me, the writ scheme is incompatible with discretionary review when there's an error in the judgment. And that really --

CHAIRMAN SOULES: It doesn't say error in the judgment. It doesn't say error -- presents no error.

PROFESSOR DORSANEO: Oh, I know. But it's just misleading for the --

MR. McMAINS: I mean, what you're doing is you're changing it doesn't require reversal -- it doesn't require our attention. I mean, that's not really the same animal. It's not going to be perceived to be the same animal.

CHAIRMAN SOULES: The error that requires reversal now -- I'm just reading the language. I'm not making anything else. The error that requires reversal now is error. That fits -- that's the same word. It's in the rule -- is of such importance to the jurisprudence of the state that in the opinion of the Supreme Court it requires correction.

MR. McMAINS: But that's not what the reversible error means under our Goddamn rule. Reversible error is that it substantially -- it

probably caused the rendition of an improper judgment. If you have an improper judgment caused by legal error, it requires reversal. I mean, there's no real point in arguing. That's all I'm saying. Let's just change the language.

CHAIRMAN SOULES: That's the problem.

MR. McMAINS: That little piece of language there where we -- when we say it requires reversal -- if we want to say which requires --

CHAIRMAN SOULES: That is the problem, because once we start that --

PROFESSOR DORSANEO: Review.

MR. BRANSON: What we can do is put a new designation in it. Call it IBBWWFI. It's broke but we won't fix it.

CHAIRMAN SOULES: Rusty, look at this with the idea of, can it work? I mean, because if it can't, then we need to have a session this week with this committee and do a bunch of work.

MR. McMAINS: It doesn't require a lot of work. All it requires -- the only time NRE is mentioned is there. All you have to do -- you can even leave NRE as long as you just define what you're talking about.

CHAIRMAN SOULES: It's not defined

now. Why do we have to define it now -- define it for the future when it's not defined for the past and the words still work?

MR. McMAINS: What I'm saying is why don't you --

PROFESSOR EDGAR: The statute says requires correction.

PROFESSOR DORSANEO: Requires correction?

PROFESSOR EDGAR: Isn't that what the statute says? Doesn't the statute say requires correction?

PROFESSOR DORSANEO: That will be a good thing to look at actually.

CHAIRMAN SOULES: Requires correction. We can change requires reversal to say requires correction.

JUSTICE WALLACE: Put NCR instead of NRE, no correction required.

CHAIRMAN SOULES: Requires correction.

(Off the record discussion ensued.

PROFESSOR EDGAR: There will be about

a 90-day hiatus though between September 1 when it's effective and January 1 of the rules, but I don't know we can do much about that.

CHAIRMAN SOULES: Well, this will really work with this.

JUSTICE WALLACE: This is immediately effective.

PROFESSOR EDGAR: It's effective now?

JUSTICE WALLACE: Yes.

PROFESSOR EDGAR: You've already changed it in the rules?

CHAIRMAN SOULES: Are you sure this won't work without fixing it? Why do we need to change to NCR when we've gotten so use to NRE? It's going to mean the same thing because that's what they do now.

MR. BRANSON: Did you ever tell your kids just to play like it was fixed?

CHAIRMAN SOULES: Okay. What do we suggest they call this when they say refused --

PROFESSOR EDGAR: Whatever they want to call it.

CHAIRMAN SOULES: Well, I know that -- that 900-pound gorilla, but they probably want us to at least suggest something.

MR. McMAINS: I think, you know, in the language of the statute, you could say it's of the opinion that the application presents no error which is of such importance as to require correction, the Court will deny the application with a notation refused no reversible error. You don't change your notations. You just incorporated the statute.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: That's a good idea. I second that.

CHAIRMAN SOULES: Give me the language again, Rusty.

MR. McMAINS: -- the application presents no error of such importance to require reversal -- or require correction, the Court will deny the application with the notation refused no reversible error. That's the only --

CHAIRMAN SOULES: It's been moved and seconded. Any further discussion? Those in favor say "I." Opposed? That's unanimously recommended.

(Off the record discussion ensued.

CHAIRMAN SOULES: Okay. Has anyone thought of any other loose ends other than trying to deal with the work -- the good cause aspect of 166b that Bill still has on the table? Okay. Well, let's go to that. Everybody think hard and see if there's any loose ends because we want to finish up here with everything done, if possible.

MR. ADAMS: Which page is that on?

PROFESSOR DORSANEO: It's on page 214 and 215.

CHAIRMAN SOULES: Ready?

PROFESSOR DORSANEO: Yes. The current version of tentatively amended Rule 166b provides in the subparagraph dealing with the party communication or investigative privilege a proviso that reads like this: "Provided however that upon a showing that the party seeking discovery has substantial need in the preparation of their case and that they are unable without undue hardship to obtain the substantial equivalent of the matters by other means, the parties may obtain the matters described in 3d," and they are witness statements. And then is says: "Excluding written statements made by any potential witness or party to any attorney for that potential witness or

party and 3e," which, again, is the party communication business.

This draft that I had prepared, and more particularly the language on page 215, is different from that in one major respect. The difference is a broadening of the substantial need undue hardship escape valve. The principle reason for doing that really involved the work product idea and makes me no difference. I have no pride of authorship whatsoever and I would be happy just to move what has already been acted on in here. That would be all right, although I frankly like the broader.

CHAIRMAN SOULES: This committee, I think, with more members voted not to permit work product to be penetrated on that test sometime back. I think we ought to stay there.

PROFESSOR DORSANEO: I think that you're right, with everybody gone. The best thing would be to put it in the proper place.

CHAIRMAN SOULES: So, let's -- but I think you've got this written better than it was written the first time. If we could change the subparagraph designations and get them straightened out in your draft so that we're not

-- in other words, we would not open up (a). We would still have --

PROFESSOR DORSANEO: It would be (c) and (d).

CHAIRMAN SOULES: It's just (c) and (d), isn't it? Subparagraph (c) and (d).

PROFESSOR DORSANEO: With -- there is that additional language when it talks about witness statements, it also specifically removes from the safety valve written statements made by any potential party or witness to any attorney. So, if you wanted to leave that protection of work product in, you could say by subparagraphs -- or "by subparagraph (c)," comma, "excluding written statements made by any potential witness or party to any attorney for that potential witness or party and (d) of this paragraph 3."

CHAIRMAN SOULES: That parenthetical phrase burdens the -- burdens the rule, makes it very -- to me, when I read it and tried to work on it to get it to the Court and I've had people calling me asking me to try to read that to them because it's hard to read. Isn't it a fact that we're talking about undue hardship getting things under (c). What that's really getting at though

is attorney-client privilege. So whenever you've got attorney-client privilege as an additional ground, you don't get --

PROFESSOR DORSANEO: You don't need that.

CHAIRMAN SOULES: You don't get it anyway under this undue hardship. And isn't it true that with the additional ground of attorney-client, which that parenthetical is -- you've already got it protected. And the parenthetical is not necessary to shield the attorney-client privilege communications outside of the witness statements anyway. I mean, it's adequate, is it not, just to provide the shield without saying that here?

PROFESSOR DORSANEO: Then you could just say by subparagraphs (c) and (d) of this paragraph 3.

CHAIRMAN SOULES: If people are already having trouble reading it and it's really taken care of by attorney-client privilege, it might be better to clean the rule up and just -- here we've made a history that that is the case, and judges should follow this if they can find it, if that's our intent.

MR. McCONNICO: I'm not following you-all, I'm afraid. But as I understand it the way you're proposing that it be drafted now, Bill, the only thing that it's really going to get to is consulting expert reports with where the consultant is not -- those reports are not relied upon by a testifying expert in (c).

PROFESSOR DORSANEO: I should have made that clear. I'm following -- I'm reading really from Luke's book.

MR. McCONNICO: I have the old numbers then.

PROFESSOR DORSANEO: Haven't you changed witness statements to (c), Luke, in your book?

CHAIRMAN SOULES: Right.

PROFESSOR DORSANEO: And party communications to (d)?

CHAIRMAN SOULES: We didn't open up consulting experts or work product.

PROFESSOR DORSANEO: And really that expert business is a lot -- if you wanted the group things, you would say attorney-client privilege, work product and expert business. That all tends to be more work product-like than

witness statements and these party communications.

CHAIRMAN SOULES: That's why we never even allowed that to be penetrated for good cause. We said you can't get them for good cause, but you can get witness statements and party communications. We differentiated along those lines.

PROFESSOR DORSANEO: That's a very rational way to take a half step.

CHAIRMAN SOULES: Now, do we need the last sentence any longer in your proposal?

PROFESSOR DORSANEO: Well, I'm not -- the answer to that is "no." But, of course, I think that last sentence contains a very important concept.

CHAIRMAN SOULES: But that concept is one that needs to be continued and studied with the big concept of work product that you're going to continue to work on, isn't it?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: So, really that sentence for the time comes out.

MR. McCONNICO: What sentence is that?

CHAIRMAN SOULES: The last sentence in Bill's proposal, because that links back up to what we were trying to work on about who is the attorney and who are the agents.

MR. MORRIS: You're just taking the whole last sentence out?

CHAIRMAN SOULES: Yes. So, we would now -- the good cause aspect would read, "Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent materials by other means, a party may obtain discovery of the materials otherwise exempted from discovery by subparagraphs (c) and (d) of this paragraph 3," and stop. Is there a motion?

MR. McCONNICO: I move that we adopt what's just been read.

CHAIRMAN SOULES: Second?

MR. MORRIS: Second.

CHAIRMAN SOULES: Moved and seconded. Any further discussion? All in favor say "I." Opposed? Do we have any other business before the committee? I can't tell you-all how much I appreciate the work that you-all have done here.

PROFESSOR EDGAR: I move we adjourn.

JUSTICE WALLACE: That goes triple for the Court. We really appreciate it.

CHAIRMAN SOULES: Thank you. The reports were excellent. We are adjourned.

(End of proceeding.

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 statement of facts in THE SUPREME COURT ADVISORY COMMITTEE 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 $ 648.00.

WITNESS MY HAND AND SEAL OF OFFICE this, the 15th day of July, 1987.

Chavela V. Bates

Chavela V. Bates, Court Reporter
316 W. 12th Street, Suite 315
Austin, Texas 78701 512-474-5427

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Annette S. Bell

July 20, 1987

Flo,

Enclosed, please find a handwritten statement by Mr. Frank Branson of the Supreme Court Advisory Board Committee. This should have been attached to the back cover of the transcript of June 27, 1987.

This was misplaced when our binding person went to bind the 27th. Would you please see that this gets attached to that transcript as there is a reference to this handwritten statement in there.

Thank you,

Priscilla