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MEETING OF THE

SUPREME COURT ADVISORY COMMITTEE

AUSTIN, TEXAS

BE IT REMEMBERED that the above entitled matter came on for hearing on the 12th day of August, 1989, beginning at 8:30 o'clock a.m. at the Texas Law Center, 1414 Colorado, Austin, Texas, and the following meeting was reported by KATHERINE A. BUCHHORN, Certified Shorthand Reporter in Travis County for the State of Texas.

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SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

AUGUST 12, 1989 MEETING

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CHAIRMAN SOULES: The minutes stand approved, but we will leave that open in case somebody sees a problem later in the day. Next, the red lines are the changes that were made at the July 15th meeting or the Rule changes that were voted by this Committee to recommend to the Supreme Court that these changes be adopted. They are pages 6 to 35. Does anybody see any corrections or changes to those that need to be made to make them conform to the action of the committee on July 15th?

PROF. DORSANEO: Mr. Chairman, on page 30.

CHAIRMAN SOULES: Page 30. All right.

PROF. DORSANEO: This is a minor clerical thing, that 5-4 in the last underlined line pertaining to the Rule needs to be closed up to be 54. That also appears one other place, on page 32 in TRAP 53(a).

CHAIRMAN SOULES: Okay. I see that.

PROF. DORSANEO: I had, also, a question. This is the only one that I had a question on in this package, as to the language in 51(b), especially the-- somebody called on

"however the failure." It looked to me like it wasn't a "however" situation when I read it this morning. "Failure to timely make the designation provided for in this paragraph shall not be grounds for refusing to file a transcript..." blah blah... "however, the failure of the clerk to include... will not be grounds for complaint on appeal." That doesn't look like both of them were addressing-- if I'm understanding it-- things that will not be grounds. And I didn't understand why it was "however."

CHAIRMAN SOULES: "If the designation specified in such a matter is not timely made." Let's see. "Failure to make the designation shall not be grounds for refusal of the transcript; however, the failure of the clerk to include the matter will not be of complaint if the designation is not timly filed." Okay.

So the second part says that if the-- if the clerk doesn't include the matter in the transcript, you can't complain unless you have made a timely request. Is that what it says? The first part says that he's supposed to

file it-- you're suggesting it ought to just be two independent sentences?

PROF. DORSANEO: I'm just raising the question. I'm not sure I understand what it is meant to mean, frankly; so I'm just raising a question as to whether it is meant to be worded this way. It confuses me, what I am reading.

CHAIRMAN SOULES: Bill, do you think it would be better grammar if it--

PROF. DORSANEO: I think it would be better as two independent sentences.

CHAIRMAN SOULES: Does anyone feel contrary to that?

MR. McMAINS: Yeah. I think, actually, the reason it is a "however" is because it's to show that there is some penalty for not making the designation early. The penalty ain't the loss of the right of appeal, but there is some penalty; and that is, you can't complain on appeal if there's failure to include a matter that you didn't designate timely. I think that is why the "however" is there. That is why they are quasi-connected in thought. It does deal with the consequence of a failure to timely designate.

CHAIRMAN SOULES: Right. We'll just take a concensus here on how the Committee feels, whether it ought to be one sentence divided by a semi-colon as it is in these materials, or that we should make it two sentences, the new material just one independent sentence and leave the other one independent like it was. How about this, if we just reversed the words in the last sentence of the present rule where it would say, "However, if the designation specifying such matter is not timely filed, the failure of the clerk to include the designated matter will not be grounds for complaint on appeal."

MR. K. FULLER: And you are just reversing those clauses?

CHAIRMAN SOULES: Right.

MR. K. FULLER: That makes it better. I like that.

PROF. DORSANEO: I like that.

CHAIRMAN SOULES: We like that one sentence, but reverse those clauses?

MR. K. FULLER: I like that better.

CHAIRMAN SOULES: All right.

PROF. DORSANEO: What that really

achieves is that every time I read this sentence from now on, I will not continue to be confused by what is meant to me.

CHAIRMAN SOULES: Now you've got me confused by what you said.

MR. K. FULLER: And you will know that you contributed to any confusion to that sentence.

PROF. DORSANEO: That's right. If there is any confusion, I want to be at least partially responsible.

MR. K. FULLER: That's right. You've got it.

MR. McMAINS: Why don't we adopt a blanket claim statement?

CHAIRMAN SOULES: Does anyone have any other assistance to give me to make these conform to the action taken at the last meeting? They seem to conform, then, except for the two typos pointed out in 53 and 51 and what we just talked about in TRAP 51. Okay. They will stand approved as reflected in these materials at pages 6 to 35 with those changes.

It seems to me that the-- of course, everything on here is important; but the most--

probably the most difficult in terms of really working through and resolving what we need to do today would be Agenda Items 7, 8 and 18, 7 being the part on perfection of error in the charge, 8 being the part on cross appeals; and 18 being the effect of a judgment in the Court of Appeals that is contrary to the judgment of the trial court and how that may affect or not affect supersedeas.

JUDGE PEEPLES: Luke, before you go to that, can we go back to page 34? On the publishing of opinions, as I read (h), as amended, no matter how irrelevant or wrong the Court of Appeals opinion is that the Supreme Court grants and reviews it, it has got to be published?

CHAIRMAN SOULES: That's right.

JUDGE PEEPLES: But right now, a lot of times they don't order them published.

CHAIRMAN SOULES: That's right.

JUDGE PEEPLES: What is the reason for this change? Why should a case that's going to be reversed probably and is just utterly irrelevant be published unless the Supreme Court wants it published?

CHAIRMAN SOULES: Well, the Court asked the consensus of this Committee on that. The Committee debated it and I believe-- well, it debated it. And the feeling was that there is enough information in the Court of Appeals opinion, even when it is followed by a Supreme Court opinion, that often reading the Court of Appeals opinion helps an understanding of the final decision by that court.

There was other discussion about the Supreme Court wanting to know what this Committee felt, preferred, in these circumstances, whether to require a positive decision by the Supreme Court to publish or not. And this Committee voted that they preferred to have them all published and felt that those granted and refused were actually a small number of the total opinions of the Court of Appeals and that it wouldn't overburden the bookselling-- book-purchasing problem.

JUDGE PEEPLES: I realize it has been decided; but based upon my, I guess, eight months at the job, I think an awful lot of Court of Appeals judges, if they know they're not going to publish the opinion, don't take as much

care in researching it because they know it is not going to be published.

CHAIRMAN SOULES: This is only grant and outright refusal.

JUDGE PEEPLES: Well, by outright refusal, obviously, that ought to be published. But if the Supreme Court is got going to grant writ and reverse, a lot of things are going to be published that haven't really been researched; and it's going to be embarrassing to the appellate judge that wrote it.

CHAIRMAN SOULES: I understand that.

JUDGE PEEPLES: And I think that is one of the points that Austin McCloud was making last time, although he was saying more than that. But it has been signed. I guess that is all there is to it.

CHAIRMAN SOULES: So maybe what we ought to do then is get right into these harder problems and try to get them resolved and then get to-- all of them, all of the questions are important. I'm not saying anything is more important than the next; but sometimes some of the out-of-town people have airplanes to catch mid-afternoon and are not able to stay. And

since these, to me, seem to be the most substantive questions we have, I would propose to take them out of order and early in the day to get the maximum amount of discussion based on those. Does anyone object to that, to proceeding along those lines? Well, why don't we start with-- maybe this-- I guess the charge rules on page 56.

MR. McMAINS: Is Hadley here or coming?

CHAIRMAN SOULES: No. Hadley had surgery. It came out fine. It was kidney stone surgery. They tried several methods of bursting those stones up and finally got it done without having to do abdominal, invasive surgery. But he is still unable to travel and is somewhat uncomfortable.

He did, however, write me a letter, and that appears on page-- back in the back. He wrote a longhand letter, page 97, responsive to these suggestions. And Holly retyped it at page 95 or typed it at page 95 maybe for ease of reading; although, his handwriting is perfectly readable.

To explain what this is, to just

describe what it is, the Rules; and then we'll get into Hadley's remarks, too. Last time, one of the struggles we had was Judge Casseb and others-- I think it was the consensus of the Committee that lawyers should help the Court do the charge for the reasons that were then stated.

A lot of times a judge doesn't have a whole lot of resources to use to do his charge, and he needs written input to form the charge. And that was a part of the perfection-of-error process; but, as we discussed it, there wasn't a lot of sentiment that that had to be a part of the perfection-of-error process, but there was strong sentiment that it needed to be a part of the trial process to help the judge.

So the approach of these is-- what is on the table here-- is to cause lawyers at a point in time to submit written questions and instructions for the judge to use in the judge's charge. But doing that or not doing that has nothing to do with perfection of error. So we have separated out helping the judge and perfection of error. That is the first problem

of anything that needs to be said. Now, how do we do that? Look back at 265(a), and it sets up how the parties will proceed to put on their case.

MR. K. FULLER: What page, Luke?

CHAIRMAN SOULES: This is on page 56. And the other thing that was a problem with trying to do this before was that the Rules are just a mess the way they are right now. If you start looking at objection to the charge, it is spread all over the Rules from 271 to 279. And it is-- what is supposed to be in the charge is spread all over. 274 has got information that seems to effect perfection of appeal, but there are hardly any cases on it. They always ride over on 279.

MR. K. FULLER: Well, do I understand what is to be proposed here is that if I am the moving party, when I close in evidence, rest my case-in-chief, at that point in time I am to submit my proposed jury charge?

CHAIRMAN SOULES: Exactly.

MR. K. FULLER: And then the other side goes and when they close their evidence, they submit their proposed jury charge and then

the intervenors in turn?

CHAIRMAN SOULES: Right. At the conclusion of their evidence.

MR. K. FULLER: That's different.

CHAIRMAN SOULES: At some point, the judge has got to be given information about his charge. It seemed to me that-- and this is my idea. I mean, it is, maybe, a bad idea. It is just an idea. Where does the judge get help in putting his charge together? Well, it seemed to me that a party who has rested his evidence at that point should know what his jury questions and instructions should be.

MR. K. FULLER: Well, Luke, it seems to me that it is hard to come up with a jury charge-- proposed jury charge-- when you have only heard part of the case.

CHAIRMAN SOULES: No, no. The judge doesn't come up with his charge at that point.

MR. K. FULLER: No. I mean for me, as, let's say, the moving party. Customarily, we have a charge conference. That's where we come up with the charge, at the close of all of the evidence.

CHAIRMAN SOULES: Let me lay the

scheme out here, and then we'll go back and debate it. If I can just lay it out, and then we'll get to it. Then at the end of all of the evidence, the judge takes these suggestions and forms a charge and files it. So this would put in the record the charge that we're all objecting to and trying to get changed which is not even a part of the record today.

If you read a charge conference, it gets sometimes confusing because you don't even know what the parties are objecting to because that has never been made a part of the record in the case. But this would require that that be made a part of the record. The judge would form his charge and file it. Then there would be a charge conference. And objections would be made to the charge that the judge filed.

MR. K. FULLER: Is it at the charge conference, then, if you change your mind, you discover something else about the evidence that-- and you can say, "All right. I submitted a proposed instruction, but now I want to change it"?

CHAIRMAN SOULES: Yes. Now, the submission of the questions and instructions

that you do at the close of evidence has absolutely no effect on appeal or otherwise. It doesn't foreclose doing something completely contrary to it later on. It is just an assistance to the Court.

Okay. Then most of the rest of 271 is a collection from 277 and 278 of the criteria and the rules for making the charge and, for instance, rebuttal. You can do disjunctives. You don't do various phases, this old carry-over and trespass to try title. The Court should not comment in its charge. It collects things that were not in one place and says, "This is the form of the charge."

So the parties submit their suggestions. The Court draws its charge under the Rules that exist today and then files it. Under 272, then the judge files it and holds a charge conference. Then each party can object, and then the form of these objections, you can't conceal them or obscure them, voluminous. You can't adopt another one, the rules that are now over in 274. What this is now doing is putting things in time sequence that are just scattered through the Rules.

Then it said, "The Court may modify the charge of the court at any time before it is read to the jury"-- which, is, of course, presently the way it is now-- or as provided in 286 which is the additional supplemental charge that is made after the charge is read to the jury. Pursuant to a jury question or a motion of a party or the Court's own motion or whatever, whenever they send in additional instructions.

So now you have got-- and then here are the rules for preservation of error. You just object. You have to object in a form either in writing or dictated to the court reporter, which is out of old 272. We've got the presumption that unless it is otherwise noted in the record that objections are made at the proper time. That is in the rule. And the Court will announce its rulings or endorse the rulings on written papers if they are made in writing-- objections are made in writing.

Then here is a juncture that we get back to. There are two ways that-- there are two controversies pretty much in this No. 5 on page 62. The first is-- this says that if you

object and the judge wants a written submission that would cure your objection that he can order you on a specific item to submit a curative question or instruction in substantially correct form to the Court. And if the judge gives you that order, then if you fail to submit, to comply with that order, then you waive your objection.

So question No. 1 is: Should the judge have that power, to say, you know, "Wait a minute. That objection is stricken on. I think it is serious. I think I'm inclined to sustain it and adjust the charge. But you, I'm ordering you to submit something in substantially correct form for my consideration."

And then you-- if for whatever reason you don't do it, do you waive your objection? And should a judge have the power to put you in that position in order to get a responsive, written suggestive cure? That is the first question.

Then if you say that the judge should have that power, then the next question is, can he order the objecting party to cure any objection to a question or instruction or a

definition; or should he be limited to ordering the party with the burden of proof to fix a question? In other words, Pat has got the burden on a question. Ken is objecting to the way Pat has got his question set up, and it is-- in the Court's charge. Well, it is in the Court's charge now, but it is Pat's burden. Should the judge-- and Ken objected. Should the judge be able to say, "If you want to sustain that objection, I'm ordering you to submit something to me in substantially correct form that will cure your objection"? But it's Pat's question.

MR. K. FULLER: That sucks. I mean, that's bad. You're making me do-- you're making me do his work. I think the burden ought to be over there to draft it.

CHAIRMAN SOULES: I'm just trying to lay out the question.

MR. K. FULLER: Okay. I'm glad you explained it that way. I thought it was in favor up until you explained it.

CHAIRMAN SOULES: Should the judge have the power to put us in a position to submit in writing? And if-- now, Alternate 5 says that

on a question, the judge may only order the party with the burden to fix the question; however, on instructions and definitions, he can order the objecting party, whoever is making the objection, which is what the rule says now is required, a written submission for instruction or definition.

Then it goes on to say-- this is, of course, perfection of appeal-- in paragraph 6, that compliance with Rule 271(1), where you give your questions and instructions to the trial judge as your evidence closes, is not a requisite for appeal. It has nothing to do with the appellate process. They expressly say that, and that failure to conform to 271(1) shall never constitute waiver of any error. They say it both ways, that it is not a requisite and you can't waive. Trying to make it as clear as possible.

MR. K. FULLER: Are we going to take that one up first?

CHAIRMAN SOULES: Then the charge-- when all of that is done, the objections have all been made, then the charge is read to the jury and then, of course, goes to the jury. And

then the last rule is this one on deemed elements that you get to after the jury because there were omissions from the charge.

The process now runs timewise-- if these were adopted, would run timewise with the flow of the trial; and the rules are collective, as I have indicated. Now, Hadley says that regardless of whether we make changes-- you will see on page 95-- well, there's too much of it. But it says even if-- his feeling is, even if none of those proposed changes are adopted, the reorganization should be. Judge Rivera.

JUDGE RIVERA: I like the approach, and I like the way they are set out and put together. And my interest, of course, is in the trial court 271. I think all of you need to look at both of those together. I think we are saying that the trial court has to do his and then in the other rules for preservation of error, we said some things that-- if they are not required in the trial court, they are making them there even though they didn't have to do it in the trial court or they have to it different than in the trial court.

Anyway, my observation for Rule 271,

the first one is, I see no reason why we need two rules, 271 and 272, if the first one is charged-- the way it is worded now, "charges of the court and objections thereto." Again, we are separating the rules, and that's what we're trying to eliminate. People look at one rule and they don't look at the other and we are trying to correct that problem and we're still having it separated. I think we can put them together and eliminate that. Then if we are really trying to help the trial judges, the first sentence at the conclusion-- lawyers will get the idea it doesn't have to be before. Sometimes, especially in a complex case, we like to look at the questions even before we start a trial. Maybe even a week or two before trial.

CHAIRMAN SOULES: We've got a last sentence, here, Judge, that says, "The Court may order that any party's jury questions, instructions, and definitions must be submitted at any other time for the convenience of the Court." That is there. That is last sentence of this 271(1).

JUDGE RIVERA: I saw that, but the lawyers only read the first sentence.

CHAIRMAN SOULES: Oh, okay.

JUDGE RIVERA: The rest of it, I have no real problem with it. It looks real good. I wish we could put the paragraph 3 that is in Rule 272 in bold, capital letters, underlined, flashing or somehow. You know, some lawyers, still object to every word in the charge. I'm not talking about every question or every sentence. I'm talking about every word in the charge, which is the same thing, just in case they catch something, you know.

Then what I said about the appellate for preservation of error, if we prepare a charge and it is filed and then we hear objections, some are sustained, some are not, or we come up with a corrected or an amended charge, do we need to file it or just file it after we get an answer as to verdict? And if we file it, do we need to hear objections again? It is left open.

I see no problem with it the way it is except for what you say in the preservation of error things. Preservation, you say you've got to object; and if you object, you have got to submit or you have to tell them. But if the

charge that is filed is not the one read to the jury, you don't answer that question.

CHAIRMAN SOULES: Well, that's intended in 274. "Before the argument is begun, the trial judge shall read the entire charge to the jury in the precise words in which it is completed." The use of those words, "is completed," was to try to say, "Now we have got a different animal than that one that was filed at the conclusion of all of the evidence that the parties objected to." That is filed and you make your objections and then the charge goes through some sort of process and then it is completed. That is on page 65, Judge; and I don't know whether I got it done adequately, but that was--

JUDGE RIVERA: I think I see it here except for the (inaudible) in the other rule.

CHAIRMAN SOULES: In 274. Let's see. There's nothing on page 65, Judge; but I may not be looking where you want me to look.

JUDGE RIVERA: In other words, I think 271 and 272 are okay except that in the other, for the preservation of error, you are making comments and affecting 271 and 272.

CHAIRMAN SOULES: Right. And do you see a problem with that, Judge?

JUDGE RIVERA: Not really. I am calling it to your-- I'm only concerned with the trial court, what I have to do and don't have to do. Really, I have been following that procedure that we have here either at the beginning of the trial or at the end of the-- during the trial, I have the questions and instructions. And two minutes after we close, I've got them ready. And I like to go ahead and look at them, and then we hold our conference and then we object. If I hold a conference before, they start objecting before they know what I'm going to give them; and they start arguing back and forth and they really don't have anything to argue about.

So if I tell them, "This is what I think based on what you gave me," that conference is reduced to, you know, 10, 15 minutes instead of two hours. It works real good. And I have been following that and it moves right along. So this rule is the way we have got it now, 271 and 272.

CHAIRMAN SOULES: Pat, I believe you

had your hand up.

MR. BEARD: Well, my question is, I'm representing the defendant. The plaintiff submits-- it has got plaintiff's issues in there and I object and I have that objection. The Court says, "You write it." So I write it wrong, too; but for different reasons. The Court turns me down. Now he can go to-- I have got no standing to-- he submitted it wrong, but I have no standing to appeal when I have made a valid objection just because I can't write it either?

CHAIRMAN SOULES: That gets us to 271 or 27--

PROF. DORSANEO: Three.

CHAIRMAN SOULES: -- 273, paragraph 5, which is certainly the most substantive part of this-- basically, it is just a reorganization except for 5 on page 62. That is getting right to the substantive issue that we're at.

Let's talk about the first issue first. Do we feel that the trial judge should have the power to order a party who has made an objection to the charges-- to the charge that the Court put together at the charge conference?

He has made his objection. Does the judge at that charge conference have the power then to direct that party? Let's first call it an instruction so we don't get the question problem.

He objects to an instruction. Should the judge have the power to order that party objecting to the instruction to submit in substantially correct form a proposed cure for the objection being made; and, failing compliance with that, put the party making the objection in a waiver position as far as preservation of error? In other words, the objection just doesn't get there if the judge orders you to fix it and you fail to fix it? Bill Dorsaneo.

PROF. DORSANEO: I think the judge ought to be able to make a request to counsel or order counsel-- however you want to put it-- to master the same thing, to provide assistance to the court in preparing the charge.

The difficulty that I have is in going beyond that and saying that if you don't respond, you have waived your complaint. If you don't respond with something that's

substantially correct, you waive your complaint. If you don't respond and it's not perfect, which may be what "substantially correct" can mean you have waived your complaint. I have difficulty with the waiver part of it and when that will come into play, if at all. And that is where my trouble spot really is.

CHAIRMAN SOULES: Let me say this: I didn't write this to advocate it. I wrote it in hopes that we could get our work done today. And it occurred to me that the Committee might say, "We don't think that just objecting is enough. That is not enough help to the Court." And I tried to think through-- assuming that debate might start, how would we then approach-- what more would we suggest to the Supreme Court is not unfair?

And I thought, well, one is to get the judge to order anybody objecting to try to fix it. And then talking to Hadley, he said "What about a question where you don't have the burden?" And that's when I put this in.

This is not here as something that I am advocating. Again, it is just text that if we feel that something more than an objection

could be required by the trial court and the trial court should have the power to require that in order to try to get a proper charge, here it is.

There, I think, is some risk. I think there is a lot of risk. That if the judge doesn't have this power, that people-- skilled people, skilled complainers about the charge, are going to be able to build error into the charge, preserve error in the charge, and the trial judge never really realizes that he has got error in the charge because all he gets is an earful, and what the appellate court gets is a written transcript to study.

And to me, to give the Court this extra power probably increases the likelihood that the first trial will be a correct trial and the first charge will be a correct charge and probably will reduce reversals due to error in the charge. That was-- you know, whether it is right or wrong, that is one way to look at it. Ken Fuller.

MR. K. FULLER: I have got a basic question to ask about this whole theory. First of all, I question seriously in my mind if this

thing is broken enough to fix. You know, the worst enemy of good is better. I see the street lawyers getting caught in a trap with this kind of wording. You know, we have talked before--at least I have, and I have heard other people say the same thing. We are subject to a lot of criticism year-in and year-out by the practicing Bar. "Why are you guys always changing the Rules?" If there is something really broke, they can understand why we do it. But I think as we are getting into the area of fine-tuning--personally, I don't see this as that big a problem. I think it has been working. But I am adamantly opposed, just conceptually, to putting the burden on the party to do it correct that is defending against it. That just doesn't--

CHAIRMAN SOULES: That is not the question. That is going to be Question 2.

MR. K. FULLER: That is one of the questions here, and I'm speaking to the whole thing. Secondly, I would like to go way back to what we are talking about in the trial itself of requiring the submission of a proposed charge by the moving party upon the close of the evidence. Now, let's remember--

CHAIRMAN SOULES: Ken, I'm going to-- I don't mean-- Pat has started debate on 5, and that is where I would like to stay.

MR. K. FULLER: I'm sorry. I thought you were trying to consider them all at one time. All right. I'll save my remarks on that one for a later time.

CHAIRMAN SOULES: I want to get through and work through first how much power should a trial judge have at the charge conference.

MR. BEARD: Let me ask-- everyone-- if I make a valid objection but I can't do it right without someone telling me what is wrong with my proposal and it just gets overruled and yet it's submitted on a defective charge that I've objected to, that shouldn't be.

CHAIRMAN SOULES: I'm not-- I'm not completely following you.

MR. BEARD: In Federal court, we try to admit our charges in advance, you know. The Court gives the charge, and we object. But no matter what our submitted charges, our objections are what controls in the Federal court. And we always ought to be able to object

to a defective charge.

CHAIRMAN SOULES: And that is all?

MR. BEARD: You know, like Ken, I'm not sure, you know-- I don't have any trouble with the present system; but I'm not saying that the lawyers don't need guidance at all. But I don't want to ever get where if I can't do it right and I'm objecting to what the Court is doing that I can't take that up.

CHAIRMAN SOULES: Well, that is the state law now.

MR. BEARD: No, not plaintiffs-- I don't have to submit charges for the plaintiff I'm representing. I would object. If I've got to submit, somebody needs to tell me what is wrong with it, if I have got a valid objection to what the Court has done.

CHAIRMAN SOULES: If you are a defendant and you object to the plaintiff's questions, that is all you have to do. Is that what you're saying?

MR. BEARD: Under the present system.

CHAIRMAN SOULES: Under the present system.

MR. BEARD: Right. But if I have got to correct it myself because I--

MR. K. FULLER: He's going to keep doing it until he gets it right.

MR. BEARD: -- I want to know what is wrong with what I submitted. There's many an instruction that people have asked for that they went beyond, and the Court just says, "That instruction is defective. You don't have any standing."

CHAIRMAN SOULES: But if you object to his instruction, then you have got to submit it.

MR. BEARD: I have to submit it then.

CHAIRMAN SOULES: That is this Alternate 5. It just goes about it the same way.

MR. BEARD: I object to his instructions that are defective. I may not get mine if there is no instruction there at all, and if I submit it as wrong, I don't have any standing. But if it is his instructions and it's defective--

CHAIRMAN SOULES: That isn't right.

The only way you can preserve error on instruction is to submit it in substantially correct form--

JUDGE PEEPLES: Even if it's in the charge already?

MR. BEARD: In the charge?

JUDGE PEEPLES: I'm not sure about that.

CHAIRMAN SOULES: Well, we'll look at the Rules. Bill, did you have your hand up? Go ahead and talk.

PROF. DORSANEO: I guess my first preference would be to have objections simply be sufficient and leave the charge-- responsibility for getting a charge together on the trial judge. That would be my-- I could be convinced otherwise about that, but that is probably my first preference. That would mean no paragraph 5 of any shape or form.

My second preference, after listening to Pat, I think somebody ought to be able to draft the part of the charge that they're placing reliance on.

MR. BEARD: That's what lawyers do.

PROF. DORSANEO: I think that is not

probably too much to ask, even though I do think under current practice that an objection is probably, under the better cases, sufficient if the judge wants to submit your affirmative defense or whatever and you just object to it because it is wrong.

But I do think, probably, the second alternate is the next preference that I would have because it seems to me that that is getting-- or the alternate, because that seems to me to be saying, basically, that if the judge asks, the part of the charge that you're really placing reliance on is the part that you have to provide to the judge. That doesn't seem like a lot to ask. It may be that it is asking too much about instructions and definitions there; and, perhaps I would be inclined to want to soften that by saying in (a), "party objecting to the omission of an instruction or definition" rather than just objecting to-- well, like a word, you know, or two, and instruction or definition.

And the reason I say that is, you just basically see where I am coming from. I don't like the idea of putting all of these

burdens on counsel because I do think this is broken. The system is broken. I don't think when I go to a charge conference or engage in this process under the current Rules that I can ever do better than a B because it is just too hard to make objections and get all of your requests done. I just think it is really too hard. And if I can't do it myself, I don't want to really be expecting anybody else to do it either.

It just strikes me as an unfair situation that the parties are in. If they are not going to get the charge they want from the judge in order to preserve their complaints, that it is just a very tough situation to be in. And that, Ken, I think, is the fix. I think that is what is the broken part of it. It is too hard.

CHAIRMAN SOULES: Rusty?

MR. McMAINS: I think that actually a lot of what is broken, even though I think it probably already is the case law, is assisted by your description of how clear the objection has to be, which to me obviates, really, the necessity of requesting, too, because you're

objection rule says that you have got to object specific enough to support the conclusion that the trial court was fully aware of the ground of complaint and chose to overrule the objection.

It seems to me that the insertion of that standard really does fix most of the problems that we currently have. And I think that adding to those problems with a requesting process resurrects the waiver principles as well as maybe puts the burden on you to do something for the other side.

The real thing we are trying to do is cut this hiding behind the law. You don't know what exactly is going on. The same thing with a trial judge. They don't want to be deceived into not knowing exactly what is going on until they get to the formal objecting process, and then they have to listen real close.

I think the combination of the unfounded objections constituting a waiver and explaining what a good objection means is probably good enough without imposing any burden to request, per se; although, I think that we might amplify, even here, by adopting the whole

standard that the objection can be amplified by demonstrating to the Court the request-- you know, by request, so that you have eliminated-- as I read these rules-- the prohibition against it being in the same document, for instance.

If they were in written form, you have taken that little trap out, which I think is a good thing as well. Which is another reason it is hard to do because what you-- the way that the format is now, you have a vast-- it has a correlation that is the seminal requisite, and you also have to request. And if the request isn't in "substantially correct form," which is where we get into a lot of waiver problems, then you waive the objection which is actually your initial credit.

If the objection is specific enough, surely the lawyers aren't-- and the judges-- they aren't dumb enough that they can't fix it if they choose to fix it. So applying that standard, I really think that the amplification of the objection standard and the elimination of the requirement that they be in separate documents is probably enough of a fix. And I have problems with this whole "substantially

correct burden to submit" stuff.

JUDGE HECHT: You say leave 5 out altogether; is that right?

CHAIRMAN SOULES: Except for the last clause which says failure of any party to submit a question and so forth shall never be a waiver.

JUDGE HECHT: If you don't say it, it's not going to be perceived to be changed.

MR. BEARD: Let me ask again, now--

CHAIRMAN SOULES: Rusty, Justice Hecht had asked for a clarification of your position. Are you suggesting, then, that neither 5 nor 5 alternate be used; that the Rule is simply set up for the objection, the seminal predicate, and then state categorically, "The failure to submit a question, instruction, or definition in writing shall never be a waiver of any objection to the Court's charge"?

MR. BEARD: Okay.

CHAIRMAN SOULES: Which is the last clause--

MR. K. FULLER: Say that slower.

CHAIRMAN SOULES: It is written here. It is the last--

MR. K. FULLER: What page are you on?

CHAIRMAN SOULES: If you look on page 62--

MR. K. FULLER: 62. That's my problem.

CHAIRMAN SOULES: I'm sorry, Ken.

MR. McMAINS: I might qualify that a little bit by saying, any objection that complies with 272 or whatever.

CHAIRMAN SOULES: All right. We're focusing now on--

MR. McMAINS: Resurrect objections that are somehow different than what the--

JUDGE HECHT: That's what I was having a--

CHAIRMAN SOULES: Yeah. Right.

MR. McMAINS: I think that is the Deemed Findings Rule and Waive Ground Rule. Nobody that has the burden of proof is going to go there without the charge because the other party is not going to-- they will say, "Well, wait a minute. Why should I object to their failure to have any issues? They're the ones with the defense who are suing me, and it is

waived if there aren't any." So there is going to be something there. I don't know we really have to tell them that because we have got the Waive Grounds Rule and Deemed Findings Rule that is going to work on that. Nobody is that silly, I don't think.

JUDGE RIVERA: That is what I had reference to, that there might be some inconsistency or some amending of the ruling in the trial courts. You set out the procedure for asking-- for questions, and then you charge the Court with the duty to prepare the charge.

MR. McMAINS: This really is closer to the Federal system of saying, you know, as long as the trial court knows what your problem with the charge is and it ain't fixed in the charge, then you're going to be able to complain about it. That is really what, in fairness, ought to be the situation. You ought to be able to look at the record and say, "Here is the problem they talk about, and it wasn't fixed." So if it ain't fixed and the problem was very well, amply discussed, then you ought to be able to complain about it without having to jump through any other hoops.

CHAIRMAN SOULES: Judge, can I get back-- I think we can fix your concern in 274 here. That is, how do you-- but we'll do that in a moment. How do you differentiate between this charge that the judge does at the close of evidence and files, and the charge that ultimately goes to the jury? Those are going to be two different things in nearly every case. And I think I can work that in 274 in a moment because it is at that point that we now have all of the objections and we have got a revised charge.

JUDGE RIVERA: That is the final one, the one they're going to rule on or pass on later.

CHAIRMAN SOULES: That is the one you're going to read to the jury. And I will not lose that thought, and I'm marking it right now.

But getting back to where we were on 5-- okay. In the center of the page on page 62, here is where we say, you know, "We have changed the law. We told you object, and what we mean by giving you that positive duty is that that is all you have to do." So we have this sentence--

well, it's a clause. "Failure to submit a question, instruction or definition in writing shall never be a waiver of any objection to the Court's charge." And I have got some suggested changes already to that language but if everybody has got that-- does everybody see that on page 62?

MR. K. FULLER: I still can't find it. I'm sorry.

CHAIRMAN SOULES: All right. I'm sorry. It's right in the center of the page.

MR. K. FULLER: And it is-- I've got it now.

CHAIRMAN SOULES: What I am hearing is this-- and it should be amplified a little bit. It should be "Failure of any party"-- insert those words. "Failure of any party," and then "to submit a question, instruction or definition in writing shall never be a waiver of any objection," and insert "made pursuant to Rule 272," which sets up the rules for making an objection. So you have to comply with those rules.

If you make that objection, an objection that complies with the requisites of

272, you don't-- no waiver. And I will read that now as I have got it in my notes. "Failure of any party to submit a question, instruction or definition in writing shall never be a waiver of any objection made pursuant to Rules 272 to the Court's charge."

MR. K. FULLER: It's still a part of that same sentence?

CHAIRMAN SOULES: That would be all there is to 5. Every other word in 5 would come out so that the judge would not have any power to-- as an appellate predicate. He's got a whole lot of power.

MR. K. FULLER: I've noticed that from time to time.

CHAIRMAN SOULES: He's got a lot of levers.

MR. K. FULLER: Somewhat. They say, "If you want to play games, we'll play games."

CHAIRMAN SOULES: But he can't increase your duty-- your requirements for appellate predicate by making any request at trial. If you make an objection that is good under 272, you have preserved your error in the charge.

JUDGE RIVERA: If you complied with it, we can't change it here now.

CHAIRMAN SOULES: Is that the consensus of the Committee on how 5 ought to be treated, that the judge not have any power, as far as additional appellate requisites are concerned, to require more than a mere objection?

JUDGE PEEPLES: I have some questions about that.

MR. BEARD: On omissions of instructions. Now, we're not-- you know, as the law stands now, if you object because your question is omitted, you must submit it in substantially correct form. We haven't changed that rule by this, have we?

CHAIRMAN SOULES: We have not. Now, however, you can preserve error-- well, maybe I didn't hear Pat right. If there is something--

MR. BEARD: Failure to submit a definition in writing shall never"-- you don't mean that--

CHAIRMAN SOULES: If there is an instruction there and it is defective and you object, that preserves error now and it will

preserve error in the future under this rule. Now, what we have changed is this: A total omission of an instruction can now be preserved by mere objection.

MR. BEARD: I don't think we ought to do that.

CHAIRMAN SOULES: That is the way this is written. That is the way this is written.

MR. BEARD: I don't think we ought to change that rule.

CHAIRMAN SOULES: All right. Let's debate that because that's-- Judge Peeples?

JUDGE PEEPLES: In support of what Pat Beard says, it bothers me that we say in Rule 271 you have to make your requests when you rest, and there are utterly no consequences to that.

CHAIRMAN SOULES: That's right.

JUDGE PEEPLES: And you're proposing now to say to the person with the burden of proof, not only are there no consequences when you don't come to court with your request, but you preserve error by simply objecting when there is a total omission.

Now, Rusty said there are consequences in the Deemed Finding Rule; but if it's less than a complete ground of recovery or defense, the Court can, after a hearing, find it. So I think that the person without the burden of proof still is at risk here. I just--why in the world can't we require someone with the burden of proof to at some point come up with a substantially correct tendering? I mean, there is nothing unfair about that.

CHAIRMAN SOULES: Bill, and then Rusty, then any other hands.

PROF. DORSANEO: I think if there is an instruction situation or a definition situation and somebody objects to it, there ought to be a definition of negligence here. Of course, I'm taking an easy one.

All right. A definition of negligence will come from somewhere, and I do not believe that that will be the end of it. There will be a definition of negligence. It might be the worst definition of negligence anybody ever thought of devising. And then at that point, the objection process comes into play. My mind can't conceive of--

MR. K. FULLER: Total gap.

PROF. DORSANEO: -- it coming to a full stop or of lawyers telling the judge, "Judge, I don't have to do anything. I'm not going to do it." And then the judge saying, "Well, that's fine. I'll just overrule the good objection and have reversible error." I can't conceive of it happening like that.

CHAIRMAN SOULES: Rusty, you're next and then Pat has his hand up.

MR. McMAINS: The other thing is that in-- we were trying to isolate awhile ago, where is the system broke? And the truth-- in my view, the one place the system falls down and one place that you will never get an agreement between two lawyers, regardless of sophistication except on what you better do to protect your ass, is when an instruction or definition, or question even, but particularly instruction or definition is defective by virtue of an omission of something in it; that is, where it could-- where what your complaint is could be fixed in large measure by putting something additional in.

Now, the concept is in, but it

doesn't have all of the components that it might have. You simply do not know under the existing case law, in my view, that you are for sure protected by an objection or a request. And you better do both. And you might have to do both. And there is even the one Corpus Christi Court of Appeals opinion saying, you do have to do both, which I find to be bizarre because the current rules contemplate that it is one or the other, but never both.

And I just don't see that that is, per se, a problem because there are consequences to omissions if, for instance, you have left out an element of your cause of action or of your defense. There are consequences that automatically attach to that, including the power of the trial judge to find it.

Now, the trial judge has plenty of power if he says, "Well, now that is fine. Don't give me the instruction. Somebody has pointed out that it's missing something. That is fine because I will decide. You not having decided to give me any help in this area, I will just make the decision on that question that you haven't given me any help on."

I don't want to be the one that denied the judge the right to submit that question to the jury and then is going to decide the question that I have not left to the jury. There are plenty of inherent powers with the court. Anything of any great consequence there, in my view, is what, pragmatically, is going to be happening. Everybody is going to be tendering the papers that they need to be tendering.

MR. BEARD: We can't write a rule as to what is an omission. The courts have got it where I don't know what an omission is in a lot of cases. But if you change the rule where the judge no longer can rely on the fact that you have just objected to an omission, it will be many a years go by before the judges realize that and get it reversed. I don't know what is wrong with the present law that says if it is omitted, you must submit it in substantiated and correct form if you want that instruction. What is wrong with the system we have today?

JUDGE HECHT: What is wrong with it is, it may or may not result in a waiver. If you're not sure and you are in a position where

it may be practically difficult to submit it in writing and you're sitting there scribbling it out and you're not sure it is right and it's just-- but what is at stake is not really the problem in the charge. Because if it is just a question of a problem in the charge, I never saw a case where an objection came up, while I was trying cases, that you say "Judge, there is a problem here," and the other side starts scratching his head and saying, "Well, there may be a problem here." So he is going to start thinking of ways to fix it or say, "Well, Your Honor, I think it is good enough," or whatever his response is. But by the time that process is over with, the judge and the lawyers have a pretty good idea of what they have done and what was at stake, and now they are ready to go to the jury and let the chips fall where they may as opposed to some technical requirement that you find out on appeal you should have requested it this way or you should have filed it separately or you should have done this and now you can't complain about it anymore.

MR. McMAINS: And further, Pat, frankly, historically, the system worked better

because we knew-- there were a lot more questions and they were a lot more focused. When you go to the general charge, the office of instructions and definitions has broadened conspicuously. And there is an awful lot of things that look like independent defense or theory of recovery concepts that ain't in the question. They are in something else.

And all of a sudden, you are sitting there-- and when it is in something else, as the Court clearly has the discretion to do under the general charge rules now, then all of a sudden you do have this burden to be fixing another party's problem with regards to what they're supposed to be proving just because we have converted the concepts in the question into concepts in the instruction. And that is the reason the system is getting more broken on a daily basis is because of the move to the general charge. And that is the unfairness, in my view, of using the old language on substantially correct form that has cost a lot of people a complaint that otherwise looks pretty close to legitmate. Because it ain't perfect. Because the "substantially correct"

simply, in my estimation of the cases, means something different when you get an instruction than as opposed to when you don't get it. And I think Judge Peeples will agree with me on that.

You have got lots of ways in which you can say, "Well, it was close, but it was far enough off that the Court didn't have to do it." And if they didn't have to do it, then you can't make the complaint. That simply is one of the unfair aspects, I think, of the requirement to tender it in substantially correct form.

CHAIRMAN SOULES: I want to get a consensus on a small issue, maybe just a part of an issue here. The question is: How many feel that an objection should be adequate to preserve error from a completely omitted instruction of definition? Do you see what I'm saying? If we pass that, then objection is going to be-- we're going to feel an objection is good enough for anything. An objection under 272. An objection that meets the requisites of 272.

MR. BEARD: On omissions?

CHAIRMAN SOULES: On complete omissions. How many feel that an objection should be the sole required appellate predicate

in that circumstance?

All of those who feel differently? Okay. So that vote, then, is that in the total omission, the objection should be all that is required. I guess it follows, then, that an objection is all that's going to be required to preserve error in any circumstances because that is the most difficult to conceive of an objection preserving completely. How many feel then that an objection should be the only appellate-- requisite appellate predicate in objecting to-- in a charge error, a 272 objection? Show by hands. Nine. Those opposed? Okay. That is now unanimous. Of course, subject to the earlier vote that had some descent.

Then to fix this drafting, what I would propose to do is to leave the No. 5 on page 62 where it is right here, where my finger is, going down the page, and then strike all of the first, second, third, fourth, fifth, sixth, seventh and eighth lines. And then the ninth line, strike the words "not make such order," comma. Capitalize "F," for "Failure" and use the language that I gave awhile ago for-- this

would be the total text of part 5. "Failure of any party to submit a question, instruction or definition in writing shall never be a waiver of any objection made pursuant to Rule 272."

JUDGE PEEPLES: How about "That complies with Rule 272."

MR. K. FULLER: "In compliance with."

CHAIRMAN SOULES: "In compliance with Rule 272"? "Made according to Rule 272." How is that?

JUDGE PEEPLES: It is very important, as Rusty said, that "fully aware," "specific," the judge, nevertheless, chose to overrule it. That is good language that ought to be--

CHAIRMAN SOULES: That is really comes out of case law, which we-

JUDGE PEEPLES: I know. That is good to have it in the Rule.

CHAIRMAN SOULES: -- we put the cases back there that that case rule was found at. Okay. So "Made in compliance with Rule 272," and then strike "to the Court's charge." So paragraph 5 would read as follows: "Failure

of any party to submit a question, instruction or definition in writing shall never be a waiver of any objection made in compliance with Rule 272." All of Alternate 5, then, would be deleted.

MR. LOW: Waiving your objection, or deferrance in preserving? Maybe you're considering them--

CHAIRMAN SOULES: Buddy, the part where it tells you how to preserve error is in 272.

MR. LOW: What I'm saying is that we say that it cannot be that your objection is not waived but the rule-- really what you're saying, then, is that you don't have to do that. You don't have to do it. I mean-- and you're not talking about waiving your objection. You're just really meaning to say "In order to complain, you don't have to submit one." But at any rate--

CHAIRMAN SOULES: You're right. The problem is that the old rule is written in the negative instead of the positive, and it is in 272.

MR. LOW: What we're really saying,

it is not necessary anymore.

CHAIRMAN SOULES: Articulate again for me.

MR. LOW: I'm saying-- we say here, "Shall not be a waiver of objection." Okay. Maybe that does it, but what we're really wanting to say is that we're doing away with the requirement of having to submit it in proper form.

MR. McMAINS: What you want to say is, it shall be sufficient to preserve your right to complain on--

MR. LOW: That's what the rule should say. I think we ought to tell people in clear language we're doing away with it. Let's tell them we are.

MR. McMAINS: Actually, from a border standpoint, if you just kind of basically delete all of 5 and put this notion back in (1) because it follows 272-- it says "No failure to submit a question, instruction or definition nor any defect therein, shall be grounds for reversal... unless the party... made a proper objection pursuant to Rule 272," and then say, "However, an objection in compliance with Rule

272 shall be, in all cases, sufficient to preserve any complaint on the field."

CHAIRMAN SOULES: Rusty, where are you? I can't find you.

MR. McMAINS: Back on 61. I'm just saying, in this paragraph 1, leave that sentence there and then follow that with your thought that was going in 5, but just quit there and say, "In all cases, an appellate complaint to the charge may be presented-- shall be sufficient if objection is made in compliance with Rule 272." Then, you know, those seem to me to be really both halves of the same thought. And puts you right up front in 273, right following 272 where it talks about how it is that you do this objection, and then the rest of it talks about preserving the record of the objection and the Court's ruling.

CHAIRMAN SOULES: We'll work on that in a second here, and maybe I can get at it.

MR. HATCHELL: Luke, while you're working, can I get a point of clarification from Buddy or Rusty? Are we moving towards the situation where making a request will not preserve error?

PROF. DORSANEO: Yes.

MR. HATCHELL: We have a bunch of provisions in here about judges denying requests, then; so I guess they have to come out. I don't know.

CHAIRMAN SOULES: Where is that, Mike?

MR. LOW: One of the things you're talking about is on (3) of 272 where that will have to come out where you have parties' objections to questions--

CHAIRMAN SOULES: Before we move on, let me see if I can get to this. What I would do is add-- I don't like the way (1) is written, but it is the way the Rule is written. It starts out negative. Failure doesn't waive error, but it doesn't tell you what perfects error. It is not in the 270 series right now. So I would start--

JUDGE RIVERA: I thought that was the tight rule, preservation of error.

CHAIRMAN SOULES: That's right. I would start (1) with this sentence: "Proper objections made pursuant to Rule 272 shall preserve error in the Court's charge," period.

And then "No failure"-- then that sentence that is there, "No failure" and then move-- and the way the language in the cases is not "compliance." It's "proper objection pursuant to rule" is the way we use it. We've--

MR. HATCHELL: Of course, we've added a standard now at this point, is the thing.

CHAIRMAN SOULES: Proper objection. That's what a proper objection is.

MR. HATCHELL: I can see where you can do it at the time the rule says you should do it, but not necessarily in compliance with the standard-- that meets the standards. I don't care. It is certainly not a big point. I don't even think I raised this point.

CHAIRMAN SOULES: Well, but we have a concept of proper objection. Those words kind of-- that is now-- that has a legal significance in case law, proper objection. They always do say "Pursuant to 272." And that's-- the real reason I'm raising it is, that is the way (1) was written to begin with, to be "proper objection." If we are going to put (5) into (1), which is fine with me, we ought to be

consistent in either calling it proper objection pursuant to Rule 272 or objection made in compliance with Rule 272. It ought to read the same in every place, and I don't care which. I'm saying--

MR. HATCHELL: I don't think it is a problem.

CHAIRMAN SOULES: So "Proper objection pursuant to Rule 272"? Is that okay with everybody?

MR. HATCHELL: That's good.

CHAIRMAN SOULES: Okay. No. 1-- the language in (5), then, would be "Failure of any party to submit a question, instruction or definition in writing shall never be a waiver of any proper objection-- of any objection." No. I tell you, that has a different meaning. I think we ought to leave it "objection that complies with 272," even though it's a little different. I think it has a different meaning.

So we'll just move (5) the way we have presently got it written to be sentence No. 3, the unnumbered third sentence of (1). And (1) would then read in its entirety "Proper objections made pursuant to Rule 272 shall

preserve error in the Court's charge. No failure by the Court to submit a question, instruction or definition or any defect therein shall be ground for reversal of a judgment unless the party complaining on appeal made a proper objection pusuant to Rule 272. Failure of any party to submit a question, instruction or definition in writing shall never be a waiver of any objection made in compliance with Rule 272." Those in favor say aye. Opposed?

PROF. DORSANEO: I'm going to say "aye," but-- I'm in favor, but I just want to move a verb.

CHAIRMAN SOULES: Okay. Let's move a verb.

PROF. DORSANEO: I don't know if this is-- just tell me to be quiet if this does not make any sense.

CHAIRMAN SOULES: No. What should we do?

PROF. DORSANEO: The second sentence, could it-- it bothered me, it begins with "No." Are you saying "The failure shall not be a ground for reversal"? Or maybe "no" should be-- no. Forget it. It's too

complicated to fix it. Just let it be. Just let it-- I'll take it back.

CHAIRMAN SOULES: If it comes to you later, let me know.

PROF. DORSANEO: I understand what it means. It's not as artful, as you said, as it could be; but it's fine.

JUDGE RIVERA: Just leave out the word "no." Just start "Failure."

CHAIRMAN SOULES: Well, that changes it, Judge, because it says, "No failure shall be a ground for reversal unless..." I guess we could say "Failure shall not be a ground"--

PROF. DORSANEO: Because you're going to warrant a defect in there--

CHAIRMAN SOULES: This is-- well, it's already a defect.

PROF. DORSANEO: "It would be the failure of the Court to submit a question, instruction or definition or a defective"-- you would have to add more words, you know.

MR. McMAINS: Or the submission of any defective--

PROF. DORANEO: "Submit a question, instruction or definition shall not be a ground

for reversal."

CHAIRMAN SOULES: Well, do we need to change this to make it understood?

JUDGE RIVERA: It's okay like it is.

PROF. DORSANEO: Agreed. Okay.

MR. BEARD: Now, do I understand this to mean that our present practice of submitting all of these issues and instructions, the judge writes it, reviews it, signs it, that's out? That doesn't preserve any error anymore. Now you must object specifically and then reincorporate all of these matters that you previous-- that you submit? The practice of submitting it to him and having him sign off on it is out? You have to object?

PROF. DORSANEO: You have to make a clear and specific objection, and that's all you need to do. And you can't make a little quiet objection and then slide something in either at the end.

MR. BEARD: Okay. The net effect of it, the practice of having a judge endorse it, is immaterial now, unless it is incorporated in your objection to the charge?

PROF. DORSANEO: Right.

MR. BEARD: That may make a really long objection to a charge if we start incorporating, you know.

CHAIRMAN SOULES: Now let's go to Ken Fuller's question which was, I believe, at what point in the trial process should a party-- we're done with appellate. We have fixed how you preserve error in a charge.

MR. LOW: I still have one question. Every time we change these, somebody-- there is case law and so forth, and they wonder what we changed. Again, I come back to the same thing I raised before, "shall not be a waiver." Now, are they-- would some Court say, "Okay. Now, there are certain things that you-- you know, objection is sufficient." Are we putting in the rule now-- but that now if you didn't go ahead and have "that's not a waiver" are we saying that the waiver applies to everything? I'm saying, is it clear to them that we are just going to have an objection only?

JUDGE HECHT: You would change the waiver to "shall not be required to preserve."

MR. LOW: Well, now Rusty suggested language because I can see where you have a case

that says-- it still doesn't tell us when you have to object, when you have to submit in proper form. And they say, "Well, what if this is one of those things that you have to object to; and now are they telling us, 'Well, if we don't go ahead and also put it in proper form, it is not a waiver'"? I mean, we are just doing something here, and we're not telling clearly what we are doing.

CHAIRMAN SOULES: Help me get it said better. What do you--

MR. LOW: Well, I'm just saying-- I don't know.

CHAIRMAN SOULES: Give me some language.

MR. LOW: Well, the language would be that after proper objection is made pursuant to that rule, nothing further requested in the proper form should be required to preserve error or something. I just think we ought to-- when you talk about waiving objection and waiving that, I think we just ought to clearly come out and say that no longer do you have to submit it in proper form in order to complain on the deal.

CHAIRMAN SOULES: I'm going to write

this out right now. Give me a chance. I'll get it done.

MR. McMAINS: If you started one with the mere statement that "an objection pursuant to a proper objection pursuant to Rule 272 shall, in all cases, be sufficient to preserve the right of the party making the objection to complain of the Court's charge on appeal"--

MR. K. FULLER: Then you could add there to say "without the necessity of."

MR. McMAINS: Yeah. And then you could have the second sentence which says--

CHAIRMAN SOULES: Let me get at it right here. Let me just amplify that first sentence that we just wrote. "Proper objections made pursuant to Rule 272 shall preserve error in the Court's charge, and no party must submit any question, instruction or definition in writing in order to"-- huh? "And no party is required to submit any question, instruction or definition to the Court in order to preserve error in the Court's charge."

MR. LOW: It might be longer and so forth; but, to me, it is just clearer of what

we've done. I think if we change the rule, it ought to be made real clear what you change when you make a rule.

CHAIRMAN SOULES: Let me get this down, though. When we get back, we have to type these things up. "Proper objections made pursuant to Rule 272 shall preserve error in the Court's charge, and no party is required to submit in writing any question, instruction or definition in order to preserve error in a Court's charge."

MR. LOW: That is clear.

CHAIRMAN SOULES: Followed then by the present sentence typed after No. 1, and then followed by the fifth sentence in No. 5.

MR. K. FULLER: Luke, I have a question on one word. Instead of "pursuant," I thought you said "in compliance with Rule 272." "In compliance." 272 is one sentence that ought to be cleared and all of that-- I thought it was "in compliance with Rule 272" rather than "pursuant to."

CHAIRMAN SOULES: Okay. The best way to do that is to change it everywhere. "Objections made in compliance with." Then a

change will also be made in the last two lines of the typed No. 1. "Unless the party complaining on appeal made a proper objection in compliance with the Rule."

MR. K. FULLER: I really think that is clearer.

CHAIRMAN SOULES: Okay. Does anyone else have any suggestions on that? Mike Hatchell.

MR. HATCHELL: Maybe this is not on that, but I just want to get you to look at 272(3) and 273.

CHAIRMAN SOULES: Okay. I see where you are headed. We have got some action on request, don't we, that we need to go back and clean up? Okay. But let's get this down because--

MR. HATCHELL: Oh, I'm sorry.

CHAIRMAN SOULES: Let me nail this down. Does anybody have any other comments on language which will be the standard now for preservation of error in the Court's charge under 273?

MR. McMAINS: Yes.

CHAIRMAN SOULES: Is that on this

point?

MR. McMAINS: Well, yes. It does not meet the modification of that language. It's just one additional concept. The conjunction of this is that there is still the threat of waiver by not submitting any ground of recovery or defense that has to be preserved in Rule 275.

CHAIRMAN SOULES: Yeah. Well, that gets over to 275, which is--

MR. McMAINS: We don't want to mislead people into saying that you never have to request anything or else don't suffer any jeopardy because you do suffer jeopardy. It is not enough to preserve the failure to submit your own-- your entire theory of defense or recovery. You can't rely on that to happen. And I think--

CHAIRMAN SOULES: It think it is good to have in the history of this rule. We are talking here about error in the Court's charge. We're not talking about error in just failing to go to trial on the ground of recovery.

MR. McMAINS: I understand. All I'm

saying is, I think if you are going to make it this broad and say "This is how you preserve error or the right to make an appellate complaint," that still in this rule, it needs to be subject to the waiver that is explicit in Rule 275.

MR. K. FULLER: Why don't you just say "except as provided to the contrary by Rule 275"?

MR. McMAINS: Yeah. "Except as provided in Rule 275." Maybe on the waiver stuff, "except as provided in Rule 275."

MR. K. FULLER: At least get them over there to look at it.

MR. McMAINS: That is all-- we aren't trying to change that aspect of the rule, and I think that it is the operation of both of those that ensure the practice will both continue as it is in terms of the trial court's ability to require something and still simplifying the objection process.

JUDGE HECHT: 275 is not really grounds for appeal. It is waiver of theory.

MR. McMAINS: That's right. But the problem is, when we say you can preserve error

in the Court's charge by making an objection under Rule 272 in all cases and you don't have to request, ever, that looks to be in conflict with 275 which has appellate consequences. That is the Deemed Findings Rule and the Waive Grounds Rule. And it is a waiver. It is a waiver of error.

If I go to trial on a theory of negligence and I don't submit it, it is a waiver of error. I can't take that complaint under Rule 272 that he didn't submit my theory of negligence.

MR. LOW: In order to object under 272, don't you have to request?

MR. McMAINS: We haven't gotten to that now, have we?

MR. LOW: Your objection is that-- "Well, Judge, you know, this is not inclusive."

CHAIRMAN SOULES: Can we hold that? Because I think some of that is probably going to get fixed with this requesting business.

MR. McMAINS: I'm simply saying, by overbroadly stating the waiver issue and what the focus of preserving appellate error is, you are understating or de-emphazing the effect of

not tendering anything on your own theory of recovery or defense.

CHAIRMAN SOULES: Subject to getting Rusty's problem fixed, do we otherwise-- does everybody pretty much agreee with this language?

JUDGE HECHT: One more. Subparagraph 6.

CHAIRMAN SOULES: Okay.

JUDGE HECHT: It is more and more duplicative of what was already written in subparagraph 1.

CHAIRMAN SOULES: Really not, Judge.

JUDGE HECHT: It's not?

CHAIRMAN SOULES: Because my concern was that the judge would go back and say, "Hey, look over here at 271. You have got to submit, and if we don't say "expressly," then the duty under 271 has no appellate consequences. Some felt the court say it does. That's why I wanted it done that way. It is somewhat redundant, but it adds a specific--

MR. McMAINS: We haven't voted on that aspect of it anyway yet, on the 271 part anyway.

CHAIRMAN SOULES: No. We haven't

done 271 yet. Then let's go on. And we haven't really voted on anything, I suppose, yet. Back to trying to work through this whole request concept which is now nothing more than the 271 requirement-- if it should be the requirement under 271.

What is the rationale for the conclusion of evidence? I tried to think of the latest point in a trial where a party should be responsive as a matter of standard to the Court for putting jury questions up. And we have the rule that-- in order to have a question or instruction submitted, you have got to have pleadings and evidence. That is all you have got to have if it is a fact issue. So that is the point where you have rested, and it seemed to me like people ought to have a pretty good focus of what their question is going to be and their instruction is going to be before they rest their case at trial.

And if we are going to set a uniform standard subject to this sentence that says a judge can ask for them anytime he wants to to suit his convenience, then that is a place where maybe it is appropriate. Maybe that's not the

right place. But Ken may have some feelings about that. I don't know where you are with that.

MR. K. FULLER: Let me speak to that just a moment here, and I won't go on too long. It has been my experience, when you are in the throes of a jury trial-- I mean, the whole world is coming to an end about this point, particularly when you get to the charge conference. And to impose another procedural "shall submit" in this process, the complaint you hear from juries most of the time is, "My God, we sit and wait and lawyers and judges are talking and we hear evidence three hours a day and then we wait in the hall for six hours a day while they are all doing lawyer stuff."

At the close of your evidence, to require at that point the submission invites, to me, another delay in the proceeding. "Wait, Judge. You know, we thought that we were going to be calling some more witnesses, but we're going to rest our case-in-chief at this time." Now then, 271 requires us to submit in writing our proposed instruction and our questions. It looks to me like you are inviting a recess at

that time for the lawyers to scurry rapidly back to their office or do whatever they have to do to submit this.

Now, since the judge can require this at any time they want to, my suggestion is, we don't need this, number one; and number two, if we do, let's not make it mandatory with "shall" language. I don't see the need for it, personally, as long as the judge can require the submission of these at any time to begin with. And to require a stop in the jury process at that time for the lawyers to put together more writings, more things for the judges doesn't make good sense.

CHAIRMAN SOULES: If you agree with Ken, this can be fixed by just deleting all of this except for the last sentence and doing a little bit of a language change in the last sentence. "The Court may order that any party's jury questions, instructions and definitions be submitted at any time to the convenience of the Court." In other words, it's easy to fix here languagewise. I've got it two ways.

JUDGE RIVERA: That is why it is better if you submit them before you start the

evidence. You have no problem when you rest.

MR. K. FULLER: The thing is, whenever--

JUDGE RIVERA: And, you know, we have a pretrial rule that we are going to look at; and that has-- also, to look at the questions. And I know in all of the big cases we do, if you have a pretrial and that's a day before or a week before, we already have the questions. And to me, that would be better.

JUDGE HECHT: And it depends on the case. When I was trying cases, I never asked the parties to submit a comp charge unless it was a particularly complicated comp case.

JUDGE RIVERA: Or a conservatorship.

JUDGE HECHT: Or an ordinary automobile accident when it's just negligence and contributory negligence.

MR. BISHOP: Can we put in, though-- add to the end of the sentence that the parties may supplement their proposed questions at the end of the evidence? Because the evidence, obviously, may change what you proposed at the beginning. It may not--

CHAIRMAN SOULES: I think the

suggestion now is that we not have a point in the trial, where we just have this last sentence where the Court may order that any party's questions, instructions and definitions be submitted anytime to the--

MR. BISHOP: I undersand that. But if the Court says you will submit your proposals at the beginning of the trial, and then the evidence changes what you thought was going to be your instructions, you need to have the right to say--

JUDGE RIVERA: You can withdraw at any time.

CHAIRMAN SOULES: Policy on that comes to my mind. We-- you know, in Federal pretrial orders, you have to put the jury questions up. Then there is a body of case law that says that the judge is supposed to be lenient in giving a party a good and proper charge even though the question is not in the pretrial order because the parties haven't seen the case tried yet. So there is where you get relief from the fact that you maybe have not done a very good job of pretrial order and so you get help.

What I'm wondering is, if we write this into the rule, are we going to have parties essentially trifling with the trial court when he asks them to give him an issue because they feel like it's not really too important because they have got an obvious safety valve, and it's right there on the face of the rule. And all I want to do is raise that so that we think about it and then deal--

MR. K. FULLER: And we can do it that way--

CHAIRMAN SOULES: Hold on. Just raising that so that we don't-- not look at that in making whatever decision we do make.

MR. K. FULLER: You can make a proviso that any such charges submitted made with the leave of Court be amended.

CHAIRMAN SOULES: You don't-- that's not the standard in Federal court; and it would be a horrible standard, I think, to have.

MR. K. FULLER: If the judge says "Two weeks before trial, everybody show up here with their proposed charge," and everybody shows up with a proposed charge and they give it to the judge, you spend three weeks in trial after

that, I don't want to be bound with what took place three weeks ago after 14 witnesses have been called and my star witness just got his guts cut out. And so the only way I know to do it, then, is to say you can change those proposals with leave of court or some kind of kick out. You have got to have a window to jump out of.

MR. McMAINS: But you don't want the Court being able to bind you by just not giving you leave either. So I don't--

MR. K. FULLER: True. Before you hear a word of evidence to say you have got to have your request set in concrete doesn't make good sense to me.

JUDGE HECHT: By the same token, if the judge asks for the charge and the plaintiff walks in and says "Judge, the only question we have is, did the negligence of the defendant cause these damages?" And the defendant says, "Well, the only question I have got is limitations." And I'm going to say, "Where is your confound charge? Give me the charge." And I assume that at that point, somebody is going to whip it out of their briefcase and give it to

you. And, of course, if they don't, why, there's going to be plenty of repercussions to that. So as far as the trifling with the Court is concerned, a skillful trial judge is not going to have too much difficulty with that. And then as far as leave of Court, I agree, that is a bad standard. If some judge decides he is really going to hang you up, he just-- he says, "I deny leave. To late for trial."

MR. McMAINS: I do think, however, specifically stating the ability of the judge to require the parties to tender their proposed issues-- and I do think they should be qualified as proposed-- needs to be in some way modified subsequently by saying that you're not-- you have the right to supplement those; and that the submission of the proposed question shall not bind you on the final process of preserving any complaint to the charge.

The thing that has started kicking in a lot, of course, in these cases is arguments about invited error from-- well, I've-- this was requested by the-- you know, by-- much like the other side. So even though he's objecting to it, he has really invited the error because he

is the one who proposed it in the first place. That is another thing that probably wouldn't hurt to be fixed in saying that you ought to be entitled to basically see all of the evidence come in and kind of change your mind as to what it is you are really going to bind yourself to and when you're going to do it. And it ought to be done under 272. And when you get there, that is what they ought to look at and not worry about what went before. It can be mentioned by the Court. It can be taken into the overall context. "Well, you started out with that. Why are you changing your mind?"

And you would say, "Well, Judge, I didn't think about this at that time." And it ought to be what you're thinking about at the time you're supposed to be doing it that ought to be concerning you.

MR. K. FULLER: It's what is versus what might have been or what you hoped for.

MR. LOW: You're right. If we want to go back to one place, back to 272, we need to make it that way rather than saying you can also have error here and here.

CHAIRMAN SOULES: Let me see if this

language-- just put it up for vote. Again, I'm not advocating it. I'm just trying to write something. If we change 271 just to say that the Court may order that any party's jury questions, instructions and definitions be submitted at any time for the convenience of the Court," should that be followed by a sentence that says "The Court shall permit parties additional and modified questions, instructions and definitions after the close of the evidence"?

MR. BISHOP: To submit additional questions at the close of the evidence?

JUDGE RIVERA: Put that in the objection part. When we hear objections, we can hear objections, requests, withdrawals or deletions.

CHAIRMAN SOULES: Well, Judge, the scheme of this is that we're going to put in 272 the helpful-- the help-the-Court rules. Then we're going to put over there--

JUDGE RIVERA: It isn't going to help us if they're going to take it back.

CHAIRMAN SOULES: Well, we don't want--

JUDGE RIVERA: I guess what I'm saying, if we don't let them in at the beginning of a trial or a definite day, it doesn't help us.

CHAIRMAN SOULES: Okay. Now there, see, is one view that when the judge says it, that's it; and then just hopefully, I guess, the parties can go out and get the Federal cases and show what the Federal courts have done to get parties out of a trap whenever they haven't done their questions and answers-- questions and instructions very well in advance of trial.

JUDGE RIVERA: From the practical side, if you tell a lawyer six months ahead of time, "I like the proposed charges at the beginning of trial or two weeks before," you know, that's fine. They have time to go look it up and prepare it. But in the large counties where you see the lawyers for the first time when you start picking a jury and the rules say, "Well, it's at the end of the evidence. I don't have my charge ready."

JUDGE PEEPLES: Can I ask this? I don't understand what kind of trap a lawyer is in if he does or does not submit good, bad--

CHAIRMAN SOULES: Nothing. There is no penalty for doing it wrong or not doing it at all.

MR. BISHOP: Yeah, there is. Sure, there is. If the judge-- if he doesn't submit something and the judge doesn't submit anything to the jury and he doesn't object, with-- and, of course, the judge doesn't have to submit something, I suppose, if he doesn't have anything submitted to him.

CHAIRMAN SOULES: That's right. What you have got, you have got the 275 penalties which we're going to get to in a minute, which is Rusty's-- we got you to deal with that. And, really, I guess that is the only penalty if there is an objection of some kind made. But if you don't object, then, of course, that is a waiver as a result of objection.

What I want to focus on now is, do we write language that says that the judge shall permit additional or modified instructions at the close of evidence, or do we leave that silent and let the practice take care of itself?

MR. LOW: Don't most trial judges--

say, if you submit them early, they look through-- I mean, most of them have other things to do, not just their own case. They're not going to go through this thing with a fine-tooth comb. They are interested in mainly what the issues are and kind of be sure that the party has got some idea on how he ought to submit his case. And if the lawyer knows how to submit a case like that. Then when it comes down to it, you want to have this charge and that charge and then it comes down to one charge, and that's the charge that is submitted to the jury. The parties object to it, and that preserves error. So why do you need something other than just the suggestion of the Court? And the Court may want it a week early or whenever. Why do you need more than that?

CHAIRMAN SOULES: I think Doak had the thought that brought this up. What do you think, Doak? I think Doak's concern was, yeah, but if you tell the judge he can ask for it any time, then you get the judge set in concrete and you have no way out of a problem that you find yourself in later on. And do we write on that or not is really kind of what we

are talking about. Tom Davis?

MR. DAVIS: If the judge says, "Look, I want the issues here when this case starts," what lawyer is going to say, "No, Judge, I ain't going to do it"? Or what lawyer is going to go in there and give him a bunch of trash and then come in after trial and throw in the real charge? I don't think you need anything like that.

If you tell him he can require it, then you tend to set him in concrete. Then if you say you can amend it, then you retract from the requirement of making them put it in before trial. So I would say that we don't need anything in there and back to the same old idea. Let's don't put anymore changes or anymore language in the rules than we absolutely have to.

CHAIRMAN SOULES: Doak, counter that and then we'll go on.

MR. BISHOP: Yeah. I disagree with that. I think that any lawyer certainly is going to do a good faith effort to give the Court his proposed charge up front if the Court orders it. But what happens when the evidence

changes and your case changes somewhat with it? If you don't have the right to come back at the end of the evidence and present some supplements or amendments, you might be--

MR. DAVIS: It never entered my mind that you wouldn't have that right. Are you going to say, "No, that's what you gave, and I'm not going to give this charge when the evidence raised it and you object"? There is error right there.

MR. HATCHELL: I think this a point that needs clarification, Luke. Is what you are working on now a set-in-concrete request that satisfies Rule 275? In other words, the judge can say two weeks in advance of trial, day of trial? That is your only opportunity to comply with Rule 275? I just want to make sure--

JUDGE PEEPLES: I hope not.

MR. HATCHELL: Tom assumes that it isn't. Doak is worried that it is. That is the point of debate, I think.

CHAIRMAN SOULES: That's exactly the point of debate. Very crisply put.

JUDGE RIVERA: From a practical side, anytime we have objection or comments or

something to the charge, we listen. And we change the word, we'll change a sentence, we'll change the instruction, we'll change the definition if it is a good challenge to the charge. Or if we forgot something, we'll add it in. So that will never end. But it is a good idea to have some proposed charges at least in the beginning and get rid of a lot of argument and debate between the lawyers before a problem exists, and it will help the Court in making some rulings on objections that would tie it up later, that this is an issue or not an issue. We need some guidelines to help the judge get started.

CHAIRMAN SOULES: How about if we made this sentence a little bit different in tone and say "The Court may order that any party submit proposed questions and instructions." And we just get kind of totally away from "requested" and then we just talk about "proposed" so it is really a softer concept in this 271.

JUDGE HECHT: Since you-- I assume you would impose the burden equally on all parties, we might just take out "any party" and

say, "proposed jury instructions"-- "jury questions, instructions and definitions will be submitted," any I would say "reasonable time." And I assume that no trial judge is going to ask for it a year before trial. Perhaps we ought to cover that base.

MR. LOW: I'm not so sure-- if I'm representing the plaintiff, I'm not real sure I would want him-- I would want to submit both of them. In other words, each party ought to just submit his own. The judge may say, "Well, you draw a complete charge, and you draw one." I don't know that it is intended ever to do that. I think it is the parties' own ones that you do that. And I wouldn't want the trial judge to have the idea and say, "Okay, Buddy, you draw a complete charge for everybody. John, you draw"-- I think each one ought to concentrate on his-- that party's request and not the whole; and maybe the Court wouldn't consider that. But I think that is the reason they have it about parties.

CHAIRMAN SOULES: Then "The Court may order that any parties that"-- wait a second. "The Court may order any party to

submit proposed jury questions, instructions and definitions at any reasonable time for the convenience of the Court"?

MR. DAVIS: I don't want to beat this thing again, but doesn't the judge have that power? Are we going to put in the rules every power the judge has?

CHAIRMAN SOULES: Well, no, I don't think so.

MR. DAVIS: Well, he has got that power from a practical matter. And I think it is unnecessary to reestablish in the rules to try to put it in the language because every time you do that, you detract from the power a little bit.

CHAIRMAN SOULES: Well, the district judges that were here last time wanted-- whether or not it was a matter of preservation of error, they wanted something said that tells the parties that they are supposed to help the judge draft a charge. That is all this does.

MR. DAVIS: We do that in 272. That's what they do there.

CHAIRMAN SOULES: Okay. If we do

this this way, is this enough? Or do we go on and talk about some point in the trial where the judge has to express leniency? Let me just put the question this way: If one-- the question is, should (1) read as follows and have no more letters? "The Court may order any party to submit proposed jury questions, instructions and definitions at any reasonable time for the convenience of the Court." How many are in favor of that? Raise your hands.

MR. K. FULLER: Did you have the word "proposed" in there?

CHAIRMAN SOULES: Yes. Proposed. Proposed. Six. Those opposed to that? Three. Okay. That carries. Okay. So that is what we're going to do about the assistance to the charge, to the judge, is going to be contained in that language. Now, we have got to go through these and look for this word "request" and talk--

MR. DAVIS: Don't we have to go in and put something about him letting you supplement now that we have put it in?

CHAIRMAN SOULES: No, was the vote.

PROF. CARLSON: Can we go to 275?

CHAIRMAN SOULES: I'm sorry, I can't understand what the-- all right. Elaine Carlson. What is your proposition?

PROF. CARLSON: I understand what your concern is. I think if we kind of look at 275(f) you will see how this sets.

MR. HATCHELL: Yeah. 275 does require "request." That needs to be dealt with.

CHAIRMAN SOULES: That's exactly where I want to go to, but what I want to do is kind of wash through the trial rules and clean it out of these first; and then when we look at 275, we'll know what it is we have done or not done. It's an order that I'm trying to take it in. Let's just turn through these rules paragraph by paragraph and see if anybody sees any "request" problems in there.

JUDGE HECHT: Do I understand that the vote was to put this sentence in and no other?

CHAIRMAN SOULES: That's right.

MR. McMAINS: I didn't understand that.

CHAIRMAN SOULES: Well, it was said.

MR. BISHOP: It was said.

CHAIRMAN SOULES: It was said.

MR. BISHOP: That's why I voted against it.

MR. McMAINS: In terms of the one section. I mean, that doesn't say that you are eliminating the concept of the right to freely amend or something?

CHAIRMAN SOULES: Rusty, the proposition was this: Does No. 1 read as follows with nothing more, and the vote was six to three in favor of that. Does anybody care to change their vote? It stands.

MR. BEARD: Let me ask you, if you call it "proposed preliminary," would that help to solve the worries somebody has got?

MR. HATCHELL: Not serious.

CHAIRMAN SOULES: Okay. Now let's wash through these now and try to find where this request concept comes up in these rules because Mike has pointed up that it is there and, of course, it doesn't work now. So on page 56, paragraph two, does anybody see anything there? No? I don't see anything. Three? I don't see anything there. Four? Five? Six? Seven?

MR. HATCHELL: It's 272(3) and--

CHAIRMAN SOULES: Well, I'm looking at 271. I'm going paragraph by paragraph through all of these rules to see where we have a problem. We'll get there. Eight, nine, ten.

MR. McMAINS: You're talking about only this problem, Luke?

CHAIRMAN SOULES: Just where we are trying to pick up this "request" problem. Okay. Now, 272, No. 1 doesn't have any problem in it. Okay. How about No. 2? Okay. Now, (3) does. "When the complaining party's objection to a question"-- strike "or requested" and put in "to a"? Would that fix that, Mike?

MR. HATCHELL: Well, again, I'm still having a problem with not taking up the 275 issue. Elaine does, too. 275 talks about requests. So I'm-- this language may be right if 275 stays the same, and it may be like you say--

CHAIRMAN SOULES: Okay. Then we need to turn to 275 to answer the 272 question? Is that right? How so?

MR. K. FULLER: What page is that on?

CHAIRMAN SOULES: 275 is on 67. On page 67. How so, Mike? How do we--

MR. HATCHELL: Elaine was--

CHAIRMAN SOULES: Or Elaine.

PROF. CARLSON: I think it depends upon what our position is going to be on whether or not you have to-- if you can merely object to preserve your position that you have not waived an independent ground of recovery without actually tendering the question.

MR. LOW: Let me make a suggestion on that and just-- where we come down and we have here on the third line, it says "which is submitted or requested," just leave out "or requested." And you come down and then you add to that "unless." Going down, objection to No. 272. What I would do is go through this, and again, be consistent with proper objection rather than submission in proper form and try to make objection-- you know, use the word "objection" under 272 and tie it into 272.

PROF. DORSANEO: Well, I would change the first sentence in 275 to say, "Upon appeal all independent grounds of recovery or of defense" et cetera-- I would say take out "or

requested or waived," but I wouldn't go back and refer to 272 because I don't want somebody to be able to object only that you didn't submit my conversion claim or my contributory negligence defense. I do want some type of "request" there. I'm hitting myself back between the eyes.

MR. LOW: But, again, we're trying to be consistent that we're going away from that, and we want to go to the idea of making an objection and properly pointing it out. We still come back to the idea that most people are going to come with, you know, the proper ones. Again, if you make objection, here, you are coming back now and putting "request" back in. But if you make a proper objection and point out that this is totally omitted and you object to it and so forth, then it causes the trial judges--

PROF. DORSANEO: You've convinced me.

MR. LOW: -- and then you come back to it again and you could put-- you know, if that is the concept we're going to.

CHAIRMAN SOULES: Elaine and then

Ken.

PROF. CARLSON: So are we saying that you should be able to say to the judge real clearly, "Well, I didn't submit any issues or any questions on my conversion claim; but that is how the evidence has panned out and I want to be real clear that I want conversion questions in the charge"?

CHAIRMAN SOULES: That's right.

PROF. CARLSON: Is that enough?

PROF. DORSANEO: I'll bite that bullet at this point because that's not going to happen.

MR. K. FULLER: I'm really having trouble with this entire first system, but I-- sentence-- but I have got a major problem with one word in it. And where did this come from? "Conclusively established." It bothers me.

CHAIRMAN SOULES: This is 279. This is 279, unchanged.

MR. K. FULLER: I meant-- excuse me. I realize it comes from 279, but the word "conclusively" really bothers me.

CHAIRMAN SOULES: Well, that's the appeallate standard. Something that is

conclusively established doesn't have to be submitted to the jury. There is not a question about it.

MR. BEARD: The ultimate fact is undisputed.

MR. K. FULLER: I have no problem with that, but-- okay. All right. But it looks almost like we have a double negative in the sentence. "Upon appeal all independent grounds for recovery or defense not conclusively established under the evidence and no element of which is submitted or requested are waived." Okay. All right. I think I understand now. I'm sorry. I didn't realize what you meant by "conclusively established." It's virtually an uncontroverted fact.

CHAIRMAN SOULES: That's right.

JUDGE HECHT: You're just taking out "requested," aren't you?

CHAIRMAN SOULES: Yes, I think so. All right. I'm going to propose now that we just go through here and take out "or requested" in places and we eliminate this and we get 275 straightened out and then go back and fix 272.

PROF. CARLSON: Does "submitted"

then mean you object? Is that what that means?

CHAIRMAN SOULES: Submitted by the Court in the charge.

MR. LOW: But still, if it is done, you still need to object, you know.

CHAIRMAN SOULES: Okay. I need somebody suggesting a specific fix. Who has got it? Okay. Elaine has got it. What is it?

PROF. CARLSON: How about if it says "no element of which is submitted or proper objection to its non-inclusion is made in compliance with Rule 272"?

MR. LOW: "Unless a proper objection is made under Rule 272."

PROF. DORSANEO: Yes. "Unless proper objection is made in compliance with Rule 272."

CHAIRMAN SOULES: Yeah. There you are. "Upon appeal, all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or waived unless"--

MR. K. FULLER: "Properly objected to"--

CHAIRMAN SOULES: -- "objected to"--

MR. K. FULLER: -- "in compliance with"--

CHAIRMAN SOULES: -- "in compliance with"--

MR. K. FULLER: -- "Rule 272."

CHAIRMAN SOULES: -- "with Rule 272."

PROF. DORSANEO: Mr. Chairman, one other little small point--

MR. LOW: You're going to have to come down here again to line eight and take out the word "without request or objection," if you're going to put "without objection."

CHAIRMAN SOULES: Okay. Take out "request or"--

MR. LOW: Yeah. And just put "without objection."

CHAIRMAN SOULES: We'll change that inside the commas from "without request or objection" and delete "request or" and say "without objection in compliance with Rule 272" and so forth. Okay. Have we got any other requests? Okay. "There is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party"-- this is

a new "request."

MR. K. FULLER: Yeah. That's a different kind of "request."

CHAIRMAN SOULES: "May after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgement. If no such written findings are are made...deemed..."-- and that. So that fixes the problem in 275 a way-- one way. And now let's go back to 272.

JUDGE PEEPLES: Before we leave that-- I was out of the room for a minute. Is it the sense of the Committee that "objection" and not "request" preserves totally on this?

CHAIRMAN SOULES: Yes.

JUDGE PEEPLES: Okay. Is one of these cases in which there are 15 causes of action included and the plaintiff is really serious about one or two and he makes sure that those are in the charge and says, "Judge, I know that breach of contract and DTPA are in the charge; but I object to your failure to submit clusters on negligence, bad faith, breach of fiduciary duty, conspiracy," X, Y, Z. That

preserves--

CHAIRMAN SOULES: No, that wouldn't preserve it because it doesn't meet 272's requirements of specificity.

JUDGE PEEPLES: So would he have to spell out the elements of each one of those?

CHAIRMAN SOULES: He would have to be very specific. You have got to meet the requirements of 272 that objections are attached.

MR. LOW: You might have to have your proposed there written so you can read it and object to it.

JUDGE PEEPLES: If he has got to be that specific in his objection, why not make him tender on something that's totally omitted when you're talking Rule 275? When the Committee voted earlier, I thought it was with the understanding that what Rusty said about 275, you know, that was going to stay the way it is.

CHAIRMAN SOULES: We're fixing 275 now to permit an objection to preserve error on a wholly omitted ground. Is that the consensus of the Committee? Those in favor of that position, show by hand.

PROF. CARLSON: I'm sorry. Could you repeat that?

CHAIRMAN SOULES: We're going to have to pay attention. We have a lot of real hard work to do. We're going to lose some of our Committee people before we get to cross appeals. We have got to get through this so we have got to concentrate and move. Now, we can table it, but we're getting-- we may be getting along.

Judge Peeples has raised the question, have we taken a vote that objection is all it takes to preserve error to omitting a ground.

JUDGE PEEPLES: A total, complete, independent ground of recovery of defense.

CHAIRMAN SOULES: And I thought we had taken a vote but I don't know so we're going to take it again. How many feel that the objection--

JUDGE RIVERA: That complies with 272?

CHAIRMAN SOULES: If the objection complies with 272, is that all it takes to preserve even on wholly-omitted ground? Those

that say yes, show by hands. Those opposed? Okay. Then the answer is, it does.

Okay. So we have fixed 275 to do that, and we now need to fix-- go back to 272(3) on page 60. "When the complaining party's objection to a question is obscured" and so forth. Is that the only place we need to make a fix, Mike?

MR. HATCHELL: 272(3) and 272(6)-- 273(7).

CHAIRMAN SOULES: 273(7) which will now been (6) because we did away with (5).

MR. K. FULLER: Luke, is that necessary in the light of 272, which says you have to do it with specificity?

CHAIRMAN SOULES: Is what necessary?

MR. K. FULLER: Well, we are on (3) of-- we are on paragraph (3), are we not, of 272 on page 60?

CHAIRMAN SOULES: Well, we just passed that.

MR. K. FULLER: Oh, I'm sorry. I thought that was up for discussion.

CHAIRMAN SOULES: We already-- all we're doing is eliminating "or requested"

because there is no "request" function anymore.

MR. K. FULLER: Okay. Got you.

CHAIRMAN SOULES: So (3) will read "When the complaining party's objection to a question"-- and so forth.

Now we are over to-- on page 63, where the (6) is, that is going to be changed to (5); and where the (7) is, that is going to be changed to (6). Okay? So we are looking at that now as presently numbered paragraph-- is it 6, Mike, the last paragraph?

MR. HATCHELL: Yeah.

CHAIRMAN SOULES: "For purposes of appeal, objections shall be deemed overruled..." We will strike "and requests shall be deemed refused" and then pick up with "if not ruled on by the Court." Does that take care of the "request"-- mentions of "requests" that are inappropriate in the rules as you see them, Mike?

MR. HATCHELL: It's all I've been able to find.

CHAIRMAN SOULES: Let's leave that open in case someone sees this and either today or-- of course, we'll send red-line versions out

to everybody at the conclusion, after this meeting. And if you see them at that time, please call it to my attention and I will consider that to be an editorial change and proceed to fix it as it comes to my attention.

Comment-- the comment, "To place in a single rule all requisites and predicates for appellate review of error in the charge... to eliminate any necessity to request"-- "request instructions or"-- "or definitions in writing for purposes of appeal." Okay. Fixing comment there because that is altogether eliminated.

Okay. Now, we have got a package, and are we ready to consider these as a package? Any objections to considering them as a package? Okay. They are on the table as a package. Comments?

MR. McMAINS: What is the package?

CHAIRMAN SOULES: The package is 271 through 275 as we have gone through them rule by rule and changed them out. Oh, 27-- excuse me. I have promised Judge Rivera to go back and look at Rule 274. What I would change there to make it clear that there are two different charges-- there is a charge that gets filed under 271 and

then there is a charge that goes to the jury. I would put here in 274-- begin with this: "After ruling on all objections and before the argument is begun, the trial court shall complete the charge and read the entire charge to the jury."

JUDGE RIVERA: I think that is good. Yeah.

CHAIRMAN SOULES: So it would read this-- write in before the-- at the beginning of the sentence these words: "After ruling on all objections, and--" make the "B" a small "b"-- "before the argument is begun, the trial court shall--" insert "complete the charge and then read the entire charge to the jury in the precise words in which it is completed, including all questions, definitions and instructions."

MR. K. FULLER: How about "read the completed charge"?

CHAIRMAN SOULES: Well, these words kind of came from the old rules, and the precise words "in which it is completed"--

MR. K. FULLER: Okay. All right. That's enough. Precise words, "in which it is completed"?

CHAIRMAN SOULES: Yes.

JUDGE RIVERA: That is okay. That's the one that will contain the verdict.

CHAIRMAN RIVERA: That's the verdict. That's the verdict.

MR. K. FULLER: It's the only one the jury ever sees.

CHAIRMAN SOULES: That's the only one the jury is supposed to see. I have heard they have seen some others.

MR. K. FULLER: I've heard of them hearing them. I haven't heard of them seeing many.

CHAIRMAN SOULES: The court reporter gets something in there, and the judge says, "What is this?" You know, in Federal court, it happens that-- they don't read the charge to the jury before argument. Sometimes you don't realize that there's something in that charge until it is over with.

Okay. Now, the package is on the table as amended rule by rule for discussion. Tom Davis.

MR. DAVIS: If you are going to read the entire charge, I assume that would include

questions, definitions and instructions.

MR. K. FULLER: It says in the precise words. I don't know how--

JUDGE RIVERA: It is verbatim.

CHAIRMAN SOULES: These are the words that are in the present rule. I didn't change them except to talk about the completed charge.

MR. DAVIS: It doesn't make any difference. Just extra words. It doesn't include something else because they'll argue that that didn't need to be read.

CHAIRMAN SOULES: Well, I think the courts are now reading them completely. I'm afraid if we delete that, is that telling the judges they don't have to do it anymore? This is the way it is written out, Tom.

MR. DAVIS: No big deal.

CHAIRMAN SOULES: Okay. Now, the Chair considers a package of rules from page 56 through page 72 to be on the table for action as indicated in the markup on the record here today. And we're open for discussion on the entire package. Rusty.

MR. McMAINS: I don't recall that we

actually discussed in any details of the provisions on paragraph-- primarily, paragraph 6 in Rule 273--

CHAIRMAN SOULES: 273?

MR. McMAINS: -- which is the thing about compliance with Rule 271 is not a requisite for appeal.

CHAIRMAN SOULES: Yeah. That is (5).

MR. McMAINS: "Shall never constitute waiver of any error."

CHAIRMAN SOULES: Right. That was-- Justice Hecht raised that, too. The reason that in trying to write this that I felt it was it added to the text is that when you put a requirement up here in 271(1), some trial judge or Court of Appeals or somebody may believe that a failure to meet that, to comply with that, has appellate consequences even though some later rule says all you have to do is object. And it added to the work product to just flat say, "It does not effect your appeal if you don't do what 271(1) says you're supposed to do."

MR. McMAINS: I understand. I'm not complaining about the fix that has occurred so

far. It is not a complete fix is altogether what I'm trying to get at.

CHAIRMAN SOULES: Okay. Help me get it fixed right.

MR. McMAINS: The concept-- this says that-- the fix is "is not a requisite for appeal of any objection." Then it says failure to comply doesn't constitute a waiver of the error. Now, the question is, what about compliance as constituting an invitation of error?

In other words, suppose there is something wrong with the charge that you submitted and you catch it at the time that the charge is prepared. Under the current case law, that is ample authority for the proposition that you invited that error when you tender. This rule doesn't say that the appellate court can't consider that.

CHAIRMAN SOULES: How many feel that it should? I think it should. I mean, your in advanced trial. The judge is asking you to kick in your issues, and you haven't had your trial yet.

MR. McMAINS: But you don't have-- I

mean, the evidence--

CHAIRMAN SOULES: You haven't tried your case.

MR. McMAINS: Well, this is the whole question of the time in which you do, in fact, preserve error. Why should you-- if the notion is that you shouldn't be bound by what you did the first time in terms of making your bottom-line complaints on appeal, and if you're trying to eliminate the effect of that, you haven't completed the elimination of that effect unless you say that that is not going to prejudice your right to make an objection even if you are the one-- even if the error that you complain about originated in your request.

CHAIRMAN SOULES: So what we need to do is--

MR. McMAINS: So long as your objection is sufficient.

CHAIRMAN SOULES: Give me language. I need express language on how you fix this so you cannot deem some compliance with 271(1) to be invited error.

MR. McMAINS: I think all you really have to do is say "and compliance" when you say

"compliance with Rule 271 is not a requisite for appeal of any objection before the charge, and compliance or failure to comply with Rule 271 shall never constitute waiver of any error in the Court's charge or of any objection to the Court's charge made pursuant to Rule 272 and 273," because that's where the waiver argument is made as to invited error context. So as long as you put "compliance or failure to comply," then you should, I think, cover that. Do you agree, Mike?

CHAIRMAN SOULES: I think we ought to do it this way: I think we ought to just say-- we ought to add to the end of that sentence-- and I'll have to go back and look at the language a little bit-- say "or be deemed invited error." That is--

JUDGE RIVERA: Let me make an observation. I just noticed-- if you go to Rule 272 there, it says to disregard it. And the first paragraph says you must be in compliance with 272 when you preserve error. You're going to have a bad conflict. See? Section 1, we just fixed it to where it says that if you make an objection pursuant to Rule 272 to preserve

error, it must be that way. Then later on you say to disregard any objection pursuant to 272. We did that in a couple of other places. We're saying it must be in compliance with 272.

JUDGE HECHT: That constitutes a waiver.

CHAIRMAN SOULES: Rusty, my reaction to your language is that it-- it is not-- it doesn't just say that-- to me, it doesn't quite say-- articulate directly what we're trying to fix. If you read it and think about how it operates, it operates that way; but it doesn't articulate how it operates. And I'm suggesting that we might think of articulating how it operates a little more clearly.

MR. McMAINS: Let me give you this and just see what you think. I'm actually cutting down the rule. "Compliance with Rule 271(1) or failure to comply with Rule 271(1) shall never constitute waiver of any objection to the Court's charge made pursuant to Rules 272 and 273."

CHAIRMAN SOULES: Read it again, please.

MR. McMAINS: "Compliance with Rule

271(1) or failure to comply with Rule 271(1)--" there is "nor" right there-- you've got "neither, nor" right there. Let's leave that to the grammarians-- "shall never constitute waiver of any objection to the Court's charge made pursuant to Rules 272 and 273" In other words, I'm just saying--

CHAIRMAN SOULES: I understand. That is right.

MR. McMAINS: -- compliance with Rule 271 shall not waive the 272 objection.

CHAIRMAN SOULES: Let's just put it that way. "Compliance or noncompliance with Rule 271(1) shall never constitute waiver"-- of what?

MR. McMAINS: "Of any objection." You just eliminate that error in the Court's charge. Say "of any objection to the Court's charge made in compliance"-- I guess we changed that language-- "with Rules 272--

CHAIRMAN SOULES: Okay. Let me think through that now. Is everybody satisfied that if we do it that way that anything you do in 271(1) can't be-- whatever you do under 271(1) will not effect you on appeal? In other

words, it won't be deemed some kind of invited error because you do it wrong or waive an objection because you later make an objection inconsistent with what you submitted under 271(1). Just whatever you do in 271(1) is just no problem. Nobody can hold it against you forever afterwards.

MR. BEARD: Whenever you say that it can't be error-- by failure to comply, it is not error; but if one of them is observing error and the other creating error by inviting error-- so 271, compliance or not compliance is not error?

CHAIRMAN SOULES: Okay. So we'll say "Compliance or noncompliance with Rule 271(1) is not a requisite for appeal." No.

JUDGE RIVERA: "Shall never constitute waiver."

CHAIRMAN SOULES: "Shall never constitute waiver of any objection to the Court's charge made in compliance with Rules 272 and 273." Does everybody agree that that is what I just said? We are trying to do that. So for purposes of history, this rule, that is what it is intended to do and we think it does.

Okay. Those in favor of the rewrite

that I have just given on-- let me read it again. This will be what is printed No. 6 but what we have changed to No. 5 paragraph on page 63 to read as follows: "Compliance or noncompliance with Rule 271(1) shall never constitute waiver of any objection to the Court's charge made in compliance with Rules 272 and 273." Those in favor, say aye. Opposed?

Okay. Further discussion on the package of rules from 56 to 72. Seeing that there is no further discussion, the Chair calls for a vote of those in favor of the passage as amended here today by vote of Committee, say aye. Opposed? It will be unanimously recommended to the Supreme Court.

Now I would like to go to the cross appeals rules and work on those.

MR. McMAINS: Luke, I would ask you, if you will-- because we had been working on this last night, and I need to get some photocopying of it done which I can do over lunch. Can we go to the other one?

CHAIRMAN SOULES: No, we can't because Bill has got to go, and I want him here for this. I mean, we've got to do this. What

time is your plane, Bill?

PROF. DORSANEO: 1:00.

CHAIRMAN SOULES: All right. The Chair will turn to pages 101 and proceed there.

PROF. DORSANEO: Mr. Chairman, I'll stay if that would facilitate the business of the Committee.

CHAIRMAN SOULES: Well, this is vitally important that I think you be here for this, so why don't we take it up.

Rusty, how long before your written materials are here?

MR. McMAINS: Oh, no. I mean, I've got it here. I just need to make some photocopies. I'm saying I can do that at lunch.

CHAIRMAN SOULES: Okay. Sarah will go do that now, and we'll get them back in here and lay them down here. But this series of rules-- I wrote a letter to everybody, and what it does is-- there are two kinds of appeals, of course. Limited appeals and what I'm going to call general appeals. And the definition of general appeal for purposes of this is an appeal other than a Rule 48(4) appeal. Every appeal that is not a Rule 48(4) limited appeal is a

general appeal, but that is not the way the rule is written because I can't find any use of the terms "general appeal" or "unlimited appeal" or "complete appeal" or "appeal of the case as a whole." You know, you just don't find them out there. So I have defined it in the rule as appeal other than pursuant to Rule 48(4), but that is awkward to say. An appeal other than a 48(4) is a general appeal for this presentation.

This is cross-- this is perfection of appeal by parties not the first appellant. If the first appellant perfects a 48(4) limited appeal, no one gets any excuse from perfection by virtue of that. And as long as the series of perfecting appellants perfect to-- each perfects a 48(4) limited appeal, no one gets perfection off of that limited appellant.

But the moment the first appellant perfects a general appeal, then this rule operates as follows-- the proposal operates as follows: Second predi-- stop "as follows." That is the first predicate. The second predicate to all of this discussion is that every item filed in an appellate court has to be served on every party to the trial court's

judgment. Even the motion for rehearing at the Supreme Court of Texas, if there were 50 people at trial court judgment, there are only two left, they have to serve everybody. And every time that the clerk does something, gives notice of a judgment, sends a copy of an opinion or whatever, it goes to every party to the trial court's judgment. So every part of the trial court's judgment is given-- either served by other parties or given notice by the clerk on everything that happens on appeal.

Now, when the first-- when an appellant first perfects a general appeal, that is the only perfection of appeal that is necessary for all other parties.

MR. K. FULLER: General appeal? General appeal?

CHAIRMAN SOULES: Once the general appeal has been perfected. Nobody else has to perfect an appeal, period.

How do they get before the appellate court? They get there by any party-- we'll start at the Court of Appeals. One party perfected an appeal. When that party files a brief, any other party can file an opening

brief. There are three types of briefs in here. There is an opening brief, there is a supplemental opening brief and a reply brief.

In a chain that rolls forward, any party can file an opening brief raising points, cross points, or counterpoints within 30 days of the filing of any prior brief. So maybe the fourth brief has now been filed, and that is the first party who has affected me in the trial court's judgment. And I have got 30 days, and I have notice because I have got to be given notice.

But as long as I am in there 30 days, within 30 days of another party's opening brief, I am in the court without regard to whether I am responding to that brief. I could really have just now realized that I was in jeopardy in the first brief, but I don't have to line up 30 days. As long as 30 days never passes without a brief being filed, any party can file a brief-- an opening brief. And thereafter, anybody can file-- and we still have a 50-page briefing limitation. Thereafter, anybody can file reply briefs whenever they want to file them. But all of the total of your

briefing can't exceed 100 pages.

This supplemental opening brief is the other type of brief. That can only be filed with leave of court. And you cannot raise moot points, counterpoints or cross points in a reply brief. You can only raise points, counterpoints, cross points in an opening brief and a supplemental opening brief.

The reason for putting leave of court on the supplemental opening brief is so that you don't get into this situation where a defendant-- a plaintiff has got a verdict and a judgement and he's got three defendants, and they just-- every 30 days, they file a brief and you never get the appellate record closed because they just keep filing briefs and raising new points one at a time. It goes on forever.

So when a party files an opening brief, they've got to do as good a job as they possibly can to make it complete because they are at the mercy of the appellate court to add new points, counterpoints and cross points. And one of the reasons that there should be leniency on that is if you are the second or third brief to be filed and the eighth brief filed raises

something that you didn't see coming, then you would move to counterpoint, cross point or-- in a supplemental opening brief. But that would be with leave of court to deny you that right.

Then that is the way the briefs all get and the points all get to the Court of Appeals. The record is fine-- is complete when 30 days have passed from the last filed opening brief; that is, when all of the points are before the Court that it has to consider. It can grant leave for you to get other points to the Court later, but that is the extent of the points that the Court must consider. And those that have gotten there in that way have those points to the Court without doing anything else to perfect their appeal.

Then the judgment of the Court of Appeals comes down, and you're on motion for rehearing. Any party affected by the judgment of the Court of Appeals can file a motion for rehearing in the Court of Appeals regardless of whether they are previously a party in that court.

Now, what that is for is-- when a Court of Appeals-- we have got notice of all of

these briefs. None of these briefs are raising points that are problematical to my position in the trial court. I'm satisfied. But then we get the opinion of the Court of Appeals, and it decides the case on points that were not raised in the briefs. And for the first time, I realize I'm affected now by the judgment of the Court of Appeals. I never filed a brief before because I didn't think I needed one.

Now what this "affected by the Court of Appeals" means has got to be a case-by-case basis. That is substantively affected, not procedurally affected. You have now been reduced in judgment. You have-- I don't know. Whatever. And cases-- we all know, sometimes cases get decided on points that weren't briefed, so that's the purpose of that.

Then, say that all gets overruled or sustained. If it gets sustained and a new judgment comes down, same process. If that new judgment affects a party, that party can first appear in the appeal.

MR. K. FULLER: Now, this is only on a general appeal?

CHAIRMAN SOULES: This is only on a

general appeal. We're only talking about general appeal, which is most of them.

MR. HATCHELL: 98 percent.

CHAIRMAN SOULES: Yeah, because usually when somebody limits the next guy, generally, you have to have appeal. Then the same thing in the Supreme Court. A party could not file an application for writ of error-- the first application for writ of error that didn't raise-- that didn't file a motion for rehearing. But if the first petition for writ of error raises to the Supreme Court by points, of course, that is going to be served on everybody that was in a trial court that was a party to the trial court's judgment.

If the first brief filed up in the Supreme Court for the first time raises a point that is contrary to my position in the trial court, I can file a brief in the Supreme Court of Texas and raise points, cross points and counterpoints without ever having been a party to the appeal before.

In the same series, 30 days, 30 days, 30 days, until the opening briefs have all been filed and 30 days have passed, then you

have to have leave again to file a supplemental opening brief. You can file a reply brief at any time; one brief is 50 pages, max. Total brief is 100 pages, max, without leaving the Court the same process as the Court of Appeals.

If the Supreme Court decides a case on points is not briefed, a party who has never been a party to the appeal can, for the first time, appear in the Supreme Court if the Supreme Court's judgment affects that party. It can appear on motion for rehearing for the first time in the Supreme Court of Texas and raise points, counterpoints and cross points to protect the judgment that it had in the trial court and never saw it at risk until it read the Supreme Court's opinion.

Now, again, what is affected by the judgment of the Court of Appeals or what is affected by the judgment of the Supreme Court has got to be that case. You can't write a rule that-- you know, that has got to be the Court in deciding whether the party meets the standard of these rules. That is, as affected by the judgment. It has got to look at that case before it and decide whether or not to permit

that person to appear. But there is nothing that precludes the Court jurisdictionally for permitting that party to enter the appeal anywhere that party becomes affected.

Now, that is the scheme that is laid out here. I don't know whether it is a good one or not. The Committee voted that we wanted to make perfection of appeal-- one appeal good for everybody and simplify this. This gives-- it's just wide-open and simple. It has some rules but not very many. And it probably works to cut off no one before that point where that party ought to be involved and know it. But it may not be a very good solution. That is this solution. There may be others. The purpose of it, with a scheme and the way it was drafted, it's open for discussion. Bill Dorsaneo and then Ken.

PROF. DORSANEO: The problem it attempts to solve, I think, is headed really in the right direction. My overall reaction-- and there are a lot of additional things along the way, like changing second motion for rehearing and further motion for rehearing and dealing with other problems that I see that the draft

dealt with in recent cases. There are a lot of really great things here, but my overall reaction is that it is kind of a little bit over-engineered, and I don't know whether I have the ability to deal with it with our time constraint.

Frankly, from a personal standpoint, I know I don't have the ability to deal with it within the time that I have unless I do stay, which I'm willing to do; although, I don't-- it creates personal problems for me. So I thought I ought to speak up since it got put in this part of the process because with my schedule, which I think is-- not to say that it is unfair to me, but I feel pressure.

CHAIRMAN SOULES: Well, the Supreme Court put this problem to us in early 1988. It has been on the table in May two days-- both days. It was on the table in July, and we need to get it done. We have got to get it done. This is the Supreme Court asking us to deal with this problem. This didn't come from someplace else. It came from the Supreme Court. I realize this is the first time that we have had text on the table.

PROF. DORSANEO: I understand that. I'm not being the least bit critical.

CHAIRMAN SOULES: And it should have been here a long time ago. It was requested to be on the table for the May meeting. It was requested to be on the table for the July meeting. It was requested to be on the table two weeks after the July meeting. It has never gotten here. We are going to have to march through this and deal with it as best we can and offer the Supreme Court some solution to its inquiry or we have failed to be responsive to the Supreme Court. We can't do that. Rusty.

MR. McMAINS: Well, the general observation-- and I don't want to preempt Ken or anything, but there are a lot of things addressed in your text that, frankly, we did not perceive to be where the concern of the Supreme Court was. By "we," I mean myself and Mike Hatchell and Austin McCloud, who can't be here, but whom I had a lengthy conversation with yesterday.

Basically, the fix that-- as I understood both from the opinion of the Supreme Court recently on this subject and the charge

with which we were supposed to be trying to do, was to see whether or not we had two different ways to go.

One is that everybody is up when anybody appeals, period. No ability to limit the appeal; or if there is, it is very restrictive to the ones that we had. Or, two, that you have a broader right to limit an appeal, which was why I suggested that we might toying with. We tried that and decided there were too many rules that were likely to be implicated that involved interpretation of the harmless error rule that the Supreme Court promulgated.

The problem that we were trying to address was what to do with the multi-party case, as I understood it, Justice Hecht. Wasn't that one of the basic problems that you were dealing with in the Donworth (phonetic)?

JUDGE HECHT: Yes. Although, the--

MR. McMAINS: If you fix the problem, really even in the context of the present practice in the two-party case-- and the question was in the multi-party case, which also may involve a multi-claim case. So that was the

problem we were attempting to focus on rather than mechanics of presentation of the cross points later on. The only reason I mentioned that is because the mechanics of that, frankly, we were never concerned about in this context on a general rule because the briefing rules are generally liberally construed and aren't where the people were being barred. They were being barred by not having done something early on in the perfection of the appeal, which is what we focused on.

CHAIRMAN SOULES: Which this would completely eliminate.

MR. McMAINS: Well, but it installs a mechanical process in regards to when you come in and when you do this and when you do that. And all I'm saying is that the real question is, should a party that has-- finds out when the brief of the appellant is filed and maybe the brief of the appellee is filed, that he may have some reasonss to be complaining. Then is he entitled to go ahead up without having done anything to prepare for that with regards to the trial court? And that is the problem that we were attempting to address.

I think this problem-- your solution addresses a lot of other issues about the mechanics of briefing and of presenting issues at some course during the appellate process which, frankly, were beyond the parameters of what we were considering.

CHAIRMAN SOULES: Where our discussions got lost and ultimately tabled at these prior meetings was, as we would conceptualize what happens in the Supreme Court when this same person who has been cut off first realizes. And we went on and on with trying to carry this making appeals easy or giving everybody the benefit to carry it on through, and it seemed impossible. It was impossible because we had no text.

But to keep from getting lost on those same edges again, this was engineered to go to each of those points where it seemed impossible to go to and give a party some rights-- give every party rights that gets affected through the entire appellate process. A party is never lost in this-- as this rolls out. Maybe they should be. I don't know. But to keep from coming here today and losing the

chance to respond to the Supreme Court by virtue of the same discussions that we had before that when you get out here, we don't have any answers, we put this work product together, and when you get out there, there is an answer in this work product so that maybe we can advance to conclusion or decide that we-- whatever we decide. Now this has been a part of the discussion. Every time it has been discussed, we carry it out to some point where it couldn't be-- didn't seem to be solvable. Justice Hecht.

JUDGE HECHT: So I can clarify, what I perceive the Court's inquiry to be, it really is to the structural process of appeal. And while I think the Court hopes that Donworth fixes the two-party straight appeal once and for all, obviously, the Court also realizes that it doesn't fix a whole lot of other situations that are not unusual that probably need to be addressed and resolved as simply as possible.

However, I don't think the Court is wed to the Donworth solution to the two-party appeal if by changing the whole structure you could come up with a better system. I don't think there is a conclusion one way or the

other. All the Court was trying to do on Donworth was say "Look, we have a rule, and we said so in Hernandez and we're saying so again. And all of this other problem out here is a problem, but this is not."

Now, of course, if the whole appellate structure were changed to something like the Federal system where if you don't like the judgment, you appeal, and if you do like the judgment, you just sit tight, then that might affect the Donworth-Hernandez limited appeal situation.

Now, this draft has raised a different issue than we have talked about before which is, what about the party who is affected by the appellate court's decision? Has he any recourse in the appellate court? And that is-- that is an issue that I think is worthy of discussion and one which some provision ought to be made for. But the court's concern is the whole thing. And I don't think anybody on the court has-- is wed to one solution or another. I don't think they really care that much except they would like it to be simple and they would like it to be consistent.

As you notice from the opinion in Donworth, there is some trouble left over because of the inconsistency in the way you appeal to the Court of Appeals and the way you appeal to our court. And then there is a little less trouble with the inconsistency or way you appeal to the Federal courts that are also sitting in this state.

It just seems like there ought to be some way of doing this that makes sense, that is easy for lawyers to understand, that gets everybody the maximum amount of justice without tripping them up over little procedural tricks and doesn't require that they are schooled in three or four different ways of doing it. That is the Court's concern.

MR. K. FULLER: Okay. First of all, I don't think that we can, in the time allotted to us, solve the problem to conform our state practice to the Federal practice. I just think there are too many corners to turn to get that done at this time.

Next, I would like to second what I believe Rusty said, and I'm not sure it was him; but my perception of what the problem was as

presented the last time-- and I had to leave early, also. It may have gotten flushed out. But I thought we were concerned with the multi-party appeal, the effect on multi-party appeal.

Ideally, no one would disagree that it would be best to keep it as consistent in the two-party as you can with the multi-party, too. But I think the only way in the time allocated to us that we could conceivably deal with this problem is to try to deal-- first of all, in my opinion, with a two-party appeal, does the-- if one party has an unlimited appeal and a two-party appeal, why should it not protect the second party to come along without having to perfect a second appeal? I'm thoroughly in favor of that; but, to me, the multi-party appeal is a totally different animal that needs to be dealt with separately. And trying to loop them together in one rule, I don't think we have time to fine-tune that today.

CHAIRMAN SOULES: Can you be here next Saturday?

MR. K. FULLER: Well, I don't know; but I'm just telling you--

CHAIRMAN SOULES: We're going to get this done somehow.

MR. K. FULLER: Well, we might get it done; but to put it on a short fuse no matter what the prior sins may be and say you're going to slam-bang it and put it together today and end up with some kind of bastard rule that may or may not work, I don't think that--

CHAIRMAN SOULES: Can you stay here tomorrow?

MR. K. FULLER: Whatever.

CHAIRMAN SOULES: We have got to stay until we get it done.

MR. McMAINS: The problem with--what I'm saying is, we have addressed, and I--that is what Sarah is, hopefully, typing up. A very simple solution is to, in fact, treat the multi-party appeal the same as the two-party appeal and deal with some attended issues in terms of what happens if the appealing party fumbles the ball, which was an aspect of that as well that concerned us. And what happens with the obligations on the multiple parties' file records and the fact that there only needed to be one filed that enters to the benefit of

everybody?

Those are the points that we have dealt with. Those issues are dealable in a single rule if you start with the notion that seemed to be the sense of the Committee the last time that we took a vote, philosophically on that subject, which was that one appeal should mirror the benefit of everybody else who wishes to appeal in the judgment. He may not feel strong enough to start it, but if he is going to be there, he might as well pay attention and go ahead and get it done.

All that involves is the-- in order for those cases, which is also-- well, basically, the expansion of Rule 40 to include four coponents, the first of which is only a slight modification of our existing rule.

And the rest of it brings to mind what happens if the starting party fumbles the ball and to fix the administrative problem. Now, as I say, this doesn't fix the problems about later on because our perception of what the issues were is what the scope of the appeal was going to be from a jurisdictional standpoint at its outset and not at the time you get to the

Court of Appeals. We did not attempt to address issues of somebody waking up in the middle of the appellate court because that is not what Rule 40 is talking about.

CHAIRMAN SOULES: You know, my perception of this is like a business appeal where there may be 25 parties. And they may have issues of commercial law from all over the UCC. And some of them are just altogether independent from others. I'm talking about an appeal that is virtually without limitation of possibilities of what may be brought up or one that is narrower than that. The way this was written, it gets to any of those. It gets from a two-party appeal to an unlimited size-- to an appeal without limit as to parties and size.

MR. BEARD: Well, without ever trying to each the contingency case, whether you're-- you're asking for contribution indemnity. You're the defendant. You have won and that goes upstairs and they reverse it. Now I want contribution indemnity. Is that one of the cases?

CHAIRMAN SOULES: Sure.

MR. BEARD: I don't think we ought

to have contingent appeals. If the trial court does something, we ought to go back downstairs and start over again. Do we have to have an appeal?

MR. HATCHELL: Not in the Court of Appeals, no.

CHAIRMAN SOULES: Well, the way I sense this, we will have another meeting. The question is, do we have it tomorrow, or do we have it next Saturday afternoon and Sunday? Because there are problems here that need to be addressed, and I don't know how we'll do it. Yesterday we were told that there was going to be a draft here, and it was requested to be typed and that copies be provided to the Committee. And we are having to type this work today in session. It is-- I don't know what to-- what approach to take on this. I'm the chair. I have a responsibility to get this work done. There are a lot of questions here.

The questions that are-- I don't want to vote to table it. I don't want to vote to disregard a series of ideas because they are more complicated than dealing with just some of the ideas. If we're going to approach this, I

think we need to approach it as a complete problem. In other words, how do we fix all of these-- we're talking about giving cross appeals or giving appeals rights to parties other than the original appellate on what basis? How does he perfect? Here, he perfects by filing a brief. When? Says when? This does, apparently-- what has been typed speaks to the jurisdictional issue. What is the sense of the Committee? How do we proceed?

MR. DAVIS: Let's get started.

MR. McMAINS: You have got to fix the jurisdictional issue anyway, whatever it is, whatever happens. And that is the threshold.

CHAIRMAN SOULES: And how do you fix it?

MR. McMAINS: Well, the sense of the Committee was last time, as I understood it, unless there is a limitation of appeal as basically would pretty well establish how you do that now, and it has got to be-- it has those two components that it is the severable portion of the judgment and that the notice be filed. And if that doesn't happen, then anybody that is a party to the case has the right to appeal upon

the perfection of the appeal by any other party of the case.

CHAIRMAN SOULES: By doing what, when?

MR. McMAINS: They're not doing anything.

CHAIRMAN SOULES: They have to do something.

MR. McMAINS: They have a right to appeal by way of assertion of cross point in the appellate court. There is no jurisdictional limitation to them, and that is the only argument that there has been anyway.

CHAIRMAN SOULES: They assert their cross points in what, when? In a brief?

MR. McMAINS: Sure.

CHAIRMAN SOULES: Anytime?

MR. BEARD: One party appeals and serves a brief on Defendant A. He can file a cross point against the party who has appealed.

CHAIRMAN SOULES: When?

MR. BEARD: That doesn't give him a right to cross point against 50 other defendants, does it?

CHAIRMAN SOULES: Why not?

MR. BEARD: Well, he ought to have to raise that issue going up. He ought to have to file his brief at the same time if he is going to appeal to all of these people. On cross point, it ought to be against the person who filed that brief.

MR. K. FULLER: See, you have a philosophical difference here that has got to be resolved, it appears to me, before you draft the rule.

CHAIRMAN SOULES: Exactly.

MR. K. FULLER: And some people feel some way and some feel others. I don't know how I feel. I'm still trying to find who I am. But I think this philosophical difference has to be resolved prior to attacking the drafting of a rule.

CHAIRMAN SOULES: What do you see the philosophical difference as being? Can you articulate?

MR. K. FULLER: Well, the philosophical difference is that some people feel like if you are going to appeal, you ought to have to do so from the outset; and others say you ought to be able to pick your time to jump

in the fight. That is the difference.

CHAIRMAN SOULES: All right.

MR. K. FULLER: I don't know the answer to it, but that is what I perceive to be the feeling around this table.

MR. LOW: Why jump into fight until you really get involved?

MR. K. FULLER: I'm not going to argue which is right. I'm just saying that that is the dilemma that-- to me.

CHAIRMAN SOULES: Let's put that to a question. We're going to discuss it. That is the point. He just articulated the philosophical difference. Say it again, Ken. Put it one way and then the another.

MR. K. FULLER: The philosophical difference to me, appears to be, if you are going to seek affirmative relief on appeal, you should do so from the outset. And the other position seems to be that I should be able to pick my time to get in to assert an affirmative position.

JUDGE RIVERA: I thought that we had voted on that.

CHAIRMAN SOULES: Yes. And what was

the vote, Judge?

JUDGE RIVERA: I thought the vote was, you could have any time. You're supposed to get the time limit and somebody was going to reduce it to writing.

MR. DAVIS: If you were not originally affected but only became affected later on--

CHAIRMAN SOULES: That's right.

JUDGE RIVERA: I thought that--

MR. DAVIS: Not just picking a time--

THE REPORTER: Excuse me. Wait a minute. One at a time, please.

CHAIRMAN SOULES: Not just picking a time. That's what the extensive work product was designed to do. I went back and tried to understand the votes of the Committee. I wrote a long letter to all of you which was mailed out about a week ago explaining what this does. And it does what the Committee voted to do last time. It gives a party the right to join in appeal at the time a party should know that it is at risk.

MR. BEARD: Do we have a contingency

appeal like a contribution indemnity case? Do those people have to worry until the Court of Appeals holds against them?

CHAIRMAN SOULES: They have to answer.

MR. BEARD: Defendant A says, "If you rule against me, I want contribution indemnity." Does that bring all of the other people in at that point, or do they have to wait until some court says "You have lost"?

CHAIRMAN SOULES: They would not, under this scheme that I have got here, have to file a brief until the Court of Appeals rules that they are subject to contributional indemnity.

MR. BEARD: But some-- the defendant has got to say, "If you rule against me, I want contribution indemnity." Why wouldn't that bring them in at that point?

CHAIRMAN SOULES: They could file a reply brief or they could file cross points or counterpoints. They could if they wish, but they don't have to unless they are affected by a judgment. If the trial court's judgment denies them-- denies contribution indemnity-- the trial

court judgment denies leave to all parties. If one of the defendants-- and, of course, the plaintiff appeals and one of the defendants says, "If you reverse and grant the plaintiff judgment against me, I want contribution indemnity." Right? That's your--

How does that work now? The party against whom contribution indemnity is sought on appeal does what? First of all, he probably doesn't even know it was appealed because he hasn't even seen copies of the briefs; but now they will if you adopt this. He'll get a copy of the briefs.

Under this scheme, I guess the point that would be responsive to appellee by the nonparty to the appeal is a cross point or counterpoint that would need to be raised at that juncture in an opening brief.

MR. BEARD: That is this contingency appeal.

MR. K. FULLER: Why should a party be treated differently on appeal than they are in the trial court? You know, a defendant doesn't want to be in court, in the trial court; but yet, the rules that we put on them, if you

are served, there is claim against you, you have got to show up and respond and fight this thing. Why should a party be treated any differently on appeal than he is treated in the trial court? I know we voted--

CHAIRMAN SOULES: They're not really mandatory reply briefs. I mean, they are; but they're really not in the appellate process. You don't even have to file a response to a petition for writ of error. You get defaulted if you don't. They just are treated differently somehow. Justice Hecht.

JUDGE HECHT: Well, it seems to me, if you have really crossed the philosophical hurdle of-- at the outset, which we all know is at the outset, and that is, does one party perfecting appeal give the right to any other party to the judgment to be able to come in at some point and state his position which may be opposed to the judgment?

If you can get over that hurdle, then it seems to me that the only two issues left to be decided are: What happens if the party starts to perfect an appeal and he messes up? And both of the suggestions approach that,

but I think the real problem is timing. You don't know that the party that you thought was perfecting appeal has failed to perfect it until it is too late, usually, or until the Court of Appeals rules on a motion to dismiss that, no, they didn't file it on time or they didn't file a timely motion for extension or a motion for extension was denied or whatever. So you are going to have to come to grips, it seems to me, with, does he get extra time? Does some party get extra time to do this or do they get another chance or how does that work?

And then I think Luke is right. The second issue is, we are going to have to say, "Who goes first with"-- "Who gets to brief first and who gets to brief next and how does that work"? You know, this appellate dance, who taps who? If we cross the philosophical-- of course, I think those two issues are pretty thorny issues.

CHAIRMAN SOULES: Well, we voted unanimously last time as a committee to open the appeal to other people based on one perfection. Now, this will not work; and I think it is not a change in the law. If the appeal is not

perfected by anybody, there is no appeal.

JUDGE HECHT: But if somebody files a cost bond and designates the record, moving ahead, and then his client says, "King's X. Call it off. I don't want to do this anymore. I've had a change of heart. I give up." But the other party is sitting there watching the cost bond being filed, the transcript being designated, the statement of facts being ordered and now he says, "Wait a minute. Wait a minute. I still want to appeal. I thought you were going to appeal." Then does he have the opportunity-- he has never filed a cost bond. He has never designated the record. He has never asked for a statement of facts to be transcribed. But now all of a sudden, he wants it if the other guy--

MR. K. FULLER: Well, take it one step further. What if the weight-- "I don't think I want to go ahead" just says-- files a motion to drop the appeal? I mean, you know.

MR. BEARD: I thought we were voting one or the other that effects appeal for everybody. But if that one man who appeals-- as far as I am concerned, if he drops it, he drops

the whole case.

CHAIRMAN SOULES: That's right. That's the way this would work. But Justice Hecht is saying, "Well, there are complexities with that. Do you really mean what you're saying?" And we may mean what we're saying. I mean, if we are going to ride somebody-- anybody can perfect an appeal. This doesn't preclude you from perfecting an appeal. Everybody still can.

MR. K. FULLER: If you're going to gamble, you're--

CHAIRMAN SOULES: But if you're going to gamble and the other guy that you're riding his sled, he goes in the ditch, you're going in the ditch with him.

MR. BEARD: That is what my view of it is. It is perfected; but if he drops it, you're out. That is my view.

CHAIRMAN SOULES: You were riding the sled and it got stuck. Now, you can have your own sled. Mike and then Tom Davis.

MR. HATCHELL: Let me try to narrow the focus based on Justice Hecht's, and one of the difficulties of getting anything that

anybody can shoot at is involved in, I think, what Ken and Justice Hecht and Pat were talking about.

Another philosophical component to all of this is whether or not the concept of the cross appeal involves one of two choices. The cross appealing party really wants to appeal because there is something about that judgment he can't live with, or is it something he would just like to do if somebody else perfects an appeal.

Now, it seems to me that the real rub is right there. I have no problems with the notion that if a party really wants to complain the judgment, he ought to have to do that. And I have no problems with saying, if he is just going to complain just in case somebody else happens to get an appeal up there and it falls flat, he is out the window.

But if we adopt the latter, and that is that the cross appeal is simply "a protective kind of nice thing I would like to do if somebody else would appeal" seems to me like this complex of rules that has been laid before us is like charging an open door with a

battering ram. It is just an absolutely incredible scenario of rules which really isn't very important.

JUDGE HECHT: Very what?

MR. HATCHELL: Very important.

MR. BEARD: Just a philosophy note on--

CHAIRMAN SOULES: Tom Davis had his hand up. Excuse me. I said I would call him.

MR. DAVIS: What I don't understand-- I understand that there are two questions. One, if somebody falls down on the appeal, what happens; and then the second thing, that if you can take advantage of an appeal, how do you do it, when do you do it and so forth.

Do I understand, Luke, that your proposal that you told us about does not address the first issue there as to what happens if somebody falls down on appeal but only addresses the issue of how do you continue the appeal and when do you do it? Am I correct?

CHAIRMAN SOULES: That is correct. And it deliberately does that. It actually does address the party-- both, because it omits any relief to a party whose riding someone else's

perfection which fails. And that was deliberate.

MR. DAVIS: My thought was, you asked on how we proceed. Let's take that next question. And if your proposed rule covers it, fine. Let's look at that-- or if Rusty's does and let's get started on it.

CHAIRMAN SOULES: Okay.

MR. DAVIS: We'll get by that one and then we can get into the next one.

CHAIRMAN SOULES: Let's see if there is a consensus. How many feel that a party relying on another's perfection which fails, fails with that failure, the first party's failure? How many feel that way?

MR. K. FULLER: I'm sorry. I didn't understand the question.

CHAIRMAN SOULES: Okay. This is what we said. If I'm riding your sled and it goes in the ditch, I go in it with you.

MR. K. FULLER: You ought to. If you're on my sled--

CHAIRMAN SOULES: How many are for that? Hold your hands up, please. How many feel contrary, that you ought to have relief?

Six to four that if the original perfector fails, then there just isn't an appeal for anybody else to get the benefit of.

MR. K. FULLER: S. O. L.

CHAIRMAN SOULES: It's S. O. L.

MR. DAVIS: You are taking away their right to participate--

CHAIRMAN SOULES: No. They had the right to perfect independently and did not.

MR. DAVIS: Well, I mean, you have taken away their right to depend on somebody else.

CHAIRMAN SOULES: That's right. That's right.

MR. K. FULLER: That's called lawyering.

PROF. DORSANEO: That, of course, is contrary to what we do in trial court.

JUDGE HECHT: That is not called lawyering. That is called gambling. That is the problem with this, that you ought to either tell people upfront, "If you want to appeal, appeal. If you don't want to appeal, your time is running." Or you ought to tell them that no matter what, if somebody appeals, there is going

to be a way for you to get in the door. But it ought not to be in the event that-- you know, "Here. You paid your money, you takes your chances" and plunk down that change and then all of a sudden it turns out, "Oh, sorry. By a slip-up in appellate rules, you're out the door." That is what ought not to happen.

PROF. DORSANEO: I agree with Justice Hecht. I think I'm going to tell my students, "You either perfect an appeal or you don't perfect an appeal. And you do it by filing this bond." I don't want to tell them that "Maybe you do and maybe you don't, and you'll find out when it is too late whether you should have."

JUDGE HECHT: Under the theory you just voted on, any appellate lawyer is going to get sued for malpractice if he does not file a cost bond, designate a record, or order a statement of facts. If you're going to have that rule anyway, do you really want to make the philosophical decision that you just made? Because you cannot risk the fact that the one guy over here who is charging ahead by paying his money and going forward is not going to

slide off in the ditch.

MR. K. FULLER: If you write the rule that way, you're writing a sandbag rule. You're inviting deceptiveness. I mean, you know, sucker the guy in, reel him in and then drop the appeal. That's sandbagging. So the only way to do it is to do their own thing.

MR. BEARD: Why would you ride anybody else's coattails? If he fails--

CHAIRMAN SOULES: Ray was telling me they were going to close the garage. I was not listening to what was going on so I'm lost. The question that I think is being in focus is how to provide, I guess, some safe harbor for a party who-- should we provide some safe harbor for a party who relies on another's perfection or start to perfect? The misperfection. Justice Hecht, I had thought--

JUDGE HECHT: Let me take another stand and say this: It seems to me that the issue ought to be-- the philosophical issue ought to be that the filing of a cost bond protects everybody else in the appeal. And, of course, at that time you have to file a notice of limitation of appeal at that same time, as I

recall.

And, therefore, if there is some subsequent failure to file records or take some kind of action in a timely manner that somebody else has an opportunity to come in and try to fork around there under some rules; or is it the case that if you don't like the judgment and you won't appeal it, you file your cost bond in a timely manner and then you-- and then everybody worries about the record, the way they worry about the record.

CHAIRMAN SOULES: Okay. And I think that is well put.

JUDGE HECHT: You voted on that last time; but what I was concerned about is, you say, "Well, if one party does it, that lets everybody in the door." And I don't have any philosophical problem with that, except I'm just not sure it is going to be a workable rule. I don't know whether it is or not, but you have still got a couple of issues to face after you do that.

One of them is, what do you do with the guy that stumbles; and, two, what do you do with the brief? Who goes first?

CHAIRMAN SOULES: Tom?

MR. DAVIS: After mature consideration, I might suggest that we vote as to whether we believe that if you want to appeal, you appeal; and if you don't want to appeal, you don't appeal.

MR. K. FULLER: I voted with the prevailing side mistakenly last time, and I call for a vote because I think I voted before I thought what the implications were.

CHAIRMAN SOULES: Okay. But we have a-- we're-- we had a problem where a party couldn't get into an appeal, even though the appeal was perfected. And that was one of our problems. And we--

JUDGE HECHT: For example, in the Supreme Court-- if you want to go to the Supreme Court, you have got to say something. You can't wait on anybody else to say something. If you are not sure whether you want to or not, you can wait for them to say so and then you have got an extra few days to decide. But you can't-- you can't do it like you do in the Court of Appeals, two-party appeals. You can't raise your cross points for the first time.

You have got to file your motion for rehearing, you've got to be on time and you've got to take your steps. That, as I understand it, is generally the procedure in the Federal appellate system.

Now, that is perhaps one way of doing it. Another way of doing it is, if somebody files a cost bond, then everybody knows. The door is open. I can get in. I don't have to file a cost bond, and if-- if he screws up on the record, I'll get a chance to run in there and fix it. But it seems to me like it has got to be one way or the other to start out.

CHAIRMAN SOULES: Okay. I think it is, but it may take some work. I thought the only thing necessary to perfect appeal was to file a cost bond.

MR. K. FULLER: That was the rule the last time I heard.

CHAIRMAN SOULES: That is perfected, so we've got to--

JUDGE HECHT: As to everybody or just to me?

CHAIRMAN SOULES: As to everybody.

We voted on that.

JUST HECHT: Well, I hear some people saying they want to change their vote.

CHAIRMAN SOULES: Well-- we didn't vote on it or we did?

MR. BEARD: No. We voted on that. That perfects.

CHAIRMAN SOULES: We voted on that. Now, that perfects the appeal. Now we're talking about a different problem. That's what I wanted to get to here. Now we're talking about keeping the appeal that has been perfected going. And it wouldn't-- it doesn't take much to write that a party using the 15-day rule doesn't go beyond that and run into R. D. Click who was planning to-- who was in reliance upon the cost bond being filed by the first appellate-- which "perfected" the appeal, literally, coming in and filing for additional time because nobody got the statement of facts on file and nobody got the transcript on file.

And we were believing that the appellant who perfected was going to do this and he didn't and I want some time to do it. But they're going to have to watch that holding of

the appellate process in motion. If they decide, "I'm going to ride Luke's cost bond. He has perfected appeal," they need to also watch to see that I have timely filed a statement of facts and a transcript; and if I don't, then quickly get in there and file a 15-day motion for them to do it.

And all we have got to do is write something that says anybody can file the statement of facts and transcript regardless of whether they are the party that perfected the appeal. Then we have got the record going by anybody that wants to keep it going, and we have one perfection of appeal for everybody. It is fairly easy to write.

Then you go into, "Okay. When does everybody have to get aboard? What do they have to do to get their points and cross points up?" I don't know what the right answer to that is. Here is one. That is, file a brief not later than 30 days after somebody else files an opening brief. Then you let the appellate record develop as it does. And in a complex case, it is really hard to know what the appellate lawyers-- Mike Hatchell, Dorsaneo,

Rusty-- will do with that trial court record. You don't really know sometimes, whenever a cost bond is due, what they're going to do with that trial court record until you see their briefs.

You get to their briefs and say, "My God, did we do this? What is happening to me here? I thought I had a judgment. Now I'm worried about that judgment. I want to file a brief." Or "I thought I didn't have a case. I see I have got a case. I want to file a brief. I don't want to get sued for malpractice for missing a point McConnico caught and got perfected. His client gets out and my client gets stuck." You know?

So all we've got to do, I guess, is go into a little bit earlier than these rules start and fix it so that any party to the trial court's judgment can keep the appeal going under the rules that keep it going after the first party perfection. But everybody can't not file a statement of facts and let that go 15 days too late and then everybody is running to R. D. Click.

There has to be some system, it seems to me, where you just didn't make an

appeal of the case. So this will still work except that I haven't thought-- did not think about-- I'm not trying to sell it. Any system is okay with me, but we need to do something to respond to the Court. But we can, in a few minutes, look at the statement-of-facts rule and the transcript rule and fix that so that any part of the trial court's judgment can file that timely, regardless of whether the other party perfected the appeal.

And isn't that all you've got? You've got perfection of appeal, statement of facts, the transcript and a brief. And that is all it takes, isn't it, to have your points before the Court? So if we have one perfection of appeal and we fix it so the others can get to court on the other requisites, then this will work. I don't know if it should work, but it is not hard to make it work. All right. Hatchell.

MR. HATCHELL: Well, it's very difficult to make it work. It's fine to try to do it, but just bear in mind-- I think Justice Hecht brought this up.

Probably, the first time you know that the record ain't going to be perfected is

when the Court of Appeals writes an opinion dismissing the case and all time limits to do anything are gone. The question then will arise: How much time are you going to give a cross appellee to do that? What if they have been holding this motion to dismiss for six months or so? It's fine to work on these; but bear in mind, it is not going to be a perfect solution by any chance.

CHAIRMAN SOULES: Right. I'm not providing a safety valve. I'm deliberately not providing it, and maybe we should. I would like to hear Judge Hecht, but we're not providing a safety valve for that. Somebody has got to make the appellate predicate-- got to put it into place or it's not--

MR. HATCHELL: The point is, if I have got to monitor that much of the appeal to be a cross appellee, why shouldn't I just be an appellant?

CHAIRMAN SOULES: Well, I don't know why not. I don't know why the people who have lost their rights in the cases didn't perfect an appeal. That is what Mike would do and I hope I would do, but they didn't. And if everybody

did, we wouldn't need to be talking about this probably because-- but then-- and maybe we don't need to be talking about it at all. If we really hash this out today and decide that, basically, what is written--

MR. K. FULLER: Are we dealing--

CHAIRMAN SOULES: -- is as good as we can get it--

MR. K. FULLER: Are we trying to cure a three percent problem?

CHAIRMAN SOULES: It's a small problem.

MR. K. FULLER: Oh. Well, we're killing flies with sledgehammers.

CHAIRMAN SOULES: It may be huge dollars. It may be huge consequences, but it's only in a few appeals. It may be the dominant-- it may be 90 percent of all of the dollars on appeal in a year.

MR. K. FULLER: I would assume that folks with those kinds of dollars have competent counsel that can hire lawyers that can perfect an appeal. You can probably buy one somewhere in this room.

MR. BEARD: Luke, you raised a

question that I didn't think we were disposing of this type of case. We have got two defendants here. We've got a joint and several judgment against them. I decide there is nothing I can appeal on, but he appeals. And when I read his brief for the first time, I say, "Well, hell. He has raised some points. I want to ride with him." I didn't know I could ride with him on that.

CHAIRMAN SOULES: Under this rule, you can. Yes. Under this proposal you definitely can because you get to file an opening brief within 30 days of anybody else's opening brief. And in that brief, you can raise anything that you want to raise.

MR. K. FULLER: Can we bring food in and eat while we do this? It's out there.

CHAIRMAN SOULES: Sure. Let's maybe take 5 minutes and get a sandwich-- 10 minutes for the court reporter.

(Lunch Recess)

CHAIRMAN SOULES: Let's go ahead and talk about, I guess, what we were talking

about before Ray came in, the question of whether-- should everybody have to file a cost bond. If not, then one cost bond is enough to perfect in a general appeal context. Then, can anybody keep the process going? There's some rules writing that will have to be done on that. And if nobody keeps the process going as it is designed to go in terms of deadlines, do we provide some relief to the parties that did not file-- did not perfect in that situation?

Then if we work through that and we have a perfected appeal, by that, we have not only a perfected appeal but complete appeal in terms of cost bonds, statement of facts, transcript, a brief, appellant's brief, all timely filed. Then how do other people get involved through the appellate process to the end if they are permitted? And I guess, does that kind of summarize where we were? We haven't resolved any of that, but that is kind of what we have been working at, those various issues.

Why don't we talk about the two in the middle without regard to whether we are going to pass anything. It is easy, obviously,

to say everybody has got to file a cost bond, everybody has got to perfect an appeal. It's easy for the rules to say that. It gets a little more complicated when seven parties request a statement of facts and seven of the parties request the transcript and then all seven realize that the other parties are requesting it and may pay for it and withdraw their requests. What does a court reporter do then?

You can get into a bird's nest just when you say everybody has to perfect their own appeal, too. But passing that for the moment, saying one party files, perfects an appeal by filing a cost bond, and then that party does not pursue the appeal. We're now in the second question; and that is, how would we maybe assume to fix that so that a party-- another party could pursue the pefected appeal? Any ideas on that? No ideas?

MR. K. FULLER: The only-- if you're going to give them the right to pick up the ball and run with it, you've, obviously, got the right to some kind of notice. The question is, notice from whom to whom of what?

MR. BISHOP: You've also got to provide some new time limits. That gets into a real Pandora's box.

CHAIRMAN SOULES: I think that is a threshold question. Do we permit additional time limits, or do we just say that everybody has to watch the appeal and somebody has got to get it done within the limit of 15 days or it goes in the ditch?

MR. BISHOP: I don't think we ought to provide additional time limits because otherwise you're going to stretch it out potentially forever.

CHAIRMAN SOULES: That's been one of the complaints when we have looked at these rules many times in the past, is that one thing about having finite deadlines is that a party with a judgment finally knows that it has a judgment that is insulated from appeal. That is very important. So it has always been one of the dominant considerations in the drawing of appellate rules. We have to know where we are no longer vulnerable to appeal.

JUDGE HECHT: Well, once again though, if you're not going to extend the time

limits, then is there any real reason not to say that if you want to appeal, you need to take steps to perfect your appeal? That is basically what you're saying to them anyway, that you have got to get his record down there by the day; and if I were relying on you to get it down there and you mess up, then I'm just sunk. So if I have got the independent duty to do that anyway, shouldn't we just go back to this other--

MR. BISHOP: I realize in saying this, I am revisiting the philosophical question. Yes.

JUDGE HECHT: Two more considerations for it. First of all, the part of the filing of the record, it seems to me, would be facilitated if we did away with the transcript and just move the original record from district court to the Court of Appeals. This is, after all, the later part of the 20th century, and I hope-- there should be some hope that the records get from the district court-- district clerk's office in Dallas to the upstairs second floor without getting lost or even to Eastland or Texarkana or as far away as El Paso if the case should get transferred out

there by some chance.

If it couldn't-- I mean, if the record did get lost, hopefully, the parties could reconstitute it. It seems like all we are doing is saddling some party in the case and maybe all of the parties in the case with a Xerox expense, which is just completely unnecessary.

I know in the district clerk's office in Dallas, there are two full-time people who do nothing but Xerox court records and transfer them to the Court of Appeals. And, query, should that expense be incurred or shouldn't we just say, rather than designating, rather than going through that whole process, just bundle up the court record and send it to the Court of Appeals and we are through with that issue forever? We don't have to worry about, "Oh, I have screwed up. I forgot to designate part of this or part of that" or "who did it and I did it" or something. Just send the thing to them.

CHAIRMAN SOULES: Everything on file in the clerk's office goes to the Court?

MR. K. FULLER: But you're more than

likely not going to have--

CHAIRMAN SOULES: So we eliminate this exclusion of briefs and all of that? That is probably a copied thing anyway. Copy cost is a consideration anyway. Everything that is on file in the district clerk's office could go--

JUDGE HECHT: There is rarely a case where there is so much extraneous stuff filed in the trial court's record that the Court of Appeals just doesn't have room for it or is going to object to picking it up or moving it across the room or something like that. Now, there will be some of those. That's true.

MR. K. FULLER: There is-- I only see one problem with that from my perspective. A lot of these family law cases, while they are up on appeal-- maybe they are up on appeal on the property and maybe-- usually, the divorce itself is not appealed, in fact; and it is an appeal on the property.

You have ongoing activities in that trial court. You have children. You're trying to enforce support or access. Or, for that matter, I have seen property on appeal and a brand new motion to modify conservatorship going

down below. That concerns me a little. But I would assume that there could be a lighter (phonetic) version of that of some kind.

JUDGE HECHT: Where you could copy it in some circumstances.

MR. K. FULLER: Yeah.

JUDGE HECHT: The other question I was just visiting with Luke about early on, I sense some of the problem with the manner of perfecting appeal and what the consequences are to lie in the burden of filing the cost bond. It has always struck me as strange that an insurance company should make 40 bucks every time somebody decides to appeal a case. And the parties ought to be able to go ahead and notice their appeals and then make whatever provisions for cost they want to make among themselves.

But the minimal cost bond that is required to be filed, I'm not sure that does anything except waste money and perhaps there ought to be some consideration given to just saying, "Look, I noticed my appeal. I invoked the jurisdiction of the appellate court, and I want to move forward."

It seems to me that the reason for a

cost bond is, we say, "Well, in most cases, the appellate cost is going to be about "X" dollars, so everybody has to put up "X" dollars to play." But I just wonder if that really bears keeping after a while.

MR. McMAINS: Now, the court reporter will be somewhat perturbed if you take away at least a source of collection in the event of default. And maybe the clerk's offices, too; although, if you send the original record up, that may not be a problem.

JUDGE HECHT: I could solve that problem. As far as the court reporter is concerned, I do think some provision ought to be made for paying the court reporter in advance or at least giving the court reporters an opportunity to make whatever arrangements with the party he or she wants to make.

MR. McConnico: In reality, aren't they already doing that?

JUDGE HECHT: Sometimes they get trapped.

MR. McMAINS: But there is authority for proposition. You cannot deny somebody a record because of their failure to advance the

cost and preparation of the statement of facts. And the remedy, actually, for the court reporter for that is by adjustment of the bond if it is going to be for more than that.

And for that matter, there are provisions in the trial court rules already on ruling for costs, requiring people-- to deposit-- (not audible)-- deposition costs. Start eliminating all of the bonding requirements that we have, you have got a lot of other rules to think about.

CHAIRMAN SOULES: On that second element then, what is the consensus? Is there a feeling that even if the perfecting party drops the ball, anybody else has still got to get the record in there within the ordinary times that are prescribed or that we should bill some other times and then maybe other parties could step in at a later time maybe and get the appeal-- keep the appeal going? I haven't said that very well, but...

MR. BEARD: Are you saying, Luke, after the 15 days has passed in which you could ask for an extension is gone, and then you're going to-- it seems like it ought to be gone at

that point.

CHAIRMAN SOULES: Well, if we are going to make everybody monitor the appeal who wants to keep it going, we might as well just require them to perfect and request the transcript, statement of facts, and go ahead and put the-- put it to them to take their own appeal.

MR. BEARD: But in the case where you're not going to appeal unless this other fellow perfects appeal and goes forward, you have not had to do anything before to get your appeal going. If he drops, you're willing to quit. That is the whole-- that's what I thought we were trying to reach. If he quits, I don't care. If you really care about going forward, then you ought to be protected.

MR. BISHOP: I think that is right.

MR. BEARD: At least, that's the way I view it.

MR. BISHOP: I think that's right. I think the situation-- at least that I have had in mind while we have been talking about this-- is the one where you primarily have a plaintiff, a defendant, a third-party defendant. The

plaintiff loses appeals and the defendant doesn't care to go forward against the third-party defendant or on any counterclaims unless the plaintiff goes forward on the appeal.

And I guess the question there is whether or not the defendant should be able to-- without filing anything upfront, still be able to continue and appeal against the third-party defendant or a counterclaim. Then I guess there may be other situations other than that one, but I wonder if you couldn't solve that particular problem by referring to a limited situation involving derivative rights or something like that. Rusty mentioned at one time that he had brought that up. I'm not sure how you would do it, but I think we're getting very complicated and away from that kind of situation in some of the things we're talking about.

JUDGE HECHT: If you're satisfied with judgment, you ought never have to appeal. If you like the judgment the way it is, you ought to stand silent from then on and just-- if the other side lobbies salvo with the judgment, you can just stand up there and do whatever you can to defend it, whether the trial judge

thought of it or not and try to protect judgment. It you are satisfied with the judgment, you ought to be quiet and never have to file anything.

MR. BISHOP: But in this situation, you're satisfied with the judgment. But if it is going to get overturned against you, you want to be able to overturn it on the third-party claim against somebody else. And the question is, within the original time limits, do you have to go forward and file your own appeal against a third-party not knowing what the plaintiff is going to do?

JUDGE HECHT: How is that handled in Federal court, Mike?

MR. HATCHELL: Cause reversed and remanded for entry of judgment in accordance with his opinion. And you, frankly, frequently don't know. What I'm wondering is, it is so difficult to speak of these issues in the abstract, but it seems to me like Rule 81(b)(1)-- or maybe that is not it, but whatever rule says the Court of Appeals renders a judgment the trial court should have rendered takes care of part of that and Turner, Collie

and Braden (phonetic) takes care of another part of it. The third-party action is the one that bothers me.

MR. BISHOP: Well, it seems to me that to the extent that we are reworking the Rules, that that is the one that has some legitmate claim to maybe the defendant should have a right to sit back and wait to see if the appeal is perfected against him before he perfects one against a third-party defendant. But on the other situations, I don't think that most parties should be able to sit back. Because if they want to complain about something and it is not contingent, I guess, to what you have been bringing up, then they ought to have to bring it forward within the original time limits.

CHAIRMAN SOULES: So every party that wants to complain of the judgment should perfect an independent appeal, right? It's own appeal?

MR. BEARD: Again.

CHAIRMAN SOULES: No, he's not talking about gambling. He's talking about--

MR. BEARD: You can only always

gamble on the one party going through with it--

CHAIRMAN SOULES: No, that's not what Doak is saying. Doak is saying that you don't get to brief into it later on unless you're conditional.

Tom, I'll get to you in just a second. Let me ask this. How do you get this situation, though, Doak? You have got plaintiff, defendant, and 10 third-party defendants. You see, this will reach that. This will reach one or 10 or however you want to align the parties. It doesn't make any difference. I'm not saying-- again, I'm not trying to sell it; but what I have tried to do is carry this to the point where because of some denomination, nobody is cut off.

As long as you can define a case to a finite number of parties and you define who they are, you can write a rule. But then whenever you add a factor to that, that rule doesn't work because it is too simple. It only works on a little bit simpler situation.

I don't know whether this is right or not. Maybe all we're doing is going to get to a point where we're just not going to change

anything; but perfecting the appeal, you're now talking about getting the points preserved before the appellate court. You're talking about the whole process, aren't you?

MR. BISHOP: Yes.

CHAIRMAN SOULES: Not just the filing of the cost bond?

MR. BISHOP: That's right, and I'm going beyond that. I'm trying to find some principle by which we can limit what I think we're doing and somehow simplify it. Talk about contingent appeals or some such limiting principle. And I don't know what it is. I haven't gotten a grasp of it. But that's what I'm trying to get at here.

CHAIRMAN SOULES: Tom Davis.

MR. DAVIS: I think we need to talk about this in specifics instead of generalities; and I wonder if we want to make some complicated thing here to cover a situation that may never come up in a blue moon. But I see two different situations, where you don't want to object to the judgment because you like it just the way it is; but, on the other hand, you recognize the possibility that that judgment could get changed

upstairs, in which case, you do have some comments that you would like to make for it. I think that is one situation.

Or the other situation is where you just decide, "Well, I'm not involved in this. This can't ever happen to me, and I'll just sit back and ride it."

JUDGE HECHT: As I think of it, it seems to me that the practice in the Federal system is that if you like the judgment the way it is, you don't have to appeal.

MR. HATCHELL: Right.

JUDGE HECHT: But you can take the position in your appellate papers that if the Court of Appeals is going to do anything to that judgment that affects you that you want them to consider doing this other stuff that will help you out. So that you can wait-- as appellee you can wait until the appellant says, "Judge, we want"-- "Court, we want you to render this judgment over here."

And you can see that if they do that, that is going to affect your rights; and then you can come in at the appellee's point and say, "Well, I don't agree with that. I think

you ought to leave it the way it is. But if you do change it, don't forget about these third-party defendants over here." Then, of course, the third parties come in and say whatever they want to.

MR. BISHOP: So you can raise that in the Federal courts in your cross points?

JUDGE HECHT: I believe that's right.

MR. HATCHELL: It's not a question of raising it. There no such thing as "cross points." There is also no such thing as points in an appellee's brief. And also, contrary to our system, the Federal courts do not write-- the appeals courts don't write the judgments. So it is kind-- it is a real difficult question to answer. Justice Hecht is right.

JUDGE HECHT: You're not cut off from raising it because you didn't appeal?

MR. HATCHELL: That's right.

MR. McMAINS: Isn't this fundamentally-- and maybe attacks both issues, though-- that is, that if the complaint that you make is one that originates in the trial court's judgment, then that is one question of whether

or not you ought to be able to make that complaint without going ahead and perfecting an appeal and/or making further complaint in the trial court about it.

Now, it may be an insignificant complaint, and that is really where you get into the philosophical problem of "It ain't big enough for me to appeal, but if somebody else is going up, then I'll talk about it."

If the complaint originates in the trial court's judgment, then perhaps the obligation, along the lines of one fix, requires that it be appealed. You can protect the other party because just as a matter of general appellate procedure, here if an error originates in the court of appeals, in the modification of the judgment and for the first time a judgment is rendered against you that wasn't there before or affecting you that wasn't there before, there isn't anything in our rules now that requires you to anticipate that at any earlier time. You can raise it when that happens, when the Court of Appeals happens. So the real question we're focusing on is error originating in the judgment, not that is contingent upon that

judgment being different.

MR. BISHOP: Okay. I understand that.

MR. McMAINS: So that is one limiting principle from that standpoint, which I don't think is actually a problem now in terms of the second part. I think the second part is a matter of procedural in a jurisdiction that we already recognize. We do not require you to perfect an appeal from a judgment that ain't there yet. We are pretty strange, but not that strange yet.

The real question is, okay, you have a complaint. It is a legitmate complaint, perhaps. It may be aggravated by what happens in the Court of Appeals as to the other parties. What do you do in the situation where you have never made that complaint up and down the line at this point, and how long can you wait?

None of these really address that from a limiting standpoint because all of it says you make it for the first time when you get up to the appellate court level. Truth and fact, a lot of the things we're concerned about, we may not know that early, that we want to know

about something.

It may actually be, as in the Plastex (phonetic) case, which the Court just wrote on and which this issue came up, which is the one in which there is-- the plaintiff sues two defendants and loses as to one, wins as to one.

The plaintiff doesn't care about the money lost against him because he'll get all of the money from the other one.

Defendant, inconvenient to complain about the other defendant because they are kind of in the same shoes about defect, et cetera; so for him to be complaining about having a loss on the plaintiff's issue is a little bit-- in a contribution context, is inconvenient to his position on appeal that there isn't enough evidence to hit me either. Then all of a sudden the Court of Appeals says to the plaintiff, "Okay. You go back. We're going to reverse this to you." Then all of a sudden, the plaintiff sits there and says, "Well, wait a minute. I want everybody back." And then they say, "Too late as to the other defendant."

"Well, I would like him back too."

"Too late. You should have said something earlier." Now, that is one that we have got there that is-- which the Court, with all due respect, merely said that he had not presented the issue. It didn't say what he didn't do or when he didn't do it. It just said it was too late. Whatever he did was too late.

I can't tell from the opinion what it was that he didn't do that the Court thought that he had. But he didn't start in the trial court, and that sounded like what the Court was saying. But you didn't use the magic words. You just said it didn't appeal as to these grounds rather than it didn't perfect an appeal.

JUDGE HECHT: Which-- my mind is wandering.

CHAIRMAN SOULES: Plastex.

JUDGE HECHT: Oh, the Plastex case.

MR. McMAINS: Yeah. The Plastex. You had said they didn't appeal that issue. You didn't say what "didn't appeal" means. I mean, whether he dropped the ball after the bond or whatever.

JUDGE HECHT: I thought we were worrying about whether a defect was required in

a brief warranty case context, and it turns out we were arguing about something else. If I were to tell you that we focused on that and made an intelligent decision, I would be exaggerating.

MR. McMAINS: But to say that it skated through and nobody caught it would be safe, right?

MR. BISHOP: That raises another situation than the one I was thinking of where you have got a pure indemnity. There, you have got, for example, a winning defendant and a losing defendant and the winning defendant doesn't want to appeal against anybody unless somebody appeals as to him. Then he may want to appeal his cross claim against the losing defendant. But if he doesn't do it in the original time limits that we have now, he has lost it. Am I right?

MR. McMAINS: (Nod affirmative.) Conceiveably. It depends-- I mean, I don't know what Plastex stands for in terms of where the default occurred. It may well be that they never raised the issue in motion for rehearing either. I just honestly can't tell from the opinion.

MR. HATCHELL: Or what is the basis from which it is lost.

MR. McMAINS: That's right. I mean, it just says he didn't appeal on that issue, and it didn't say-- it is not clear to me where it is that he didn't. I mean, it is obvious that he didn't file a bond.

JUDGE HECHT: Even though I would like to, I can't disspell that. It may not be--

MR. McMAINS: I understand. I understand.

MR. BISHOP: Do we not have any provisions contingent of this? Isn't that what we're really talking about?

MR. HATCHELL: We don't have-- only in the Supreme Court level do we have that. We have a conditional application for writ, of course. I have signed and signed conditional points as appellant, but there is no--

CHAIRMAN SOULES: Well, we have talked about this. How does the Committee feel about extending some sort of time relief to a party who has relied on different parties' perfect of appeal when the different party, the first appealer (sic), doesn't finish getting the

record to the Court-- to the appellate court?

MR. DAVIS: Is that different from what they have under the 15-day rule?

CHAIRMAN SOULES: Yes. Something in addition to that. How many favor giving the other parties something in addition to the 15 days available to the original party? How many favor giving additional time or additional relief for that? How many think there should be no additional time or relief for that? Everybody that is voting is saying no additional time to complete the appellate record.

How many feel that the other parties should be able to complete the appellate record even though they did not file a cost bond?

PROF. CARLSON: Within--

CHAIRMAN SOULES: Within the time period that is provided for the original perfecting party to do so. How many feel that the other parties should not have that right? That's-- everybody that voted said no additional time, but another party should be permitted-- and I guess that is the law now, isn't it, Rusty?

MR. K. FULLER: You figured that out

real quick.

CHAIRMAN SOULES: I guess.

MR. K. FULLER: I think it is the law, too, Luke.

MR. McMAINS: It depends on what the default is. The only problem is the bond. And it is not my view of the law now, necessarily, that mere filing of a bond, even without a notice, adheres to the benefit of the other parties.

JUDGE HECHT: What I hear you saying is, if "A" files a cost bond but does not file a record, "B" can file a record as long as he does so within the same period of time that "A" had and raise any point he wants to on appeal?

CHAIRMAN SOULES: Right. Is that--

MR. K. FULLER: That's what I intended to vote yes on.

CHAIRMAN SOULES: -- what we are intending to say to Judge Hecht and the Court, that that is our position? All in favor, hold up your hands.

MR. DAVIS: If that's our position today--

CHAIRMAN SOULES: All opposed to

that, hold your hands up. That's a vote of about eight to one, I guess. So that takes care of two middle points, doesn't it? Somebody defaults and somebody else can fix it but no additional time is permitted.

Now then, somebody does manage to get some-- maybe "A" files a cost bond, "B" requests a statement of facts, "C" goes over and gets a statement of facts and files it, "D" requested the transcript and "E" goes over and gets a transcript and files it. But when you look at when respective parts of the appellate record get filed, they are all there on time.

So now it is briefing time, and "A" through "E" and maybe "F" through "Z" can file a brief raising anything they want to raise if they were parties to the trial court's judgment. I mean, is that the next-- is that the next logical progression of this or not?

MR. K. FULLER: It looks to me like the first one to file a brief is the appellant.

MR. HATCHELL: Yeah, except he is now out of the picture, you see.

CHAIRMAN SOULES: Somebody has to get a brief in there within the period and then

what? Do we--

MR. McMAINS: Everybody is waiting to cross point.

CHAIRMAN SOULES: Does this, then, set in motion what I call a daisy chain, for lack of some better descriptive word, where each person recognizing some appellate jeopardy can, within a finite period of time, file its own brief if they were a party to the trial court's judgment? That is-- I'm trying to get-- we have the record on file, "A" through "E."

MR. BISHOP: If you've got 15 defendants, does this mean that they could each, theoretically, have 30 days to--

CHAIRMAN SOULES: Yes. Or 10 days or 5 days or one day, or do we want to say they have all got to-- anybody that wants to file a brief has to file a brief within a certain time? We have talked about everybody-- for serving a brief on everybody of the trial court's judgment so that they have some notice of whether or not they are in jeopardy by your brief. So that doesn't help anything if the party that gets your brief had to have a brief on file at the time you filed your brief because it is nice to

know, but it ain't very helpful, you know.

MR. BEARD: Luke, can we make everybody file within the time if they have a complaint about that judgment? If they want to cross point, they can respond to the other; but if they have a complaint about the judgment as a stand, they have to file within the time. That would eliminate all of that. Then you just file your cross points if you have got somebody filing a brief that is raising a question.

CHAIRMAN SOULES: Sure. We can write a rule that says that. But what about the party who-- McConnico is a hell of a lot smarter than me and he sees the error and I don't and we're co-defendants and he files. Am I out, or do I get to file a brief within 30 days of his to raise the same point so that my defendant has the same protections on appeal that he got his defendant?

MR. BEARD: I haven't reached a conclusion on this.

CHAIRMAN SOULES: Now we're really getting down to what this is sort of about. I don't know that we're ever going to get it, but we'll take it a step at a time and try and

decide what will happen, whether we're going to liberalize the entry into the appellate process and to what extent. We said we're going to liberalize by letting anybody file, but we're not going to liberalize by giving any more time. That would be our view.

Now, this scheme that I have, it doesn't identify any class of briefers. Everybody is the same, and they all get 30 days from each other. Or it could be 10 days. It makes no difference to me. But the reason that I had trouble with that is-- again, I'm not trying to sell it. I'm just trying to give you the thought processes. I'm not sure that we can always say who is a cross appellant and who is an appellant, what is really a cross point and what is really a main point. I mean, those are some pretty sophisticated issues to decide sometimes. That's why a lot of people go ahead and perfect their appeal because they don't know what the hell they've got.

And if we're trying to put a person who doesn't know what the hell they've got in a position of doing something about it when they realize it, and rather than putting a cautious

person who doesn't know what the hell he has got to perfecting an appeal right out of the gate, you know, then we ought to say that. Or we ought to tell them, "No. You don't know what you've got. You better perfect your"-- which is what we have got right now. So we don't need to change anything to tell anybody that if they feel like they have got some risk, they better perfect an appeal because that is the only way to be completely in safe harbor.

MR. K. FULLER: What you are struggling with now, though, is the line-up that you may-- how you start the daisy chain?

CHAIRMAN SOULES: Yeah. Just somebody starts it. I don't care whether you call them appellee, appellant, cross appellant, counter appellant.

MR. K. FULLER: Sounds to me like the first one to file--

CHAIRMAN SOULES: I guess the first one to file a brief would be the appellant under what we are talking about because the guy that files the cost bond, he may not even be involved until he decides to file a brief out there later. He files a cost bond-- a filed cost bond

and quits. But in the future, he can still file a brief if B, C, D and E did their thing to get the record up there and somebody files a brief and he is not 30 days past that or some time line. This is really what we are talking about, how this operates. It may be a bad idea, but what is the census of-- the sense of the Committee on whether that is a bad or good idea?

MR. BEARD: Luke, let me ask you this. The question of the case where you have got two defendants, and one doesn't recognize he has got grounds for appeal. Couldn't we just expand the carried party? You know, we have got all kinds of cases where one party doesn't appeal, and the Court reverses as to all parties.

CHAIRMAN SOULES: Like Plastex.

MR. BEARD: They're not-- I don't know.

CHAIRMAN SOULES: See? And that is what is wrong with the cases. You try to reconcile them. And I don't spend near as much time as Rusty and Mike trying to reconcile cases; but I do know that-- I don't think there are as many answers as there are questions about

this. Am I right, Mike?

MR. HATCHELL: That's right. It's the problem we have.

CHAIRMAN SOULES: So do we want a simple way to let parties get in under-- nonetheless, under a finite time period? That is the reason for the 30 days or some number of days. You can't let the appeal expand without time limit, at least. You may let it expand without predicate and without issue limitations but at some point the record has to be closed and the Court has to decide the case. Tom.

MR. DAVIS: Without being completely facetious, I suggest we reply to the Supreme Court that we think this is a very interesting question, one that has lots of aspects to it; and we suggest that they decide it on a case-by-case basis. That's what they're paid to do.

CHAIRMAN SOULES: You want us to certify their question back? Is that it?

MR. DAVIS: I think that's about where we are.

MR. BISHOP: Seriously, the more we get into it, it seems that there are more and

more complications. And we're going to have to write a rule if we do this that is going to be so complicated; and, theoretically, at least, allow tremendous time before you know who is in on appeal and who isn't in on appeal. I am more inclined now to go back to where we were and simply to say that to simplify things, everyone ought to have to file within the original time periods.

MR. HATCHELL: I think Justice Hecht really pointed us down the road, and I know he knows he was doing this, heading us down the Federal system. Because I think part of your problem, Luke, is that you're worried about what happens when everybody gets in the appellate court and suddenly it dawns on them, "I ought to be appealing on this."

I don't have a lot of sympathy for those people who don't know in trial court what their problems are. So if we back it back down, just like you do in the Federal system, and say you have at least got to file a notice of appeal-- you know, let everybody know "I'm coming," and if you want to give a contingency-type thing where when "A" files a

notice, I have 10 more days, then I can file one and make everybody commit at that point. In the Federal system, these just aren't issues. The briefing things just fall out just naturally. Everybody agrees to a briefing schedule; and, you know, down the road you go.

CHAIRMAN SOULES: Suppose there are 5 parties to the trial court and we get to "E" and everything is filed and so we have five participants and somebody files a brief. "C" files a brief, so "C" is the appellant if we say that. All right? From that day forward, you have got four 30-day periods in which people have to file an opening brief. That's 120 days. So in 120 days, that record is closed and ready to be decided. But reply briefs can come on.

When you look at this, it is uncomplicated in the sense that it doesn't make any difference what kind of party it is. We don't have to worry about what kind of party we are because no matter what kind of party we are, we can file a brief within 30 days of the last brief filed by somebody else. And I guess within 15 days of that because of the 15-day escape valve. So theoretically, you can have

four 45-day periods. So you could have-- what is that-- 180 days before the briefing stops, but there is only one opening brief that has got to be filed.

MR. BISHOP: If you have 30 defendants, then--

CHAIRMAN SOULES: If you have 30, then you have 30. Right.

JUDGE HECHT: Could we go back to something that Bill Dorsaneo said earlier? I think there is much virtue in being able to know at the very beginning what my responsibilities and what my risks are going to be. And if you say, to be an appellant in this case, if you-- on any issue about the judgment that you don't like as it is signed by the trial court, if there is some part of that judgment that you don't like, you have to invoke the trial court jurisdiction by filing a cost bond or notice of appeal or whatever the procedure is by "X" date, so many days after the judgment is signed.

If anybody else does it and you have a situation where, for example, plaintiff wins everything he is asking for, but for some reason the district court awards cost against him, you

know, he takes the judgment and pays the costs. But if the defendant is going to appeal, he would just as soon not have to pay the cost. Then you have a circumstance that if any party does invoke the Court's jurisdiction at some point, another party has a certain short amount of time to do likewise.

At that point, the people that did that are appellants. They each have the independent responsibility to see that the record has got to the appellate court. The appellees have no responsibility. They don't have to worry about it. They don't have to lie behind the law and say I would really like to raise a couple of points in my brief, but I will just wait and see if they get the record there and I won't have to scramble around at the end. They don't have to go first. They don't get to go first. Whoever were the appellants, they have to go first. Whoever are the appellees, they have to go next. It kind of sorts itself out. That is one scheme which has some virtue to it.

The other one which you point out is, if anybody can invoke the jurisdiction, then

somebody-- the Rules or something is going to have to decide at some point, these people have to go first, these people have to go next, and these people have to go after that in order to set some order in the presentation of the issues. Because, as Rusty says, I'm going to want to go second or third or fourth. I don't want to go first because then I just may file a supplemental brief. As soon as I see what everybody else says, it doesn't make a difference how smart I am or how smart I think I am, I'm going to figure out something of what they say that I wish I would have put in my brief and I may want to do that.

MR. DAVIS: Your situation assumes that there may be something about the trial court's judgment that they want to complain about. Suppose there isn't anything about the trial court's judgment as it now stands? Then they could raise any point that they want to complain about; but, obviously, it could be changed. Do they have to present that?

JUDGE HECHT: No. Then they can-- you can raise-- as I understand the Federal rule, you can raise anything in the appellate

court that you want to raise, whether the trial court thought of it or not, in defense of the trial court's judgment. And if the Court of Appeals is going to take a position that is different from the trial court that all of a sudden impacts you on a way that you couldn't have anticipated, you can argue about that and defend against that.

MR. DAVIS: Even if you could anticipate it, you shouldn't have the burden to go on with--

JUDGE HECHT: That's right. I misstated. Right. Yeah. Even if you couldn't anticipate it.

CHAIRMAN SOULES: What do we do with all of this? Judge, what do you suggest we do with all of this to serve the Court?

JUDGE HECHT: I tell you, Luke, there are just so many pretty deep philosophical issues here. As I was thinking earlier, I believe this Committee could reach a consensus on any one of two or three approaches to the problem, which we're probably solving.

When you are talking about changes of this magnitude, the Supreme Court is not

going to-- I would imagine that they would adopt any change that you recommended on a very deeply divided vote. If the vote were six to three, and only half the members were present-- and you're talking about these kind of changes in the appellate system-- I think they're just not going to do that. Even if it was seven to two, I just doubt that seriously they would wade into that kind of swamp with no more assurance than seven out of 36 members of this Committee think it is a good idea. That's just not enough, I don't think.

Maybe the best thing-- now that we have sort of outlined the parameters of the problem, maybe the best thing to do is, at one of the early conferences in September, present an outline to the Court of where we are on this, what the various choices are, how two or three systems could operate and see if they would want to pick, if they have a preference.

If they don't have a preference, if they want to send it back to you, if they just want to leave it the way it is-- maybe it is time for some feedback from the Court. And I, frankly, don't know-- the only consistent theme

I hear from the other judges that I don't think there is any disagreement about is that it ought to be simple and it ought to make the most-- it ought to be inexpensive and it ought to be easiest for somebody to take a substantive position without tripping over his feet if he is not the most skillful appellate craftsman in the world. I think that is the consistent voice I hear from the Court. Other than that, I don't hear it strong. So perhaps I should carry back this. We have got a record made of it. We can look at the record of it and see what they think.

CHAIRMAN SOULES: Okay. Well, by way of summary then and listening, if you will-- and help me get this right-- we believe that there should be only one party who is required to perfect the appeal by filing either a cost bond or notice of appeal or whatever and maybe the right paper; and right now, it's a cost bond.

Thereafter, any party of the trial Court's judgment or a series of parties should be able to carry the appeal to the point where the record is filed and somebody has got a brief

on file. That that all needs to be done under the present timing. Even though it can be done by multiple parties, serious parties' time limits should not be changed to grant additional relief because some parties were relying on another who stumbled. That is just-- they all stumble together if that occurs.

MR. DAVIS: Under your time period, you have got 15 days to come in and get an extension of time and you could extend it for six months if the Court wanted to?

CHAIRMAN SOULES: Sure. The way it-- the time as they function--

MR. DAVIS: If you want time, you have got to ask for more time within 15 days?

CHAIRMAN SOULES: Right. That's the intent of this. Then after that, how the criteria on how-- we are all agreed up to that point; is that right? Okay. We're all agreed to that point. After that, how it is that multiple parties get their points before the Court, we don't have any consensus on that. The vehicle or the classes of parties or the times. Is that fairly stated? Tom.

MR. DAVIS: It just occurred to me,

if some parties that didn't file a bond are going to have to come in within 15 days, and-- say somebody falls down on the appeal. Somebody that doesn't file a bond within 15 days has to come in and ask the Court of Appeals for an extension of time to get it filed. Why can't they at that same time be required to ask the court to establish a brief in sequence as to when the brief should be filed from those parties that want this extension of time?

CHAIRMAN SOULES: Well, that is a way. Really, what we're talking about is exactly there. I mean, we have now got the cost bond on file, the record-- statement of facts on file, the transcripts have been filed-- either the transcript or the original record has been filed and anybody can brief that was a party to the trial court's judgment at that point. But we have not resolved-- we don't have a consensus on how to define the parties into maybe classes of how they might brief or the points or the sequence that they would be briefing in. Is that fairly stated? Okay. Steve nodded, so I guess that is fairly stated.

Let's spend about ten minutes maybe,

everybody kind of saying what they think would be a workable sequence for all of these parties from trial court's judgment that are now entitled to assert points. What are the mechanics of their doing so? Tom Davis.

MR. DAVIS: My suggestion might be that on a case-by-case basis when these parties are granted additional time to file the record, part of the relief they need to ask for is to establish a briefing schedule and let the appellate court on a case-by-case basis decide who should go first and how many days they should have.

CHAIRMAN SOULES: The only problem I see with that, is suppose you have got Party Y who hasn't done anything yet and who hasn't even come to court and the Court doesn't even know that he is supposed to have a briefing schedule because he hasn't said anything.

MR. DAVIS: I would say maybe he is out of luck.

CHAIRMAN SOULES: Okay. That is one solution. Rusty, do you have a suggestion on how that might work?

MR. McMAINS: I think that-- again,

I come back to the distinction that was made whether you're-- if your complaint is one originating from the trial court's judgment, I really think that if you intend to appeal, you should be treated as an appellant. You should have the obligation as the appellant to file that brief to address any complaints you have to the trial court's judgment, period. And then everybody else is treated as an appellee. It may well be that other appellants will also be treated as appellees, but we have that situation now.

The problem is what you call multiple appellants. But everybody lists what party they represent anyway, appellant so-and-so and whatever. But that eliminates this 30, 30, 30-- you know, a bunch of expanded time periods.

CHAIRMAN SOULES: So you would just keep the same briefing schedule as the rule now provides?

MR. McMAINS: Keep the same briefing schedules except perhaps you would insert one thing that says that in response to one of the briefs if something comes up where a complaint is made that somehow is against you that, you

know, was not in any way related to your complaints in your original briefing, that you have a right to respond to that. But that is-- that only gives everybody, basically, one chance to see everybody's opening shot, if there are any.

MR. DAVIS: You are assuming someone goes on with the appeal. What we're talking about is when somebody is dropping the ball on appeal. Aren't you drawing the distinction-- I agree with you, that if they want to object about that judgment, they maybe should perfect appeal; but we're also talking about situations where they don't want to object about the trial court's judgment yet.

MR. McMAINS: I understand that, but I think if 30 days is past-- for instance, after the perfection of appeal-- and nobody else has filed a brief, then you better move for extension to file your brief if you have a complaint as to the trial court if you want to carry it forward. Now, if you're willing to go home at that point, then maybe you don't want to appeal--

CHAIRMAN SOULES: Doak, how do you

think a briefing schedule ought to work after we have got the record all there?

MR. BISHOP: Well, I tend to agree with Rusty. I am more inclined to maintain the briefing schedule we have got in the rules now.

MR. McMAINS: And that's the way to argue the problems. We keep using appellant and appellee everywhere and we keep cutting down the argument, expanding the number of people that are a certain animal. We have got all other places to deal with, too, if we carry it out too far.

CHAIRMAN SOULES: Judge Peeples, do you have a suggestion?

JUDGE PEEPLES: I think I like Rusty's suggestion, but I would like to hear Mike Hatchell's. He does a lot of this, too.

CHAIRMAN SOULES: All right. Mike.

MR. HATCHELL: What factual scenario are we talking about now? Are we talking about where there has been a fumble or--

CHAIRMAN SOULES: No. We're past that. If there has been a fumble, it is over. We have resolved that that is where we want the Court to stay. But there wasn't a fumble.

Somebody always managed-- it was a rugby. Somebody always managed to keep the ball in play. This made-- till they got it scored. So we have got the record up to the Court and we're now to the briefing schedule. How should it work?

MR. HATCHELL: Then I think-- and we are abandoning the concept that an appellee cannot respond by cross points?

CHAIRMAN SOULES: No. We haven't abandoned anything. We are asking for your conception of how-- a good way for this to work in its entirety without any limitations.

MR. HATCHELL: Personally, I'm with Doak and Rusty as a preference. I guess that is just that I don't like our present practice. But if you go to that practice, it seems to me like you also back down and say that the party who files that initial brief has named himself as an appellant somewhere down in the trial court by an appeal bond or notice of appeal.

And, also, the Federal rules are very good about allowing the parties themselves to agree to a briefing schedule and the courts approve them in a minute. So that would answer

Tom's situation as well, when you have multiple appellants and multiple appellees. They are very liberal about allowing the parties to get together and agree "You file your brief. I'll file my brief."

CHAIRMAN SOULES: But the parties haven't agreed.

MR. HATCHELL: See, we don't even have any rules relative to reply briefs or responses to cross appeals.

CHAIRMAN SOULES: But the parties do not agree. They can't agree. What do you suggest is the--

MR. HATCHELL: Then the standard Rules as they now exist, but probably with the addition of some rules relative to the filing and reply rules.

CHAIRMAN SOULES: Reply briefs including cross points?

MR. HATCHELL: Well, no, you don't have those anymore under my theory.

CHAIRMAN SOULES: You don't have what now?

MR. HATCHELL: You don't have cross points anymore.

CHAIRMAN SOULES: What takes the place of the cross points?

MR. HATCHELL: Because everybody is an appellant--

CHAIRMAN SOULES: Everybody is an appellant?

MR. HATCHELL: -- who is complaining of the judgment, as Rusty pointed out.

MR. DAVIS: Cross point.

CHAIRMAN SOULES: Okay. Then what happens, then, when you don't complain about a trial court judgment, but the Court-- you don't even participate in the Court of Appeals, but then the Court of Appeals does something that is harmful to you?

MR. HATCHELL: File a motion for rehearing.

CHAIRMAN SOULES: You've got the right to do that?

MR. HATCHELL: Uh-huh. Certainly. Everybody is either an appellant or an appellee. They are never, in my opinion, out of the appeal.

CHAIRMAN SOULES: Every party of the trial court's judgment is before the Court?

MR. HATCHELL: Yeah.

CHAIRMAN SOULES: Does everybody agree with that? I guess that's right. Buddy? Speak up.

MR. LOW: In Federal court, just dropping the ball, they have-- as Mike is aware and everybody else here-- they have another rule, it's pretty liberal. If you mess up on your notice, which is perfection of appeal, the trial court has-- for excusable neglect or so forth, they are pretty liberal on that. If you drop the ball in Federal court, there is a rule that will help pick it up for you.

CHAIRMAN SOULES: Elaine, what is your view?

PROF. CARLSON: I agree with Rusty's idea, but I also like your idea of making sure-- I guess, that is really covered now under the rules-- but making sure that all parties to the trial court judgment have notice of what is going on throughout the appeal. I think that is very important for terms of the process working.

And I think it might be well to put in something on the reply side of this, such as "unless the parties agree among themselves" or

"unless the appellate court orders to the contrary, then there is "X" number of days to respond." Because what I hear here is that people want a definitive period of time which they know they have to respond but they also want-- the rule could be clearer. The appellate court and perhaps the recent idea of the parties setting their own schedule to vary that definitive time period so that parties do not lose their position by virtue of an arbitrary passage of days to reply.

CHAIRMAN SOULES: Did we get it fixed-- I guess we did last time, that everybody to the trial court gets served with everything. Is that-- huh?

MR. K. FULLER: We voted on that today, didn't we?

CHAIRMAN SOULES: Not yet.

MR. K. FULLER: Sometime or other, we decided that.

CHAIRMAN SOULES: That's what I'm trying to remember. I know we decided to do that. Yes, it is. It's in TRAP 46 on page 25. So that part it, we have taken care of; and the rest-- well, that is just the bond.

MR. K. FULLER: We had that somewhere, Luke.

CHAIRMAN SOULES: No. All we did was-- we did the bond, but we-- did we do the briefs and the judgments, too?

MR. K. FULLER: I think we did.

CHAIRMAN SOULES: Sarah said we didn't. I believe we didn't. Where is that going to show up? That's not in this series of rules here. Let's see. Okay. Help me now get through at least these-- giving notice to everybody because we're in agreement on that. Look at page 102. It's No. 5, but it would be staying 4 because we're not going to do the rest of these changes. But 4, where it says "Notice of Limitation of Appeal... to be served on all parties to the trial court's final judgment," no opposition to that? Okay. That will be recommended. Basically, what we're talking about now is, everybody gets notice of what is going on in the appellate court anyway.

Now, on page 106, 74a is just a notice ruling. Is there any opposition to that? Okay. That will be unanimously recommended.

JUDGE PEEPLES: Are we through with

cross appeals?

CHAIRMAN SOULES: Did you have something you wanted to add to that, Judge?

JUDGE PEEPLES: I'm unclear about something. Rusty, Subparagraph C in this proposal of yours, are you backing away from that, or do you still agree with that, that the appellee, who didn't independently perfect, can complain by cross point in his brief?

MR. McMAINS: I thought we kind of sort of chucked this to the Court as to what exact format they were going to be doing. He was just asking how we designate people. All I'm-- he was just asking my preference on how that designation is handled. I am kind of halfway inclined-- if that is what you-- if you go through a process where anybody can appeal and you don't know who is doing it, that if there is a complaint as to the trial court's judgment, you ought to be required to be appellant.

JUDGE PEEPLES: In a straight, two-party appeal?

MR. McMAINS: I don't care. I mean, I think--

JUDGE PEEPLES: The appellee, if he didn't--

MR. McMAINS: I think it should be the same way for everybody, however many people there are. And that is-- you have to back away from the Donworth if you want to make it consistent for the two-party and multi-party, and you're trying to figure out how to do this by giving everybody the right to do it; but the question is, to do what? And you start redirecting what a cross point is. I'm not saying I want to do that. I'm just saying, if we do that--

CHAIRMAN SOULES: Are you suggesting, Judge, that you want to make some move to adopt some of Rusty's--

JUDGE PEEPLES: No, I don't. I didn't understand Rusty saying that.

CHAIRMAN SOULES: I'd be pleased to entertain that if we want to do it.

JUDGE PEEPLES: I don't think I agree with that, but it's not a big issue.

MR. DAVIS: I think I found a correction you need to make in--

CHAIRMAN SOULES: In which one, Tom?

MR. DAVIS: Page 106 where you say that you want a complete list of the names and addresses of all of the parties and so forth. And then over here on page 107, when you exclude the pages that are not counted within your 50 limitation, I don't think you include that list. It could take up-- certainly, it's going to take up a page, maybe take up a couple of pages listing them. Am I correct over there, that that is not included with the exclusions?

MR. McMAINS: Those changes are not proposed at this juncture.

MR. DAVIS: Okay.

CHAIRMAN SOULES: What Tom wants to do in (h), in the first sentence, is add the list of names and addresses of parties.

MR. DAVIS: Well, where you have underlined it, it says "The total pages of briefing by a party"--

CHAIRMAN SOULES: That's not going to pass. But the sentence above is the existing rule, and if the Committee wants to exclude that list as such--

MR. McMAINS: Yeah, I think that is right. We should be excluding that.

CHAIRMAN SOULES: Okay. We'll do that. We will write that up that the length of briefs under 74(h) will omit this list of addresses-- list of parties and addresses. No opposition? That is unanimously recommended.

Okay. The next one I see this is in 91 where it says that the clerk-- wait a minute. G-4-- what is this? It would be "q." We're going to add a "q" on page 110. All briefs had to be served on all parties to the trial court's judgment. Any opposition to that? That will be unanimously recommended. What rule number is that? 74(q)?

And then 91, the clerk is supposed to notify all parties saying essentially the same thing, parties to the trial court's judgment. Any opposition to that? That is recommended to the Court, then, unanimously.

And then go back to 112, "Further motion"-- well, let's see. Do we want to call this-- change this to Further Motion for Rehearing rather than Second, Mike? Somebody mentioned that that was a good idea earlier. All it does is change a name.

MR. HATCHELL: Where are we?

CHAIRMAN SOULES: TRAP 100, page 112, 100(d). That is just the top-- the thing I'm having is just to give notice; but should we also change the name from Second to Further Motion?

MR. BISHIOP: I think that would be a good idea.

MR. HATCHELL: Probably. It's certainly getting that way in all of the courts.

CHAIRMAN SOULES: Okay.

JUDGE RIVERA: In the middle of the road, you call it "Further Motion."

CHAIRMAN SOULES: The text calls it that, doesn't it? It's just the title, isn't it? And 100(d), the notice to be approved. 100(d) and (a). No. Okay. No, there is not a notice.

Mike, does this state-- this 100 state the law as you understand it to be now?

MR. HATCHELL: I do not have a concept that there is any party to the judgment that is not a party to the appeal either as an appellant or an appellee. But on the other hand, I don't have any particular objection, certainly to the first edition in 100(a). The

last sentence kind of bothers me a little bit because I do not have a concept that anybody who is affected by an opinion of the Court of Appeals could not have filed a motion for rehearing; but if that helps advance anything, I don't have any objection to it.

CHAIRMAN SOULES: If it did not? Okay.

MR. HATCHELL: I don't understand this concept, "otherwise appeared in the appeal."

CHAIRMAN SOULES: What you are saying, they are in the appeal, so they otherwise--

MR. HATCHELL: I need to hear somebody else. Rusty?

MR. McMAINS: The underlined part is part of his overall package proposal. And the thing is, I think that if there is-- if you want to complain about something that happens in the Court of Appeals that actually is a complaint addressed to the trial court's judgment, I think there is a problem with not having filed a brief. Don't you?

CHAIRMAN SOULES: So omit the last

sentence?

MR. McMAINS: You know, I don't know whether-- I mean, my conception is that if the points of error are-- you know, in our practice, historically, have to essentially make a complaint addressed to the trial court's judgment. I don't see how you can just kind of side-step that and then complain for the first time in the Court of Appeals if you didn't file a brief making a complaint about the problems.

MR. HATCHELL: I think this is aimed at appellees, though, isn't it? Or persons other than the appellant?

CHAIRMAN SOULES: Well, why don't we put the first--

MR. McMAINS: No. I'm just saying, though-- if you want to hit me--

CHAIRMAN SOULES: -- if we want to put the first sent--.

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MR. McMAINS: -- with a cross point that hasn't raised a cross point--

CHAIRMAN SOULES: -- in order to advance this discussion, if we just drop out the last suggested sentence but leave in "any party to the trial court's final judgment who is

affected by the Court of Appeals can file a motion for rehearing," it doesn't say that it's not going to--

MR. HATCHELL: Well, I see what Rusty's concern is in the sense that-- you're saying, are you not, that somebody who hasn't perfected anything, it makes it appear as if he can then now perfect for rehearing?

MR. McMAINS: Yes. That way, I would like to have this case reheard even though you may never have ever heard from me before. And what I want to complain about is something that I could have told you six months ago.

CHAIRMAN SOULES: Okay. Well, I can't let this bog down. We've got too much agenda. I thought everybody said awhile ago this is what the law was now. I guess not.

PROF. CARLSON: We can raise a motion for rehearing that is changed by the Court of Appeals, obviously, even though you haven't previously raised your own cross points. Isn't that what you're saying?

MR. HATCHELL: Right.

PROF. CARLSON: So you now become agreed by what the Court of Appeals has done and

now you jump in with a motion for rehearing? This is different from what Rusty is saying, if you have a complaint about the trial court's judgment as opposed to what the Court of Appeals is doing.

CHAIRMAN SOULES: Okay. So we'll just leave 100 alone. There's no sense in changing it to get a title change.

JUDGE RIVERA: Change the title from "Second" to "Further" again?

CHAIRMAN SOULES: Well, we can if we want to do it. That would be the only change. It would be the only reason for amending it.

JUDGE RIVERA: Just to make it consistent with the prior words.

CHAIRMAN SOULES: Okay. Change "Further" only in 100(d). Is that the consensus? That will be recommended. Where is another notice provision? There is 131(a). Any opposition to that? That will be unanimously recommended. And 132, "clerk shall notify every party to the trial court's final judgment of the action of the Supreme Court docketing." Any objection to that?

Why don't we go to page 120, service

of briefs in the Supreme Court. That is a new (g).

MR. DAVIS: Luke, you need to add your list of parties to the 100-page limitation at the top of page 120.

CHAIRMAN SOULES: Okay. This is 136(g). What we're changing there is the service of briefs on all of the parties and the list on the brief and omit that from pages counted, is what we are doing on 136. Then 190(b) and (c)-- current (b) and (c), notice provisions, any objections to those? That will be unanimously recommended. Okay. Since we're there, why don't we just do this 123?

MR. DAVIS: Was that underlined portion intended to be included?

CHAIRMAN SOULES: On 123?

MR. DAVIS: Yes.

CHAIRMAN SOULES: Yeah, it is.

MR. DAVIS: I would like to make this observation, that based upon my experience with the U.S. Post Office, I really don't think three days is enough extension of time. Be that as it is, let's make that three working days and don't count Saturdays, Sundays and holidays.

CHAIRMAN SOULES: Any opposition to this change? It will be unanimously recommended.

MR. DAVIS: That's the change I'm happy if we don't include Saturdays and Sundays in the three-day extention.

MR. LOW: What about local holidays?

MR. HATCHELL: And snow days.

JUDGE HECHT: Tom is opposed to the change.

CHAIRMAN SOULES: Oh, you're opposed to the change?

MR. DAVIS: Yeah.

CHAIRMAN SOULES: Here is the thing: Let me tell you where this has come from. We have now said that by local rule, the trial courts cannot adjust time periods. Cannot do so. Now, we have a lot of fuel and cry out there and legitmately complaining about lawyers serving motions on Friday for hearing on Monday. If they serve it by hand delivery, the rules permit that. And our new rule that we have suggested to the Supreme Court would prohibit the local courts from changing that. But the thing that needs fixing-- Bexar County has got

5 days. 5 days, and you don't count Saturdays and Sundays and legal holidays; so it is really extended, the motion practice. It's made it very difficult to get anything done in a hurry, even in a reasonable period of time, in my judgment.

But I think that what they have tried to do by local rule that needs to be done is not count Saturdays and Sundays and legal holidays on a three-day notice-of-motion period. And the Federal rules don't count them in any period under five days. And this is what this does. It just picks up the Federal practice. If it's a time period, in the Rules of Civil Procedure, under five days, you don't count Saturdays and Sundays as legal holidays. You're talking about business days. If it's more than that, you count them. Otherwise, you get into all kinds of problems of how many Saturdays and Sundays and legal holidays were in the 30 days for interrogatories and it becomes impossible. But there is a three-day period in here that is extended-- like, if I mail you my interrogatories, your answers are due back in--

MR. DAVIS: I guess, three more days

for it to--

CHAIRMAN SOULES: 33 days. And that is enough. I mean, you know, what we are now talking about is a three-day extension period of an already long period. To me, I don't want to complicate that process by not counting Saturdays and Sundays and legal holidays. We already know that if you get interrogatories in the mail, you have got to answer them in 33 days from the day they were mailed. Don't go back in there and count, "Well, is there a Saturday, Sunday and legal holiday in the three-day extension?" Well, where is the three-day extension? Is it on the front end or the back end of the 30 days that the interrogatories are supposed to be-- so, to me, the three-day extension that you get for mailing don't make it any different than it already is. That is the only one.

JUDGE HECHT: I think that it's taken care of, Tom, because 21a does not pertain to notice of motions.

CHAIRMAN SOULES: No, it does not pertain to notice of motions. It's just the--

MR. DAVIS: I didn't want to take

that 5 days and let them take three away because of Saturday, Sunday and a holiday.

CHAIRMAN SOULES: No. You're notice of motion-- your three days notice of motion--

MR. DAVIS: Three working days.

CHAIRMAN SOULES: -- is three working days.

MR. DAVIS: I misread it.

CHAIRMAN SOULES: Okay. Any opposition to this?

PROF. CARLSON: Do we need to add to the end of this rule "or telephonic document transfer"? Didn't we decide that last time in rule 21a?

MR. DAVIS: Yes.

PROF. CARLSON: So it would be "by registered or certified mail or by telephonic document transfer"?

MR. DAVIS: We included that within the three-day limit.

PROF. CARLSON: The dovetail with changes we made in 21a last time?

CHAIRMAN SOULES: Thank you. So I'll add that at the end. With that addition, any opposition to this change? Okay.

Unanimously recommended.

Turn to page 186 in the materials, and we're going to have Doak's report on this problem that we were discussing. I first raised it about trying to permit some kind of extract or execution on a judgment out of the Court of Appeals, and then it was raised "Well, if you do that"-- which we don't know whether we ought to do that or not-- "what about relieving a party under-- from having supersedeas requirements from those requirements if the Court of Appeals takes away the judgment against that party?" And you were going to work on that, so we have got this here on the table to be looked at. That would function, I guess, both ways, if the Committee wants to approve it.

MR. BISHOP: Yeah.

CHAIRMAN SOULES: Okay. How does it work?

MR. BISHOP: Okay. The rule that was on the table last time is on page 186. It's Rule 82a, and that rule, as I understand it, was intended to prevent a plaintiff appellant who has lost at the trial court and then obtains a revision at the Court of Appeals level to be

able to abstract the judgment promptly the judgment of the Court of Appeals or to enforce the judgment or to at least force the defendant to, at that point, put up a supersedeas bond before it goes on.

That, I think, was the intent of the rule on page 186. There was some concern suggested about that, one of which was that if you're going to allow the plaintiff to do that, then shouldn't you also allow a defendant appellant who has put up a supersedeas bond at the trial court level and then who wins at the Court of Appeals and obtains a rendition, shouldn't you allow him at that point to obtain a release of any abstract or a release of a supersedeas bond?

So I was asked to look into that question and what I have come up with is on page 187 and 188 and it is intended to supersede the one that is on page 186 and to answer both of those questions. It is supposed to address both the plaintiff's and defendant's situation.

There were some other concerns expressed last time, one of which was the rules to be neutral and not just plaintiff or

defendant-oriented. That's what I have tried to do here.

A second was that, if you are going to allow a plaintiff to abstract or execute on a judgment at this point, then you need to give the defendant some time to supersede it; and so I have tried to address that question, also. Then a third concern was that shouldn't this be consistent with the procedures that we have in effect at this point which are all in the trial court and not create a new set of procedures and regulations at the appellate court level for doing this?

I tried to address all of those concerns in this rule, and I have written a report that explains it which starts on page 190 for those who want to look through it.

Going through the rule, what it provides, basically, in Provision A--Subdivision A, is that it makes the Court of Appeals judgment the effective judgment once it is filed with the trial court, which may be done by either party 15 days after the rendition of the Court of Appeals judgment or after the overruling of all motions for rehearing. So it

is not immediate. It does give you time to go through the rehearing process. Then a party can file it with the trial court below. At that point or within 10 days thereafter-- 10 days thereafter, it becomes the effective judgment in effect in that particular case.

The last sentence of Subdivision A says that that can be a proper basis for the exercise of the trial court's continuing jurisdiction under Rule 47k, which, in other words, triggers the ability of the trial court to set the amount of the supersedeas bond. It doesn't tell him how much to set, but it triggers that and brings that into play.

Subdivision B is intended to talk about the abstract of judgment situation; and there you have got a situation where, normally, in the trial court, the trial court's judgment is very clear and it is a ministerial act for the clerk to take that judgment and to issue an abstract judgment.

When you have a judgment coming down from the Court of Appeals, it may not be that clear to the clerk how to take that and the underlying judgment of the trial court and put

them together and come up with an abstract. So what we're saying here is that the trial court, within 10 days after motion by any party, shall specify the form of an instrument for recordation under Chapter 52 of the Property Code which deals with abstracts of judgment. So you can get an abstract of judgment put up by going to the trial court this way.

On the other side-- the next sentence deals with the other side of that coin. If you have an abstract in effect, and the defendant is the prevailing party and wants to get it released, this provides that the trial court can direct parties to release the abstract.

Subdivsion C essentially tracks Rule 49 to provide that an appellate court can review the orders of the trial court in this respect. That is basically the rule. It provides that everything that is to be done in the trial court is consistent with our present procedures, and I do think it is neutral for both plaintiffs and defendants.

CHAIRMAN SOULES: Do you have a recommendation?

MR. BISHOP: I would recommend that Rule 82a that is on pages 187 and 188 be adopted.

CHAIRMAN SOULES: Discussion? My only question is, is it necessary to use Subdivision K? Actually, it is the trial court's jurisdiction under all of Rule 47, isn't it, that comes to play in the first paragraph, 82aa?

MR. BISHOP: I don't have that in front of me, but that may be. I don't have any problem with taking "k" out.

CHAIRMAN SOULES: Okay. If you agree to that, then I'll note that here. Any further discussion? Rusty.

MR. McMAINS: Well, I think my position was not too unclear last time. I really disagree with the notion of undoing the bond or, for that matter, essentially destroying, in my view, what has been the structure of appellate judgments. That is, that the only thing there is the trial court's judgment as a mandate issue. Because the mandate is also something that is recognized and utilized even in certain jurisdictions of the

U.S. Supreme Court to know what it is for and know what it is.

All of a sudden, you are creating a different field by which you may, upon immediate assumption and loss of property, otherwise end up having to go to the U.S. Supreme Court on their immediate Court of Appeals decision. So if you have got some kind of a federal issue that you want to do something on injunctionwise-- I mean, there are other problems as well that I foresee, Doak-- no offense-- with regard to-- for instance, let us suppose that the Court of Appeals reverses a judgment and renders the judgment that you are now going to go enforce or vice-versa, and lets the defendant go. Goes to the Supreme Court, and the Supreme Court says, "Ah. You have a pool problem. We'll send it back to you to do it again." Well, in all of this time, you are operating on a judgment that now has been deprived of its efficacy, and there is no provision at all with regards to these rules.

And when the Supreme Court says "You ain't done your job right. That judgment doesn't really exist," and, yet, these rules

contemplate that is the judgment that is being enforced even as we speak and will continue to do so until the Court of Appeals gets off its duff and acts further.

So it is not just an amendment to the Court of Appeals rules either. You're going to have the same problem with regards to the Court of Appeals and the Supreme Court and they aren't in any different situation because they don't write judgments all of the time. A lot of times, their judgments are simply, "You didn't do it right." They send it back to you, you do it again, and in the meantime, you're still in limbo but you are giving the efficacy to an intermediary that you have been depriving so well. See? You are always going to be faced with the possibility of giving efficacy to a judgment that is subject to being attacked at an intermediate level. You cannot cure that problem under any of these circumstances if you totally alter the structure of the system for those reasons.

And as a pragmatic thing, in terms of the supersedeas bond, I can tell you by experience that when you get a reversal, even at

the final level, you do not get off the bond immediately. It takes a long hassle, and no insurance company is going to quit charging you a premium on the bond in spite of the fact that you might be entitled to get off of the bond for a while.

So pragmatically, it has very little impact; but your ability to get that restored and what they can do in the interim-- the problem is, under our current post-judgment discovery rules, we can't even go in and discover anything because we don't have a judgment against them. We're not a creditor under those circumstances for that period of time. They can go out and now wipe out assets with impunity.

What are we supposed to do about it? We don't have a supersedeas bond to protect us. That's the reason we couldn't be engaged in that discovery. Once that is filed, you block that. Then you go off and secrete assets, can't even find out about it under the way our rules are drafted now. I really do-- just fundamental changes that I think, frankly, are unnecessary.

MR. BISHOP: What you are suggesting

is that we not have a rule at all like that?

MR. McMAINS: Yes.

MR. LOW: I would join in that. When somebody gets a money judgment against them, or they give a bond that they're going to perfect their appeal supposedly all of the way to the Supreme Court, the Court of Appeals is just an intermediate step. And I don't see any reason to change it. If they reverse and render and now you've got a judgment, that's just-- to me, I look at it as two steps, the trial court and go all of the way to the Supreme Court. I wouldn't change it. That's just my own opinion.

CHAIRMAN SOULES: What about the situation where you-- plaintiff gets a verdict, it's N.O.V.--

MR. LOW: I wouldn't change that either.

CHAIRMAN SOULES: The Court of Appeals then reverses and renders a judgment, and the judgment winner in the Court of Appeals endures an 18-month pendency of petition for writ of error in the Supreme Court of Texas while the judgment debtor-- the judgment creditor can't abstract and he can't execute.

The judgment creditor has no responsibility for supersedeas, and the assets are completely obscured from execution because the trial judge didn't give the judgment that he should have given and the Court of Appeals already said so and there is a written denied. Now everything is gone because there was no protection for that judgment. It's one way or the other.

And this way, whoever wins in the Court of Appeals escapes to the extent it can. Supersedeas responsibility-- if he has been under supersedeas responsibility or gets protection for the judgment, he wins. In other words, the judgment of the Court of Appeals becomes something that affects economic-- has an economic effect rather than just some sort of a stepping stone to a conclusion without an economic effect.

MR. LOW: I understand all of that.

MR. BEARD: He probably can't get out of that supersedeas bond because it is phrased that you appeal it all of the way. Defendant is going to stay there with that supersedeas bond as it's normally effected.

MR. BISHOP: Well, what this may

mean is that it becomes drawn differently, if this were adopted.

CHAIRMAN SOULES: Sure. There's no need to renew that bond. Anything new on this? Those in favor of the rule as written by Doak, show by hands. Those opposed? That is defeated, six to two.

Okay. Let's go to the agenda. We've got-- the minutes were approved. The text is approved. I'll do a mail-out on some of these Committee assignments so we won't use our time, but I'm pleased to advise that Doak Bishop is going to take the chair of the standing Committee on multi-county, multi-district rules. That gives us a lot of confidence it will be a job well done. Thank you, Doak, for taking that responsibility.

I will-- any of these committees that anyone wants to serve on, if you will just notify me, I would appreciate your volunteering. If not, I will form the committees as best I can.

The next is Rule 5. That appears on-- Item 5. It appears on page 36. We worked on-- is that right? Yeah. We worked on 72--

you need to turn with me. Hold that page 36 and turn over several pages to 43. We made changes in 72 and 73 by actions of the Committee in May to cause everything that gets filed to get served on everybody else. And then we were confronted with the fact that we had a 21-- Rule 21 which talked about service and then we had Rule 72 which talked about service and then Rule 73 which was sanctions for not serving. And these were scattered in the rules and why did we have two different rules. And Justice Hecht asked us to address that, which I did; and David Beck participated in this.

So now 72 and 21 have been merged into this-- what you see on page 36. "Pleading, plea, motion, or," those words were in 72, and there is not an "and." The "and" comes off because it is not a proper article the way it is now with a consonant in the pleadings. And picked up these last two paragraphs-- actually, all of this language is language that we passed before, but it has been brought to a single rule. Is there any objection to 21, as you see it? Being none, it will stand recommended.

21a, what did we change here this

time? We changed it before because of the technologies. Probably this part-- oh. I see-- Oh, I see. "Every application to the Court for an order." We picked that up from elsewhere. Any objection to 21a as you see it here?

JUDGE HECHT: May I make a suggestion?

CHAIRMAN SOULES: Yes, sir.

JUDGE HECHT: You could change that language, Luke, to every paper required to be served under Rule 21 because it is broader than application on order. It is pleas and motions.

CHAIRMAN SOULES: How do we fix that? "Every pleading, plea, motion or"?

JUDGE HECHT: You can do that. Or you can just say "every paper required to be served under the Rule 21."

MR. LOW: Luke, just take care of the situation right now. If you're going to file a deposition because you need it for summary judgment or something, you're not asking for an order of the Court or to hear anything; just notify us of the filing. Everybody ought to know that you filed that; so I guess-- is there another rule on that, or is this what is

to take care of any notice of filing?

CHAIRMAN SOULES: Well, this is a notice rule--

MR. LOW: I want to be sure it is not an application for order or anything like that. You just can file the deposition because you're-- in connection with motion for summary judgment.

CHAIRMAN SOULES: Well, that's in the motion for summary judgment, what you have to serve on the other party.

MR. LOW: I guess you would have to put that you're filing it.

CHAIRMAN SOULES: This doesn't say what gets-- well, it-- we talked about interrogatories have to be served. Summary judgments have to be served and so forth. This, to some extent, duplicates that; but it really is the method. It says you have got to serve it on the other party or his attorney of record by this method. And then 21b is really old 73 with some words changed. 73 said "a party fails to furnish." Let's change it to "deliver on and serve to the other parties copies of the pleadings and so forth" and have the "documents"

stricken and "pay reasonable cost of attorney's fees or other sanctions pursuant to Rule 215." Now, the other sanctions pursuant to Rule 215, I don't know whether they did that-- no. We did not make that--

MR. LOW: But see, within that, you have served them a notice of a hearing. That is not really a pleading, plea or a motion or application of the Court. You know, if you're just serving-- you know, you have to give them notice. You, locally, will have the judge-- the judge says, "Okay. I'm setting this for such-and-such a time. Notify all parties." Maybe that's-- forget it, then. I just thought there might be some things that don't come within that.

CHAIRMAN SOULES: Well, the notice of hearing, I guess, could come from a lot of ways; but this-- none of this has ever-- these rules have never dealt with--

JUDGE RIVERA: We'll never have to hear them unless somebody assessed them for something.

CHAIRMAN SOULES: That's right. So, Rusty--

MR. McMAINS: Luke, the old Rule 73, of course, deals with the failure to furnish a copy of pleadings. What you're doing is expanding it to other things, right?

CHAIRMAN SOULES: Yes.

MR. McMAINS: One of those things that you're expanding to do, as I understand it-- I think I remember the discussion-- was like, for instance, proposed judgment.

CHAIRMAN SOULES: Oh, yes.

MR. McMAINS: The thing that bothers me is that the sanction now, though, says that if you include that-- and it clearly is included, it says that it "may in its discretion, on notice and hearing, order all or any part of such document stricken, direct that such party not be permitted to present grounds for relief or defense contained therein..." Now, if you're moving for a judgment, it seems to me to be pretty substantial if you didn't manage to give somebody a copy of a judgment that you can have your right to a judgment stricken somehow. That is kind of extreme. But it would appear to be authorized by this rule.

CHAIRMAN SOULES: It is.

MR. McMAINS: You think you can waive a verdict and everything else just because you didn't send a copy of the judgment to the other side? I mean, is this-- I don't think anybody who voted for there being some sanction intended it to be quite that dramatic.

CHAIRMAN SOULES: It is already a matter of appellate decision that Rule 215 can be exercised post-verdict and post-judgment to cause a default judgment.

MR. McMAINS: That is a discovery request. I understand that. This is a dispute with regard to service which you have got one party, and it may well be a dispute. I may say "I served it," and you may say, "No, you didn't."

CHAIRMAN SOULES: Trial court has got the right to sanction it.

MR. McMAINS: The point is that just based on the resolution of that dispute, you lose your right to a judgment. That seems, to me, to be rather extreme. I have no problem assessing the cost for to come down during the hearing, but not the way the sanctions rules have been interpreted.

CHAIRMAN SOULES: Well, that's a decision that we have to make. How seriously shall a person be sanctioned for not giving notice as these rules require? That's what we want to know.

MR. DAVIS: How serious is it not to give the judgment, a notice or a copy of it?

CHAIRMAN SOULES: Well, you're supposed to serve your proposed judgment.

MR. DAVIS: You should do it.

MR. BEARD: Let's let the courts wrestle with those sanctions.

CHAIRMAN SOULES: Okay. Any opposition to Rule 21b as written?

MR. LOW: No. I apologize. The answer to my question is here, if I had read further down. I apologize.

CHAIRMAN SOULES: Okay. There being no objection to Rule 21b, it stands unanimously approved. 21, 21a, 21b. 72 will be repealed. 73 will be repealed because that has been moved. We changed 60. That is the only reference to 72. Any opposition to that change in Rule 60 just to pick up the correct item? Rule 60, it just changes the rule reference to the proper

one. That's unanimously approved.

Holly has got here a list which we'll mail to all of you, and it will have to be brought forward off of our computer. Every rule we have amended, of course, has a number. And where those rule numbers appear elsewhere in the rules, she has got them identified. We're going to have to go back and see if we need to change the rule references in other rules to pick up what the-- the changes. And I'm assuming that you-all will give me the authority to circulate to you our suggestions on that. Then if we don't hear anything back, we'll take care of that with the Court by just writing redline rules for the Court to adopt, if it adopts the change that we recommend. Is that all right? Is that acceptable with the group? Okay. I see consensus on that.

Then we get to TRAP 15a. And, Judge, I believe this is your suggestion. This is on page 45.

JUDGE HECHT: All right. 15a and then related Rules of Civil Procedure 18b. We have had some correspondence that I don't have with me here today, some very rigorous

complaints from lawyers around the state who are in litigation with attorneys whose close relatives are sitting on the bench. A particular situation-- and I don't have the correspondence here-- but some very rigorous complaints in one county where one of the leading litigators in the county enjoys having his father serve as the district judge. And a lot of lawyers of the county feel disadvantaged with that and have a complaint about that; although, that is not grounds for disqualification and it may not be grounds for recusal under our rules.

In addition, they had some question about what sort of financial interests might a judge have in litigation before he was disqualified to serve as a trial judge in the case. So I simply looked at this rule and attempted to expand it somewhat to cover-- basically, most of the language is taken out of the Federal statutes and rules, but to cover financial interests and family interests.

CHAIRMAN SOULES: Judge, by way of observation, the reason that 18b was separated between disqualification and recusal is that the

Constitution says what is disqualification. So we have been concerned about whether anybody could expand on what is disqualification; and so we used the word "recusal" for everything that was not in the Constitution as disqualification.

JUDGE HECHT: I don't have any-- whether you are disqualified or recused doesn't seem to me to make any practical difference.

CHAIRMAN SOULES: It doesn't to me, either.

JUDGE HECHT: And I realize there is a distinction as to what it was worth between the Constitution and anything else; and if we want to carry that forward, I don't care anything about that. But, query, if we leave disqualification alone, should there be at least grounds for recusal?

CHAIRMAN SOULES: Well, we have-- oh, yes. I see what you mean. Should we add these new grounds of recusal that you're bringing up. Let's vote on that first. How many are in favor of the new grounds of recusal that are proposed here? Show by hand. Those opposed?

JUDGE PEEPLES: You're talking about

18b?

CHAIRMAN SOULES: Yes, Judge.

JUDGE PEEPLES: I have a question about (a)(1), "his impartiality might reasonably be questioned." What does that add to the others? What is an example of something that might fall within that that would not be caught by the others which are more specific?

CHAIRMAN SOULES: That is straight out of the Code of Judicial Conduct, is where that language comes from.

JUDGE HECHT: It's straight out of the existing rule, and it's in the Federal statute as kind of a catch-all where you don't--

JUDGE PEEPLES: The existing rule has that?

CHAIRMAN SOULES: Yes, it does. It's right here where it has been stricken through. No. 2, "Recusal. Judges shall recuse themselves in proceedings in which their impartiality might reasonably be questioned..." My suggestion is that we leave the disqualification standards that way. There is a case, an old Supreme Court case, that says the Constitution sets forth the qualifications and

disqualifications of judges and there can be no others.

JUDGE HECHT: The lingering distinction that has some substance in it is that theoretically, at least now, if a judge is disqualified, he can't act. And anything he does in the case is void as if he was a stranger off the street. Whereas if he should have recused, what he did is not void, it is just subject to being set aside. So to the extent that remains a viable distinction, I don't oppose calling it recusal.

MR. McMAINS: That's what I'm getting at. Your actual term here is "disqualified." I thought we had read it "recused."

JUDGE HECHT: I don't have any problems with that. You can just change the whole-- just make it all subparts of (2.) Just say "(2) Recusal," and then strike the rest of the language in subpart (2) and start with the suggested new language.

CHAIRMAN SOULES: That's what we'll do, but I see that we probably need to-- so that actually No. 3 under your highlighted

language--

JUDGE HECHT: Could come out.

CHAIRMAN SOULES: -- could come out. And we actually would restore what has been stricken through, the (1)(a), (b) and (c). Then we would pick up "(2) Recusal." Then we would omit what you have stricken through under (2), and then start with this language after that, "A judge shall recuse himself in any proceeding which..." and then do (a), (b) and (c) and so forth? Would that be all right.

JUDGE HECHT: Yes.

CHAIRMAN SOULES: Okay. Let's see. "Served as a lawyer and fiduciary"-- so (3) would go out.

JUDGE HECHT: There is a little piece of (3) on "or he or such lawyer has been a material witness concerning it."

CHAIRMAN SOULES: Okay. We would leave (3) there. That would be (c). Okay. "Knows that he, individually or as a fiduciary, or his spouse"-- is that a part-- has that already been read into the financial interest of disqualification or not, the financial interest of the spouse? Is that equal or financial

interest to the judge for constitutional purposes? I can't remember.

JUDGE HECHT: I don't think so.

CHAIRMAN SOULES: So (e) would be, "knows that his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or that he..."

MR. McMAINS: Can I ask a question about the preceding No. 4?

JUDGE HECHT: Yeah.

MR. McMAINS: What is this "expressed an opinion concerning the merits of it while in government employment"? I don't understand.

JUDGE HECHT: The whole part (4) is to deal with government as opposed to part (3) which is lawyers in private practice. The problem is with the government. The government lawyers who serve in the A.G.'s office, for example, there were a gillion cases pending in the A.G.'s office, and we really didn't have anything to do with them. There isn't any reason why you-all could be disqualified unless you actually participated in the representation of that case or expressed an opinion concerning

the merits.

MR. McMAINS: Yeah. We're talking about a judge; and it says-- the way it reads, it says-- start out-- forget the "participated" stuff. "He expressed an opinion concerning the merits of it while in government employment." My real question there is: What does that do to you on the C. L. E. program when there are panel discussions, and somebody is asking you something about, perhaps, a case in the Court of Appeals or whatever? If you express an opinion about it, does that stick you subject to recusal? Do you get suckered into that kind of thing? As I read it, that is a possibility.

JUDGE HECHT: That's not government employment.

MR. McMAINS: Well, it doesn't say "while in the scope of performance of government service."

JUDGE HECHT: It ought to be while acting as an attorney in government service as opposed to a judge.

MR. McMAINS: That's fine.

CHAIRMAN SOULES: Where are we reading?

JUDGE HECHT: No. 4, at the top of page 49.

MR. McMAINS: That is fine if that is what that means.

JUDGE HECHT: Yeah, that's what that means. He participated as counsel, advisor or material witness in the matter in controversy or expressed an opinion concerning the merits of it, while" serving as an attorney, a government employee, or while an attorney in government employ.

MR. BEARD: In the scope of his employment.

CHAIRMAN SOULES: While acting as attorney?

JUDGE HECHT: Yes. Just as an attorney in government.

MR. BEARD: He is just expressing an opinion. He can do that.

CHAIRMAN SOULES: Then let's see. (B) down here-- we'll get to (3), I guess.

MR. McMAINS: Judge, on (5), the one on financial interest, is there no qualification about how much interest you have to have? Is that the way the code is designed, too?

JUDGE HECHT: That is the way the Federal statute reads. There are some cases under it that say that if your interest is only-- and I thought maybe I put that in here.

MR. McMAINS: All it says is "a financial interest in a"--

JUDGE HECHT: A financial interest is defined on the next page.

MR. McMAINS: Oh, I'm sorry. I haven't gotten there. But it does say however small.

JUDGE HECHT: Yeah, but it excludes a number of things, including interest as a tax payer or utility rate payer.

MR. McMAINS: I understand that. But I'm talking now about a single share of Texaco stock would put you out?

JUDGE HECHT: Yeah, I think it would put you out.

MR. McMAINS: Under Federal Code?

JUDGE HECHT: Yeah. Oh, yeah. Under the Federal Code, it does.

MR. LOW: Under the Federal Code--

JUDGE HECHT: You're wife is the same as you. And your daughter's husband has

the same assurance.

MR. McMAINS: I just was curious because it's awful--

CHAIRMAN SOULES: I can follow the renumbering now, and by restoring disqualification and picking up recusal, I've done a little bit of renumbering, and then we have got new paragraphs. But with those changes, those in favor of 18b as written, say aye. Opposed? Then we go back to TRAP 15a, which just picks up all of that by adoption. All in favor of TRAP 15a?

JUDGE HECHT: And it adds one phrase at the end, "or in which he participated in the trial or decision of any issue in the court below." That is the current practice, but it is not required. And since these days judges are moving around more and they serve on a district court awhile and then they go up to the Court of Appeals and then some of them line up on the Supreme Court--

CHAIRMAN SOULES: I'll put in there, Judge, "Judge should disqualify or recuse himself" or "they should disqualify or recuse themselves..." Okay. Those in favor of TRAP 15a

say aye. Opposed? That's passed unanimously.

Now we go over to TRCP 4. We did that. Then page 124. Judge, I believe this is another of your suggestions. Do you want to give us your analysis of this?

JUDGE HECHT: Page 124. The Court is very concerned that there have been some cases presented where a lawyer withdrew from representing a client, and the client then contended with some support on appeal that he or she did not know that the lawyer was withdrawing. They didn't know the settings that were involved. They didn't get notice, and they got poured out before they could get another lawyer and they ought to get another chance to go back and do it over again.

Of course, you view most of those complaints with a jaundiced eye because they are awfully convenient; but by the same token, there is no reason why the trial court shouldn't try to head those off at the pass. So the change in Rule 10 simply says that before you can withdraw, you have got to supply the trial court with assurance that you have notified your client of everything that is coming up,

including that motion; and the client knows that they have an opportunity to come in and be heard. This is the local rule in Dallas and some other good many other counties, just so you don't have to worry about this circumstance.

JUDGE PEEPLES: Is there anything that requires the lawyer withdrawing or substituting to tell the judge of pending settings?

JUDGE HECHT: To tell the judge?

JUDGE PEEPLES: Yes.

JUDGE HECHT: No.

JUDGE PEEPLES: I always wanted to know that, because if there is a hearing or a trial or something in a few days, you're just causing problems. And a lot of times--

JUDGE HECHT: The way it worked in Dallas was, if you had the motion, you had the docket sheet; and you could tell by looking at the docket sheet whether anything was set. I don't know if that is true in other counties. So we-- that provision could be inserted.

JUDGE RIVERA: Put that in the contents of the motion.

JUDGE HECHT: You could put that in

there. Where you had a centralized docket like you do in some counties, El Paso and others, you might not know that there are settings coming up, and you would be ruling on those. So perhaps it is best to put that in there, too.

CHAIRMAN SOULES: Judge, once we are discharged-- where I am focusing here with concern is "withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge and has not already notified the party." Once we are relieved of obligation as counsel and counsel of record, why should we have to continue to notify the party of settings? That can be pretty burdensome, and it is not limited as to time.

JUDGE HECHT: Well, it is intended to be-- the intent of that is that if you come out on a motion to withdraw, the judge says "I'll grant it, but have you told-- but I'm going to set this case on a motion for summary judgment," the defendant-- one of the parties is standing there and he says, "Well, Judge, I don't mind attorney withdrawal, but I want my summary judgment heard."

The judge says, "Okay. I'll grant your motion to withdraw, but I want to hear the summary judgment in six weeks. I want you to tell your client as a condition of me allowing you to withdraw that if you're going to-- that you have got to be ready on this motion of summary judgment in six weeks."

CHAIRMAN SOULES: So you're talking about of which an attorney has knowledge at the time of the withdrawal?

JUDGE HECHT: Yeah.

CHAIRMAN SOULES: Okay. You object to putting those words in?

JUDGE HECHT: No. That is exactly what it is intended to say. After the Court signs the order, he is gone.

CHAIRMAN SOULES: Okay. So "can withdraw upon written motion for good cause shown."

JUDGE RIVERA: Beginning in the middle of the third line from the bottom up, can we take out the words "the party has been notified in writing" to make it read, like, as far as the motion shall state all of the said pending settings and deadlines? Then that will

be in the motion and that motion is delivered to the parties so he knows and the Court will know what the settings are.

JUDGE HECHT: That would be fine.

CHAIRMAN SOULES: "If another attorney is to be substituted, the motion shall state that a copy of the motion has been delivered to the party; that the party has been notified of his right to object to the motion..." What else, Judge Rivera?

JUDGE RIVERA: See, the beginning or in the middle of the sentence, it says "the motion shall state" and it's got several things in there. And the third line from the bottom, it says "and that the party has been notified in writing." If we take those words out because it will read that "the motion shall state all pending settings and deadlines," then the judge would also know what those settings are.

JUDGE HECHT: Just take the language "that the party has been notified" out.

CHAIRMAN SOULES: Okay.

JUDGE HECHT: And the motion will state "all pending settings and deadlines."

JUDGE RIVERA: That way the party

knows and the judge knows.

CHAIRMAN SOULES: "An attached copy of the notice to the party shall be attached to the motion"--

JUDGE HECHT: I guess you can take that out, too. Take out "copy of such notice." You can take that out.

CHAIRMAN SOULES: That would come out. "Copy of such notice should be attached to the motion." Then "If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge of at the time of withdrawal and has not already notified the party but may impose further conditions. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address..." "Attorney in charge..."

Okay. Any further discussion? Elaine?

PROF. CARLSON: I noticed on page 126, last time, we included a requirement that the telecopier number of the substituting attorney be included. And if we want to be

consistent here, on line four of the proposed change to Rule 10, it would read "name, address, telephone number, telecopier number, if any."

CHAIRMAN SOULES: Okay. Any further discussion? Those in favor say aye. Opposed? Unanimously recommended.

The next is page 128, which is TRAP Rule 7. What we were--

MR. McMAINS: The question is this goes there, too?

MS. HALFECAR: Yeah. We wanted them to be changed on--

CHARIMAN SOULES: Will this Rule-- Civil Rule 10 work?

JUDGE RIVERA: 7 is for the appellate judge.

JUDGE HECHT: It doesn't have the same problem on 2, really. I haven't studied it, but I don't know that you would want to make all of the same requirements.

JUDGE RIVERA: We don't have a hearing.

JUDGE HECHT: Don't have a hearing.

MR. McMAINS: This does require that you give notice of all of the pending deadlines

already. I think that's probably--

JUDGE HECHT: TRAP Rule 7 is probably-- so we don't have a problem with just leaving TRAP Rule 7 as it is.

CHARIMAN SOULES: So we don't have a problem with just leaving the TRAP Rule 7 as it is?

JUDGE HECHT: It's okay.

CHAIRMAN SOULES: It's okay. There is no change to TRAP Rule 7. The next one on page 130, which is-- the complaint here-- and it wasn't given to me in writing. It was telephoned in but it may make sense. There is no requirement in the rules to answer a counterclaim; so, therefore, there is no time limit to answer the counterclaim. An amendment-- you're not filing an amended answer to the counterclaim, so the seven-day rule for amendments doesn't work.

So this lawyer had a situation where a party came into the trial the day of trial and filed an answer to a counterclaim that raised all sorts of affirmative defenses, and the trial judge didn't want to let him file it but couldn't figure out how to keep him from filing

it because there was no time limit on filing that answer. So what this does, it says the party may amend their pleadings, respond to pleadings on file of other parties and so forth-- outside of seven days or inside of seven days, we'll leave to the Court. "To require that all trial pleadings of all parties, except those permitted by Rule 66"-- which is trial amendments-- "be on file at least seven days before trial unless leave of court permits later filing." Any opposition to that?

JUDGE HECHT: The Supreme Court has written on this subject at least once, and we had a case pending. I forget which issue, but we have written on this case once before at least. And we treated-- we treated the situation this way: We treated the answer, counterclaim to-- filed for the first time, as an amended pleading. And then you consider whether it is timely or whether it should be allowed as a trial amendment.

CHAIRMAN SOULES: You extrapolated it?

JUDGE HECHT: Yeah.

CHAIRMAN SOULES: But is there any

problem with just going ahead and putting them in there that you see?

JUDGE HECHT: No. I think that is what you have got to do. Somebody calls up at the last minute, a third-party defendant or whoever it was, and he is not required to answer.

CHAIRMAN SOULES: Any opposition to this one? Okay. That's unanimously recommended, changes to Rule 63.

The next is-- this sort of came to mind during the 270 series where the judge could call for special issues to be-- or questions and instructions. When you look at Rule 166, it is really sort of limited in language. It doesn't say a lot of things that are done in pretrial conferences; certainly not a lot of things that are done in Federal pretrial conferences. I don't know whether this is a good idea or not, but it gives what we felt was a pretty complete laundry list of things that can be done in a pretrial conference, and this rule hasn't been changed. We're going to change it to add a new (n). We've already voted to do that. Well, it would be some other number, but the substance,

to aid consideration and settlement of a case.

But here the Court could require written statements or contentions, contested issues of fact, trying to get stipulations, identifing any legal matters that need to be ruled on, require a list of fact witnesses except for rebuttal or impeachment witnesses, "the necessity of whose testimony cannot reasonably be anticipated," and that comes from some Federal local rules-- "who will be called to testify, a list of expert witnesses, the propositions of law, contested issues of law, jury questions and instructions, mark and exchange exhibits, any objection to the opposite party's exhibits so that they can be ruled on in advance of trial.

Those are things that have been added to the rule as it is presently written. I thought as we make a pass through these rules, we ought to at least consider this.

MR. BEARD: Why do we need to add anything? The Court can require it without you having it in the Rules.

MR. DAVIS: Some Courts don't know that.

CHAIRMAN SOULES: A lot of them don't know it.

MR. DAVIS: They look at the present rule maybe as a limitation on what they can do.

CHAIRMAN SOULES: Let me see if Pat is through with his thought, and then I'll call on the rest of you.

MR. BEARD: No, I don't--

CHAIRMAN SOULES: Okay. Rusty.

MR. McMAINS: I would agree that the Court can do a lot of these things probably now, but it concerns me somewhat that-- because, again, we haven't changed the last half of the rule on 166. And if you stick in there what your agreed propositions of law are or whatever, then all of a sudden he-- which is what it says that he could require you to do or consider, then all a sudden the standard is that will control disposition of the action unless you are relieved of that to avoid manifest injustice.

MR. BISHIOP: Isn't that the same as the Federal rule?

MR. McMAINS: Oh, I'm not disagreeing with that. I'm just real concerned about agreeing early on before you are all done,

as we all know we have a tendency to get more done the closer we get to trial, on what the propositions of law are and then not get relieved of that by the judge and face some kind of discretion issue. And it may well be an erroneous proposition of law that you agreed to.

And yet this rule purports to authorize the judge to use that to control the disposition of the case. And there's insertions of things like that that concern me. Things about the conduct of the trial or the witnesses, it doesn't matter to me that he-- you have to tell him what you're going to do with regards to that; but as to the insertion of repropositions of law-- a presumption disputed on a daily basis.

PROF. CARLSON: What do you think the standard should read?

MR. McMAINS: I'm just saying that I do think that theoretically, a lot of these things are included or encompassed in-- it says "for a conference to consider" (b), "the simplification of the issues." I do think there are some of these things that can be done with the issue.

CHAIRMAN SOULES: Wouldn't it be manifest injustice as a matter of law for a judge to hold you to an agreed proposition of law that wasn't a law at all and not give your client a trial on the law that is there?

MR. BEARD: In Federal court, you don't normally file this pretrial order until your discovery has been cut off. And I take it that the Court can put this on you at any time. As a practical matter in Federal Court, you don't file that order until discovery has been cut off.

JUDGE PEEPLES: Luke, I have heard a lot of lawyers on both sides complain about both state and Federal judges strong-arming them to settle a case. And there is a lot of sentiment out there that judges do this and they shouldn't. I think this is a good rewrite here. A lot of lawyers are going to gripe about that, I think. Obviously, a judge needs to be able to get everybody together and talk to them, but I think that there are some people who are going to fear that this language gives the judge the power to coerce.

CHAIRMAN SOULES: Well, of course,

the fact is, there are ethics opinions that say that state level court judges cannot influence settlement much. Federal judges have a lot more power, but the judicial-- the standards of conduct in state judges have been interpreted to say that they really can't do more than encourage, which is what this (n) says. That's the extent of it. I don't know what "encourage" means. That can be a pretty strong word.

JUDGE HECHT: The good thing about this rule is-- I think one of the strong complaints-- in some respects, justifiable complaints under Rule 16 is it applies in every case. Regardless of the complexity of it, regardless of what the issues are, boom, you get notice that you have got to do all of this work, even if there is only $10,001 involved or $550,000 involved.

And, query, do you really need to do it in this case. "Judge, we are ready to try the case. We all worked out our differences. We just want to put on a couple of days of testimony and get a verdict." Maybe that doesn't happen all that often, but it happens real often in state court. And it is important,

I think, that it says at the front "in its discretion direct the attorneys." And also, you can't do it without appearing before a conference.

I know the Dallas Court of Appeals considered this at one point, and it came up in a couple of cases and then the issue got dropped for various reasons. But there was some feeling there that a trial judge could not send out a formed request for pretrial order in state court; that you could invite the parties to do it; and if they wanted to do it, it would be helpful and save time and you could do it. But you couldn't strap them with all of these requirements without bringing them in and looking them in the eyeball and hearing about how come they didn't want to do it because it was going to be onerous. That was sort of the thinking of the judges.

CHAIRMAN SOULES: Tom Davis?

MR. DAVIS: I'm in favor of it. I agree with the state judges. My concern is that they don't exercise enough authority, not that they do too much. I think this kind of-- it at least helps them and gives them a little more

confidence as to what they can do that they have been able to do all along but weren't quite sure and realized it. And I think all of these are good things to cut down the time of trial. And not only that, it gives you a list that you can go to opposing counsel and say "Look, how many of these can we agree with on our own without bothering the Court?" It gives you a good check list for the lawyers to use and the courts to use. I'm in favor of it.

CHAIRMAN SOULES: Buddy.

MR. LOW: One thing that is not listed, if you are going to list specific things that I think the trial court was helpful in was the discovery schedule where you get talking about whether you're going to take this expert or the plaintiff's expert first and the defendants argue. And he can call and have a discovery schedule, and that is one of the more critical things that you can do in pretrial conferences, I have found; particularly, in Federal court where they get to arguing.

CHAIRMAN SOULES: Why don't we just put that up here in (c), just add that one in (c).

MR. LOW: Discovery schedule.

MR. DAVIS: You can throw a catch-all.

CHAIRMAN SOULES: That's in here. That's here. "Such other matters as may aid in the disposition of the action."

MR. BEARD: We shouldn't forget that John Hill's task force just stirred up a fire storm about this sort of thing, and we may do the same thing here. Was that in the time frame--

CHAIRMAN SOULES: That wasn't the problem.

MR. LOW: I'm merely saying that quite often, some of the things the trial judge gets involved in that I have seen often is, you know, you're going to take that expert first or that one and notices and cross notices and it's not specifically mentioned. But that is one of the most helpful things I have found, a discovery schedule, quite frankly.

CHAIRMAN SOULES: Further discussion on 166?

JUDGE RIVERA: I approve of it, and I think it will help. We might want to give the

parties the right to ask for it, too. In the very first sentence, "At the request of a party or in its own discretion."

CHAIRMAN SOULES: "On motion of the party"--

JUDGE RIVERA: Yes.

CHAIRMAN SOULES: -- "made as discretion or on request of the party."

JUDGE HECHT: At the request of any party.

JUDGE PEEPLES: Or on its own motion.

CHAIRMAN SOULES: Do we want to just go ahead and call it a motion when they have to move to have a conference?

JUDGE HECHT: Just send in a letter or maybe a telephone call. I hate to make it more onerous.

CHAIRMAN SOULES: Okay. So "In any action, the Court may in its discretion, or on the request of any party, direct," and so forth. Anything else?

JUDGE RIVERA: I think that will do it.

JUDGE PEEPLES: Does the Court have

to-- the way you had it worded-- if the lawyer asks for it-- I think discretion ought to apply to both of them.

JUDGE RIVERA: Well, insert it first, and any action at the request of any party that--

JUDGE HECHT: I think "The Court may in its discretion or at request of any party..."

CHAIRMAN SOULES: "May." Okay. Then all it does is consider. this is also kind of peculiar way of wording it.

MR. McMAINS: Has the right to request a conference. And he has to hold it.

JUDGE HECHT: No, he doesn't have to.

CHAIRMAN SOULES: But "the Court in its discretion" covers all of that. It covers it. The way it is written, it covers every one of those, encouraging request.

JUDGE HECHT: The parties ought to be encouraged-- I mean, a lot of parties feel like they can't do it.

CHAIRMAN SOULES: And the only thing the judge does here is consider it. Now, another strange word is there. It doesn't say

he can order it. I don't know whether he can order it or not. Should we fix that? "Consider and enter an order"?

JUDGE RIVERA: Oh, I think this is enough.

JUDGE HECHT: No. You have got to have--

CHAIRMAN SOULES: Okay. This is Rule 166 with discovery schedule added and then "on the request of either party." Putting the discovery schedule in on--- calls for renumbering of the lettered paragraphs with those changes. Those in favor, say aye. Opposed? Okay. That is unanimously recommended.

MR. DAVIS: Luke, I don't want to get you off of that, but what is the status of the recommendation I made on 66(b) for any discovery motions to include the good faith effort?

CHAIRMAN SOULES: That was adopted at the last meeting.

MR. DAVIS: Well, I missed the afternoon of the last meeting. I'm sorry.

CHAIRMAN SOULES: Let me see if we

find it here. We either did it last time or the time before. That got done, though. Tom, look on-- is this agenda-- look on page 39. "All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed."

MR. DAVIS: Page 13?

CHAIRMAN SOULES: Page 13. Okay. That was at the last meeting. 206. This is to fix a complaint. This is what is going on out there, anyway that the court reporters have made. When we decided not to file discovery-- this is page 141-- there was some resistance and there were some very careful restrictions put on how the original deposition transcript was to be handled by the court reporter so that we could have that certified to be in the hands of the officer of the court for preservation.

And one of the things we put in there was that the court reporter had delivered it to the lawyer who asked the first question. Well, that is not what happens. The Court reporter-- that is, after it has been signed.

See? It got signed, and then the court reporter delivered it to the lawyer that asked the first question. What happens is, that the court reporter delivers it to the lawyer who asked the first question or to somebody-- to a party. They get the signature, and then the lawyer just files the deposition and the court reporter never does handle the transcript of the deposition again. And this changes the certificate from having the court reporter swear they delivered or mailed it to the custodial attorney to say that it is in the possession and custody of the custodial attorney.

So the court reporter only has to confirm that custodial attorney has it and certify that in the certificate. They're not doing what we made them do because it is unworkable, and this is workable. Any opposition to that? Being none, it is approved.

248 is a tool that is used to get judges to make legal rulings before trial. And it doesn't work in Bexar county because we don't know which judge is going to hear a case. We don't know before the day designated for trial who is going to try the case. And this extends

the time for the hearing of those kinds of things till the day trial commences so that when we get an assignment to trial, there may be-- like, you have got rulings under the Texas Rules of Evidence that say that you can move to preclude evidence for legal reasons.

In Bexar county, if you put one of those motions up before you're assigned to a trial judge, the judges on the daily docket won't rule. They'll say "I think that's up to the trial judge. The judge that's going to try the case ought to rule on it." And they're right because he is going to control the dimension of the case. But we don't get that judge until the day the trial commences. We don't get him the day beforehand. All this does is just move that one day so that we can get the benefit of this two-party aid off the central docket like others can get it off of an individual docket.

JUDGE RIVERA: I thought we had already approved that.

CHAIRMAN SOULES: No, it didn't get approved. It was probably-- it wasn't written quite as clearly as this before. I had written

it up.

JUDGE RIVERA: I remember working on it.

CHAIRMAN SOULES: Any opposition to this?

MR. BISHOP: The way the rule is written is a good recommendation for changing the way Bexar county does its--

CHAIRMAN SOULES: Change it.

MR. BISHOP: I like the rule as written.

CHAIRMAN SOULES: Okay. Any opposition to giving us the benefit of it, though? Okay. That stands unanimously approved.

We have a request here on page 135 to change the rule and say the court reporter has got to be independent. The court reporter who takes the record has got to be independent. I don't have any language for that. I don't know how big a problem it is. Obviously, if the record is being skewed by a relationship with the court reporter, it is improper. My sense is that there are a lot of other mechanisms to take care of that rather than to get into questions

about whether a court reporter is related or not related in some way-- the court reporter that shows up to take the deposition.

Aren't there motions for protective orders? It seems to me that we have enough mechanisms already to take care of this problem, but maybe somebody wants to try to write a rule.

JUDGE HECHT: This could cut down on depositions all over the state.

MR. BISHOP: Luke, I would suggest that this be sent to the Committee on the Administration of Justice for study. I don't think we ought to act on it.

CHAIRMAN SOULES: All right. Then this will be referred to the Committee on Administration of Justice. Judge Peeples is the chair of that Committee. Judge, will you take this letter to your Committee?

JUDGE PEEPLES: I think it is the perfect letter for this committee. It is a matter of towering public importance that cannot wait another day.

CHAIRMAN SOULES: Did you have substantive motion, Judge?

JUDGE PEEPLES: I think we ought to

write one right now and solve the problem.

CHAIRMAN SOULES: We'll write one right now or refuse to write it. July 13, 1989, a letter from Gary Stephens to Chief Justice Phillips sets forth a problem he conceives. It will probably be addressed by the Committee on the Administration of Justice and reported back to this Committee. We request the attention of that Committee to the problem and look forward to its response.

Next we go to-- where? Hadley said that he thought we had fixed these problems that Carla Marshall raises about 296 and 297. And where he says that is in his letter-- maybe we can look at this and decide whether we have the same comfort level.

On page 97-- a typewritten version is on page 95. Item one, "W. Michael Murray's memo you sent me on July 27 points up a problem thar currently may arise. However, if the Court approves our recent recommendation regarding TRCP 296, Murray's concerns will be eliminated. Therefore, I believe no action is necessary."

We had recommended to the Court that they do 296, giving a way that would cure

these. Is that everybody's consensus, that Murray's problem will be taken care of if that happens? Okay. That being the consensus of the Committee, we take no further action on this at this time, and we will advise Carla Marshall and Mr. Murray. Holly, if you will send them a copy of what we have already asked the Court to approve and that we hope that is responsive to their inquiry.

Now, this Rule 329, we will try to look into where we can try to understand it. Harry Tindall was going to do that. Harry is not here. Does anybody understand this 329 on page 151?

MR. BEARD: I don't understand it.

CHAIRMAN SOULES: I'm going to leave it with that subcommittee. Harry Tindall should notify them to get it understood and give us a written report. "If an interest in property has been leased under the judgment, before the process was suspended, the defendant shall not be allowed to rescind the lease, but shall have judgment against the plaintiff for the proceeds resulting from the lease of such interest."

MR. BEARD: It would appear that if

the plaintiff leased the property to somebody else before the defendant suspended it, that the defendant didn't get anything but the money. He couldn't get possession of property. That's how I read it.

CHAIRMAN SOULES: Well, this is Motion for New Trial After Citation by Publication. So we have got a judgment rendered on service of process by publication. And what does this mean, "process was suspended"?

MR. BEARD: You have got a provision that was suspended by giving a good sufficient bond.

CHAIRMAN SOULES: "Execution of such judgment shall not be suspended..."

MR. BEARD: But if you lease it before you suspended it, it's not going to let you get anything but the rent.

CHAIRMAN SOULES: This must be a situation-- is this right? The judgment had been rendered. The judgment creditor has taken over the property. The judgment creditor having taken the property, has leased it. And then there is a suspension of what?

MR. BEARD: The judgment.

CHAIRMAN SOULES: Of the judgment. But the execution has already been completed. Okay. We have (c). "If the property has been sold under the judgment and execution before the process was suspended, the defendant shall not recover the property, but shall have judgment against the plaintiff for the proceeds of the sale."

MR. BEARD: That's the present law.

CHAIRMAN SOULES: That's the present law. And this says if the property wasn't sold but it's been leased, then the defendant can't rescind the lease--

JUDGE HECHT: But can get the rents.

CHAIRMAN SOULES: -- but can get the rents.

MR. McMAINS: Seems fair.

MR. DAVIS: The same thing for sales that we're going to do for lease, I guess is what they're saying.

CHAIRMAN SOULES: But if you can't get the property--

JUDGE RIVERA: He can get the property if it has not been sold, but it doesn't say that.

CHAIRMAN SOULES: Doesn't this work this way: The defendant-- the judgment debtor can get the proceeds of the sale; and if we add this (d), he can also get the ongoing rents into the future? Isn't that right?

MR. BEARD: How do they lease it without having sold the property?

CHAIRMAN SOULES: Well, it has been sold. The judgment creditor has bought the property in. Or somebody has.

MR. BEARD: If all they get is the proceeds, why do they get anything from the lease?

CHAIRMAN SOULES: That's what I'm concerned about. Shouldn't the new owner get the lease monies?

MR. BEARD: He's got to pay the proceeds.

CHAIRMAN SOULES: If there's been a wrongful execution--

PROF. CARLSON: Look at page 153. I think it's an oil and gas lease.

CHAIRMAN SOULES: 153? But it would be the same, wouldn't it?

MR. BEARD: Well, you could have a

judgment for possession title for property without having sold the property so that if you leased it, then he could get possession out of it without having sold it.

JUDGE HECHT: Well, the first part of it, the defendant should not be able to rescind the lease, right?

CHAIRMAN SOULES: But if he can't get the property, how does he have any right of any kind? If you ask me, why doesn't (c) sort of take care-- I guess what I'm getting at is--

MR. BEARD: Well, see you can get title and possession under a default judgment without selling the property.

JUDGE RIVERA: I think this implies that you can get the property back, but you have lost the rate between the date of the judgment and the date that you get it back. But it doesn't actually say that.

CHAIRMAN SOULES: Uh-huh.

MR. BEARD: If you haven't sold it, I guess you get property back; but you can't get anything but the lease monies.

JUDGE RIVERA: You've lost the income in the meantime.

MR. BEARD: There's a distinction between (c) and (d).

CHAIRMAN SOULES: (C) would be a money judgment for the execution and the sale of the property. (D) would be maybe a suit for recovery of the property itself, and you get a default judgment and you get title to the property.

JUDGE RIVERA: And you lease it.

CHAIRMAN SOULES: And you lease it out.

JUDGE HECHT: But it doesn't say that.

MR. BEARD: It's mainly oil and gas.

MR. LOW: One of the things is, I bet you it pertains strictly to oil and gas because there it's just the lease on the minerals they are talking about and the surface may be something else. So the same thing might not apply as just to a warehouse. At least, I don't know. It sounds like it to me. We can't even figure out exactly what it is trying to apply to.

MR. BEARD: I believe the oil operators are interested in protecting their oil

and gas leases.

CHAIRMAN SOULES: I say-- my feeling is, in order to get our docket clear, we reject this amendment without prejudice to it being resubmitted in the next biennium with some sort of explanation of its purpose and maybe some briefing to support the purpose.

MR. LOW: I second that.

MR. DAVIS: We need to learn more about it whether we do it that way or send it to a subcommittee and have them do it. Whatever you-all--

CHAIRMAN SOULES: Well, it seemed to me like we ought to put the burden on the requesting lawyer to explain what we need since we don't understand it.

MR. DAVIS: That would help.

CHAIRMAN SOULES: Any objection to that? Okay. We'll return this, respectfully, to Mr. Skipper Lay-- no. To Mr. Fuller, Robert Fuller; and we will request that he give us a statement of purpose and some briefing to support the need for this change to Rule 329 and then take up it up on our next agenda, which may be delayed because we're about to get this

year's work done. Any opposition to that? Okay. It's unanimously rejected with that proviso.

MR. BEARD: The meritorious defense requirement has been knocked out, has it not?

JUDGE HECHT: It is hanging by a thread.

CHAIRMAN SOULES: I think it is hanging by a noose. Next-- is it 183? I believe the next is 183. Is that right? Do we have something on 157?

MR. McMAINS: We sent that one back last time, according to our minutes.

CHAIRMAN SOULES: What did we do with it?

MR. McMAINS: We sent it back to Skipper Lay.

CHAIRMAN SOULES: Well, Harry was supposed to be here to report on this. I'll tell you what let's do, let's just pass it and see how our time goes with the balance of the day and see if we can get back to figure it out without Harry's help.

JUDGE HECHT: That presents a lot of problems.

CHAIRMAN SOULES: Is there something there, Judge, that you think needs to be dealt with?

JUDGE HECHT: Well, I don't-- the Court is not asking for any attention to it, and the Court is going to resolve it one of these days as to whether or not through all of the means that there is a requirement of a meritorious defense under any circumstances and in any context. We have said so in four or five cases so far, and I think we'll just wait. And this should be presented, but Committee can go ahead and address it in the rule; but it is a fairly foreign problem that it is talking about.

MR. HATCHELL: It seems to be directed to the use of affidavits. It's actually a pretty good little memorandum here, but I don't know-- understand what the--

CHAIRMAN SOULES: Well, let's get back to it. Maybe somebody can give that some scrutiny while we're going through the rest of this agenda. This next is Tony Sadberry's work-up on service under the J. P. rules, and he has made them conform to service under rules, I guess, 99 and 100, the ones we have worked on a

good bit. And it says they are consistent to the extent possible with district courts; procedures are workable; that there is a clerk in the Court-- in the J. P. court that can function like the district clerk. And it indicates what is done. We took away the 90-day fuse on the citation earlier, and this work arises from a letter to me from Justice Hecht that said that there had been a justice of the peace complaining about inconsistencies between their citation rules and other court's citation rules. And the justice thought that we just overlooked it, which may be the case. Does anyone see any problems with these rules that Tony has written?

MR. BISHOP: I have a small suggestion. In (c), if we're going to send a notice like this, why don't we put it in English instead of legalese and say the first Monday after the expiration instead of the "on the Monday next follwoing"? I think it would make it a little more easy for most people to understand. You may want to do the same thing in (b), "the first Monday after the expiration." It doesn't change it substantively. It is

just--

CHAIRMAN SOULES: We're not going to change the District Court rules on that, though; so this will read differently.

MR. BEARD: It says no default judgment can be granted in any cause till the citation has been on file for 10 days. Forcible entry and detainer, the Court can enter a judgment in, what? Seven days? He can reduce it to seven days. That probably conflicts with it.

"Order a citation" tells the defendant he has to answer in seven days. Forcible entry and detainer, you couldn't even get it on file. A lot of them are defaults. So I don't know how that might conflict with something like forcible entry and detainer.

CHAIRMAN SOULES: See what 534 says about it now. It may already have this in there. There are some different time periods. 534. It is already in there. That is not a change.

MR. BEARD: 10 days, no default?

JUDGE HECHT: There may be a special service.

MR. BEARD: Forcible entry and detainer has special service rules.

CHAIRMAN SOULES: Yeah. So this general rule is keeping the same meaning as far as the time periods are concerned. 10:00 a.m. on the Monday next following the expiration of 10 days after the date of service.

But that is-- that's what we-- that is true. That is the effect of it. All right. Sarah is saying that the old rule doesn't say the default judgment may be taken then, but that is the effect of it. We did put that language in 99 and 100 so that it would tell the person being served the effect of it.

MR. BEARD: The forcible entry and detainer would conflict with that citation in the file.

CHAIRMAN SOULES: Where are you reading, Pat?

MR. BEARD: Page 183-B. It requires that the citation be on file just like we do on a default, just like we do in district court. I don't know whether the present rules--

CHAIRMAN SOULES: I'm sorry. I can't find it.

MR. BEARD: 183-B.

CHAIRMAN SOULES: "D"?

MR. BEARD: "B."

CHAIRMAN SOULES: "B," boy?

MR. BEARD: Yeah.

CHAIRMAN SOULES: About where?

MR. BEARD: The last paragraph on 183-B. Wait, wait. You're on the wrong-- you're looking at the wrong thing. 183-B.

CHAIRMAN SOULES: Oh, I'm sorry. Okay. That's old 536. There is no requirement in old 536.

MR. BEARD: I don't remember ever having to file a citation for any period of time in the justice court.

CHAIRMAN SOULES: That is not in here.

MR. McMAINS: The forcible entry detainer rules especially.

MR. BEARD: You can serve them and you can cite them in seven days.

MR. McMAINS: I'm just saying that these rules don't change 739, do they? We have forcible entry and detainer rules on citation and everything right now.

CHAIRMAN SOULES: Pat, how long is the fuse on F. E. & D. default?

MR. BEARD: The Court can issue a citation for not less than seven days.

CHAIRMAN SOULES: Not less than six?

MR. McMAINS: Why don't we make it six?

CHAIRMAN SOULES: Why don't we change this to five?

MR. BEARD: In the district court, it's 10 days-- has to be on file 10 days. So why don't we make this one 5 days?

CHAIRMAN SOULES: Or three or something where we don't run into a problem; but at least it's going to be on file a day or two.

MR. BEARD: Let's say three days.

CHAIRMAN SOULES: Three days.

MR. BEARD: By the time you serve it and get it back.

CHAIRMAN SOULES: Okay. Any other problems with these rules, or does anyone have a comment about them? Is there any opposition to adopting to recommend that the Supreme Court adopt Rules 534, 535 and 536 as submitted by Tony with the change in the last paragraph of

536 from 10 days to three days? Being no objection, that will be unanimously recommended to the Supreme Court.

JUDGE RIVERA: On the citation notice, Hadley called attention to the word in the Family Code-- they changed the wording of the citation of summons by the legislature.

CHAIRMAN SOULES: If they don't quit tinkering with the Rules of Civil Procedure and the Family Code, they're going to be out of--

JUDGE RIVERA: Here is the form of the citation that they want.

CHAIRMAN SOULES: Well--

JUDGE RIVERA: In fact, it has been ordered by the legislature, so I don't know.

CHAIRMAN SOULES: Well, the fact is that the Family Law Bar just doesn't have a hell of a lot of respect for Supreme Court rulemaking authority. They can go to the legislature and get anything done that they want done and practice in their own system. I'm sorry they're not here to hear me say that, but that's the way it is. I don't think that--

JUDGE RIVERA: It is different. It is different.

MR. LOW: In what way is it different?

JUDGE HECHT: Just technically. Different things that have to be said. When it was filed, what the number was, whose marriage is involved, statement of the relief sought.

CHAIRMAN SOULES: I guess maybe we can still make rules that predicate default judgment based on their kind of citation, too.

JUDGE HECHT: Probate Code has got a citation form for it. Family Code has got a citation form.

MR. LOW: Let's have our own.

CHAIRMAN SOULES: We'll have our own? Okay. I'll respect it. But I don't think anyone is telling the legislature that, you know, what we've got is probably workable and we need to do it--

JUDGE RIVERA: Now the district clerk is asking me, "What do I do?"

MR. DAVIS: Decide it on a case-by-case basis.

CHAIRMAN SOULES: Okay. 82, we have already talked about. Turn now to 194. This is Justice Hecht, again, I believe. It looks like

your red-lining. Rule 90 on page 194.

JUDGE HECHT: Yeah. On 194, the question is regarding publicaton of Court of Appeals opinions. And as mentioned last time briefly, a case out of Amarillo Court that was not published, the Supreme Court denied the writ, and then there was an opinion in the Federal Court case and then the Amarillo Court published their opinion and then the Fifth circuit said, "Well, we don't care about that," but the U.S. Supreme Court said, "Well, you should because that may be the law in Texas." So they remanded it back to the Fifth Circuit to consider the now-published Amarillo opinion which the Fifth Circuit decided was the law of Texas. And it raises the question whether Courts of Appeals should be allowed to publish their opinions after they have decided not to and after the Supreme Court has decided the applications for writ of error.

Also, another practice that I think is common in the Court of Appeals, certainly the case in Dallas, is that any party could ask the Court to publish an opinion that they decided not to publish and they would consider that as a

motion. The rules don't specifically provide for that and perhaps they should because parties might-- there might need to be some encouragement there, that if a party feels that a case is significant even though the Court does not, he ought to have the opportunity to come in and say, "Look, Judge, this is a big case. You ought to publish it for these reasons" and give them the opportunity to make that decision.

MR. McMAINS: Judge, does the Court of Criminal Appeals pass these type of rules, too?

JUDGE HECHT: Yes.

MR. McMAINS: Are they going to have to change their rule?

JUDGE HECHT: Yeah.

CHAIRMAN SOULES: Here is-- I was kind of caught up in that, that effort. There was a case pending before the Supreme Court of the United States, I believe it was, in which the issue that had been decided by-- was it the Amarillo courts--

JUDGE HECHT: Uh-huh.

CHAIRMAN SOULES: -- was up for decision based on Texas law. It was a diversity

casee and summary judgment and so forth. And the case came to Supreme Court, and Exxon was not a party to the Supreme Court of Texas appeal. Exxon was a party to the Supreme Court of the United States appeal.

Exxon won if the law found by the Amarillo Court was the law of Texas because it was the only statement of law in Texas. Exxon moved in the Supreme Court to have that Amarillo Court of Appeals opinion published. The Supreme Court of Texas entered an order saying they were without jurisdiction to order that.

The parties then went back to the-- Exxon then went to Amarillo Court and made motion there that the Amarillo Court publish the opinion. I believe somehow Exxon also negotiated-- I wasn't in this, but there was discussion-- negotiated with the parties to the Amarillo court's appeal to express that they had no objection to the Amarillo Court of Appeals publishing their opinion. And even the losing party, I believe, agreed. I'm not certain of that, but I think that is what happened.

So the Amarillo Court of Appeals said, "What difference does it make? Publish

it." And they did. Exxon, as I say, the moving force, was not a party. Well, it turned out that there was a major case, I guess, decided on that; so I suppose it was something influential on the law of Texas. And it was exactly the question that was before the Supreme Court of the United States.

The Supreme Court of the United States, then, reading that published opinion, I believe, withdrew cert. and remanded to the Fifth Circuit and vacated the cert. and remanded back to the Fifth Circuit where Exxon had prevailed. Is that right?

JUDGE HECHT: Yes.

CHAIRMAN SOULES: So all of this conversation to say-- I feel that somebody ought to be able on a motion of a party with a serious interest in having a case published-- somebody ought to be able to go to someplace and present their need for that to be published. And if the Supreme Court is without jurisdiction and by rule precludes it in the Court of Appeals, then it is over. Nobody can get it done. It is just hidden forever. And maybe it shouldn't be.

The Court of Appeals doesn't have to

get published just because somebody asks it to. It has got to decide if it can or should. The Supreme Court, however, I think in some cases may decide that there is an awful opinion written but, really, it probably resolves the issues between the parties. But if that opinion were to be published, they might write a per curiam or do something to straighten it out. But since it is not published, they just don't take any action.

The Supreme Court feels exposed then to the possibility that, thereafter, it has lost jurisdiction to deal with the potential for writ of error. The Court of Appeals will publish something that is just completely off the wall. It messes up Texas law, and then there is not anything that they can do about it.

So there are these balancing-- balance of considerations that I think are all in play, and we might as well get them all out here and look at them play and see whether the-- to tie the hands of the Court of Appeals or not. Okay. Those are all of the considerations.

JUDGE HECHT: The Supreme Court jurisdiction ought not-- whatever ruling may

have been made in that case, it doesn't seem to me to be a jurisdictional issue.

CHAIRMAN SOULES: That's what they said.

JUDGE HECHT: They could do it almost at any time. Certainly if the Court of Appeals has jurisdiction to do it at any time, you would think the Supreme Court had the jurisdiction. By the same token, I don't think you want the Court of Appeals in this state deciding public opinions two, three, five or eight years after they have been issued and the opportunity to do anything about it has passed. Buddy?

MR. LOW: What would be wrong with what you were talking about that they couldn't do it after you had ruled on it or something or if--

MR. McMAINS: It doesn't say that, though.

MR. LOW: But it seems to me that if they did that in published form-- I don't know if the Supreme Court has the jurisdiction to do that; but they shouldn't be able to do it without approval or consent of the Court or

something because the Supreme Court may decide they want to do something.

And, like in this situation, maybe it should have come back to the Supreme Court a certified question after that. You know, is this-- you tell us. Is this what the Supreme Court thinks the law would be? There's other ways around that particular problem, but it seems unfair, after the Court has already decided for some reason not to fool with it.

CHAIRMAN SOULES: This, to me-- I would be satisfied to see something like this that says "The Supreme Court may, on request of any party or non-party to a Court of Civil Appeals decision, order a Court of Appeals opinion published at any time."

JUDGE HECHT: I don't see anything wrong with that.

CHAIRMAN SOULES: If there is a four-year-old Court of Appeals opinion that is on-point on a case pending in the Supreme Court of the United States and if someone wants to ask that it be published and you-all decide.

JUDGE HECHT: I see that as one more motion we're going to have to consider.

MR. BEARD: What kind of interest do they have to demonstrate to make that--

CHAIRMAN SOULES: There is no standard. It's a request.

MR. BEARD: Just "We want it published"? They ought not be able to do that.

CHAIRMAN SOULES: Somebody ought to be able to get it published if it is the only law there is that's not messed up.

MR. BEARD: They've got to have some interests, some reason other than-- well, scholarly reasons? Lawyering?

CHAIRMAN SOULES: Maybe.

MR. BEARD: If the Court recognizes the opinion as deciding a case at first impression, they ought to publish it. They don't do it in every case. I have seen unreported cases that have some startling news. But in--

MR. BISHOP: Sometimes that's why they are unpublished.

CHAIRMAN SOULES: Well, if we put that in, "The Supreme Court or the Court of Criminal Appeals"--

MR. BEARD: The Court can write its

own rules about what it is going to do. They might not like having several hundred of those motions.

CHAIRMAN SOULES: Well, I don't think they even have to rule on the requests. They can just throw it in the trash, I guess.

MR. BEARD: Decline to do it, huh?

CHAIRMAN SOULES: It seems to me that there ought to be someplace where a party could go to express a need to have an opinion published if it needs to be looked at. Rusty.

MR. McMAINS: I move, first of all, in terms of the sequencing. We all like to talk about what the Supreme Court can do here. This is the Court of Appeals opinion group. Or is it supposed to be on all of them? Is it just opinion?

PROF. CARLSON: No.

MR. McMAINS: (H) does address the Supreme Court, but it is right in the middle of the Court of Appeals rules.

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CHAIRMAN SOULES: There is a lot of that. That is one of Sarah's points, historically. We've got to work on that.

MR. McMAINS: The second thing is, I

think the concern immediately that you have is not met by this rule in the sense that application for writ of filing takes away the Court of Appeals' ability to publish; whereas, remember the next rule that we're going to fix in here talks about the effect of the premature filing and whatever.

And the truth of the matter is, I think what you are really concerned about is, after any action on the application for writ or discretionary review. Otherwise, send it to the Court of Appeals if you've acted-- because what you really want to know is that you ain't acting on something you think is unpublished and it turns out to be published. So if you fix it that way, at least from the Court of Appeals' standpoint, you fix it.

Then you can say "Any other request for publication after such action has to be addressed to the last Court that considered the issue." That would give them the jurisdiction to consider, if you want it. I don't know whether you want it.

MR. DAVIS: How about stating in writing that you--

CHAIRMAN SOULES: Okay. Well, I can't-- Rusty, I can't get that in here without specific language. What do you want to do? What do you want to change?

MR. McMAINS: Well, the only thing in here, it says "After any party has applied." Do you want to say "After the Supreme Court or Court of Appeals has acted upon any party's application for writ of error, discretionary review or any other"--

CHAIRMAN SOULES: Is that the way you want it?

JUDGE HECHT: Yeah.

CHAIRMAN SOULES: "Any (un)published opinion can be published after"-- and then strike "any party has applied to"--

MR. McMAINS: Right.

CHAIRMAN SOULES: -- "after the Supreme Court or the Court of Criminal Appeals"--

JUDGE HECHT: Is that any party's application?

CHAIRMAN SOULES: "On any party's application," and then pick up from there? Okay. Do you have any objection to putting that

sentence in up here?

JUDGE HECHT: Go ahead and make that same change that Rusty suggested on page 195. At the top of 195.

CHAIRMAN SOULES: "However, the appellate court shall not order any (un)published opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application," et cetera. And then at the end of (e), we'll add this word, "The Supreme Court or Court of Criminal Appeals may on request of any party or non-party to a Court of Appeals decision order a Court of Appeals opinion published at any time."

JUDGE HECHT: Right.

MR. LOW: I can see a timing problem. Does that have to be stamped some other way? Like, they are deciding to act on it and announce that the Supreme Court meets one day; and the day before, the Court of Appeals meets and they decide they're going to publish it. The Supreme Court doesn't know what is published and they announce their ruling the next day. I don't know how you could do that.

JUDGE HECHT: You can cure that by

motion of reason. The party can come in and say, "Judge, I would like to reconsider this"--

MR. LOW: Oh, oh, oh. Okay. All right. I'm just thinking of a matter of timing, without the assumption of close communication.

CHAIRMAN SOULES: Here's how you put Judge Peeples in jail. Okay. The next rule-- and that's unanimously approved then, being no opposition to Rule 90. Rule 90 has been unanimously approved and amended in-session.

Now we go where, Holly?

MS. HALFACRE: TRAP 130.

CHAIRMAN SOULES: Trap 130 on page 197. Where is that?

JUDGE HECHT: There is a draft of it on 208.

CHAIRMAN SOULES: Page 208. That is another of your suggestions.

JUDGE HECHT: This is the Ratcliff/Doctors Hospital/Rose problem of what happens when a party in the Court of Appeals files an application for rehearing before the Court is done ruling on all of the motions for rehearing. Ratcliff, the appellant, petitioner, filed an application for writ of error before he

filed a motion for rehearing.

Well, typically, what happened is that the clerk won't let you do that in Dallas. The clerk will tell you, you can't file an application before you file a motion for rehearing because, obviously, the Court is not going to consider an application if there hasn't been a motion for rehearing that's been ruled on.

In this case, everybody had gone to lunch and somebody was stuck in there that didn't know that and filed it anyway. The next day, the party comes in with a motion for rehearing. The clerk says, "No, it's too late. You already filed an application." So they really are in a catch-22. Unless they get a ruling on their motion for rehearing, they can't get their application heard and they can't get a ruling because they already filed their application, so they're stuck.

Our Court wrote an opinion that said there is this old case-- an old Supreme Court case that says the filing of application divests the Court of Appeals and then the jurisdiction to act further immediately rests with

preliminary jurisdiction in the Supreme Court, and there is nothing else you can do. So we don't think that is a very good result, but I feel like we are constrained by prior precedent.

Well, the Supreme Court then denies the application for writ of error without want of jurisdiction. Not surprising. There is no rehearing. Then the parties file for mandamus to compel us to rule on the motion for rehearing, and the Supreme Court turns that down.

Then about the same time, the Court of Appeals got another case in which all parties file motions for rehearing. The Court granted them, changed the judgment of opinion; and then under the rules, they file a second motion for rehearing. But now one of the parties, fearful that his time was running from the ruling on the first motion, decided he better get his application in there because he didn't want to lose his time on the application. So he comes in there with the application. The Court says, "Okay. We can't rule on the second motion."

This time, the Supreme Court takes the case and says "I think, rightly, that the

old Supreme Court case was wrong. The Court of Appeals ought to rule on a motion for rehearing, and so we'll just hold this till they do." So the case went back to the Court of Appeals for ruling.

The Court of Appeals then granted the motion for rehearing and remanded the case to the trial court. And I have heard this said and I have not checked it out but, apparently, there was some suggestion in the ruling on the motion for rehearing that-- impinging on the party's right to pursue their application for writ of error in the Supreme Court. So the parties came back to the Supreme Court and said "Well, they could rule on the motion, but they cannot deprive this Court of the jurisdiction that has been invoked by the application for writ of error. And the Court said, "That's right. Just quit squirrling around with it and send us the whole case and we'll sort it out later." So that's what happened.

Now we have got another case-- yet another case where this has happened; and, basically, the Court of Appeals has said, "Look, we don't care. Just tell us what to do and

we'll do it. But we just need some direction on what we are supposed to do."

So this purports to fix that by treating a prematurely-filed application for writ of error as a prematurely-filed cost bond and notice of appeal in that it simply is held by the Court until the first moment in time that it would be timely; and then it is considered filed as of that time.

CHAIRMAN SOULES: Anyone? Mike?

MR. HATCHELL: This is a real good rule, and I would like to heartily endorse it. It also solves other problems that I won't go into in terms of when there might be a defective second motion for rehearing filed, and you don't know.

I have two comments. It was suggested at the May meeting that to further put the nail in the coffin, we might add a clause that said that the clerk of the Court of Appeals cannot mail applications to the Supreme Court until all motions for rehearing in the Court of Appeals have been under the rule. I don't know whether that would be helpful or not.

And thirdly, let me get you to look

at the last sentence. The first time you read it, you think, "Well, that makes plenty of sense." But the words "such motion" at the end refer back to the last timely motion, a timely-filed motion for rehearing. I think the assumption is that the last time they filed motion for rehearing would be the last motion overruled, but that is not necessarily true. So maybe the words "such motion" should be "all motions" or something like that.

MR. McMAINS: I have one further observation, too.

CHAIRMAN SOULES: Okay. Rusty, let me get caught up with this unless it is on the same part because I get too many things on here, and I can't keep up with it. We'll get right to you. The first one is what?

JUDGE HECHT: Transmitting it to the--

CHAIRMAN SOULES: Where does it say that the clerk of the Court of Appeals mails it or does--

JUDGE HECHT: Rule 132(a).

CHAIRMAN SOULES: Rule 132(a). "Application.... forward." Okay. That is the

word.

JUDGE HECHT: That may be where we need to change it because that was very instrumental in the Court of Appeals deciding it doesn't have jurisdiction to do it.

MR. HATCHELL: Right.

JUDGE HECHT: And I think it should be changed to say "and shall, after the Court of Appeals rules on"--

MR. McMAINS: "All motions for rehearing."

JUDGE HECHT: -- "all motions for rehearing" because you can even have some later ones, see?

MR. McMAINS: "All timely-filed motions for rehearing."

MR. BEARD: You can have motions--

CHAIRMAN SOULES: "Timely-filed" maybe shouldn't play a role in this.

MR. HATCHELL: The dismissal of a motion or a failure, writ of error, saying "We're not going to rule on this. This is disposition of the motion." So I would just say "disposition of all motions."

MR. BEARD: A second motion for

rehearing isn't relative to changes or-- so you can't just tie up rulings on motions for rehearing.

CHAIRMAN SOULES: But you still get time to write a second motion?

MR. BEARD: The second motion? No.

MR. McMAINS: No.

JUDGE HECHT: No. From the first one.

MR. McMAINS: Not if you're not authorized.

CHAIRMAN SOULES: Oh, that's right. If there is any writing, you can file a separate--

MR. McMAINS: That's right. But if there isn't--

CHAIRMAN SOULES: When there isn't any writing. Okay.

JUDGE HECHT: You don't want somebody to file a spurious motion for rehearing.

MR. HATCHELL: That's right.

JUDGE HECHT: Detain the application. This has to be timely filed. "Shall"-- "After the Court of Appeals has ruled

on the last timely-filed motion for rehearing, promptly forward it to the clerk."

MR. BEARD: It is not just timely,is it? It's-- the second motion is just out.

CHAIRMAN SOULES: Well, we're all different. It's after the Court of Appeals has ruled on all timely-filed motions for rehearing?

MR. HATCHELL: Right.

CHAIRMAN SOULES: "Promptly forward." Okay. We'll put that in Rule 132.

JUDGE HECHT: A second motion after a first motion has been overruled and the Court has not changed his judgment is not timely.

CHAIRMAN SOULES: Judge, in this last sentence of your proposed Rule 130, you say "An application filed prior to the overruling of all timely-filed motions for rehearing"?

JUDGE HECHT: Yeah.

CHAIRMAN SOULES: Okay. We'll change "last" to "all." "For rehearing filed by any party shall be deemed to have been filed on the date of but subsequent to"-- now, what do we do to fix your concern there, Mike?

MR. HATCHELL: Is that in the last sentence?

CHAIRMAN SOULES: It says "motions."

MR. HATCHELL: Well, no, no. "An application filed prior to the overruling of the last timely filed"--

CHAIRMAN SOULES: No. "All timely-filed motions.

MR. HATCHELL: Well, okay. "All timely"--

CHAIRMAN SOULES: "Filed motions for rehearing."

MR. HATCHELL: Okay. Well, maybe that will--

JUDGE HECHT: Why don't you strike "filed by any party"?

MR. HATCHELL: Maybe that will take care of it, then. I see what you're doing.

CHAIRMAN SOULES: "Shall be deemed to have been filed on the date of but subsequent to the overruling of such motion." Does that work?

MR. HATCHELL: Yeah, I think that will work. Now, Rusty.

MR. McMAINS: Well, what I'm trying to get at is the term-- instead of "overruling," the first sentence does assume that the Court of

Appeals has jurisdiction over the motion. The second sentence sounds like it only deals with the overruling and that that is all they can do is overrule it, which is, of course, what your issue was, whether they can grant it.

Don't you really want to say "disposition"? That is, "An application filed prior to the disposition of the last timely filed motion for rehearing"?

JUDGE HECHT: Yes, because if they grant the second-- even if they grant the first one and change the judgment, you don't have to file another motion if you're satis-- if you have raised everything else you want to raise in the first motion.

MR. McMAINS: Right.

MR. HATCHELL: I think that's right.

CHAIRMAN SOULES: So "overruling" in the last sentence of Justice Hecht's proposed should be "disposition" or what?

JUDGE HECHT: Well, what about the first sentence of 130(b)?

CHAIRMAN SOULES: 130(b). "The application will be filed with the clerk within 30 days after overruling of the last timely

motion for rehearing filed by any party. (sic)"

JUDGE HECHT: Don't you want to say "After the ruling on all timely motions for rehearing"?

MR. HATCHELL: Right.

MR. McMAINS: Right.

JUDGE HECHT: Because if they grant it, change their judgment, and you're satisfied, you don't have to file another motion. You are protected. They can ready their appeal.

CHAIRMAN SOULES: Okay. Work with me through the language, then. We're looking at the language that is presently in the rule; is that correct?

JUDGE HECHT: "Application shall be filed with the clerk of the Court of Appeals within 30 case days after the ruling on all timely-filed motions for rehearing."

CHAIRMAN SOULES: Period. Okay. We have got that.

MR. McMAINS: The second sentence is okay.

JUDGE HECHT: The second sentence is okay.

CHAIRMAN SOULES: "An application

filed prior to the ruling on"-- huh?

MR. McMAINS: That's right.

MR. HATCHELL: Yeah.

CHAIRMAN SOULES: "All timely-filed motions for rehearing shall be deemed to have been filed on the date of or subsequent to the ruling on such motions."

JUDGE HECHT: The date of ruling. Yeah. Right. Subject to the rulings.

CHAIRMAN SOULES: Could it be that they rule on motions in subsequence? Is that-- is that any kind of a problem there?

JUDGE HECHT: They sometimes do and sometimes they file it subsequent; but this ought to include that, all of the ruling on all of it. See, "all" includes the last one. But the way it reads now, "the last timely-filed motion"-- well, sometimes, you know, it is conceiveable they will rule on the last one before they rule on the one before that. We are trying to get out of that trap.

CHAIRMAN SOULES: Actually, it's more complicated than that. It's the date all such motions have been ruled on. I mean, maybe I'm--

MR. McMAINS: You want to say the last date?

CHAIRMAN SOULES: Well, I'm struggling with that. That's right on the point that I'm trying--

MR. McMAINS: On the latest date--

CHAIRMAN SOULES: "All such motions have been ruled on." I'm trying to distinguish between picking them up each as they get ruled on, but I don't know whether that really makes a point.

MR. BEARD: It has to be the final because both sides-- (inaudible)

MR. McMAINS: We have a concept of finality involved in the Court of Appeals judgment that there must be a disposition of all issues before the Court, all parties.

CHAIRMAN SOULES: "Subsequent to the date"--

JUDGE HECHT: "On the date of, subsequent to"--

CHAIRMAN SOULES: --"on the last ruling on all such motions"?

JUDGE HECHT: You don't want to put that in there twice. "Filed on the date of,"

then "subsequent to the ruling"--

CHAIRMAN SOULES: "On the last"--

MR. McMAINS: "Final ruling on all"--

CHAIRMAN SOULES: "The last ruling on any such motion." It is the last ruling, isn't it? It's not the last motion.

MR. McMAINS: Yeah. That's right. The last ruling.

CHAIRMAN SOULES: "To the last ruling on any such motion." Now let me see if I can put Mike's problem back on the books to put "motion" singular again. "An application filed prior to the ruling on all timely-filed motions for rehearing shall be deemed to have been filed on the date but subsequent to the ruling on"--"the last ruling on any such motion." Okay. Did I get it?

JUDGE HECHT: Uh-huh.

CHAIRMAN SOULES: Any opposition to this as we have got it marked up? Okay. There being no opposition, it is unanimously approved. The next one, the Court has changed its practice. It now enhances its judgments and orders through the clerk and not from the bench.

Any opposition to this? It's unanimously approved.

Now, Harry, we need a report from you on two things. First, I guess this-- on 159, this input from Aaron Jackson. Are you ready to report on that?

MR. TINDALL: Yes. I called Aaron and talked with him and told him that we were concerned that his proposal would be, perhaps, viewed as too limiting in terms of methods to attack a judgment. He agreed, and I called him back on Monday after our meeting. He agreed that-- I think Rusty made the observation, and that it needed reworking. I have not heard back from him. So in view of that, I move this matter be tabled.

CHAIRMAN SOULES: Since we're trying to dispose of our docket, let me ask you if we could alternatively move to reject this at this time and return it to Mr. Jackson for such revision as he may choose to make and resubmit it to Committee?

MR. TINDALL: Yes. I think it's worth pursuing. He has this article attached here, you know, going through all of the progeny

of Sunshine Bus Lines. And he has got some good points, but I think Rusty said-- well, the way he has it, Rule 329 and the following rule shall be exclusive rules for a motion for a new trial; and Rusty had said, "Well, that is not the only way." So I would like to keep it alive, but it's not as well written as it is here.

CHAIRMAN SOULES: He is proposing a 329 (c).

MR. TINDALL: That's right.

CHAIRMAN SOULES: Is he proposing a new 329(c)?

MR. TINDALL: That's right. It would try to bring together all of the confusing case law about when you have had a default judgment, what is the burden and the counter affidavits and so forth on a default judgment.

CHAIRMAN SOULES: So he has done a lot of work on this, but it still looks a little bit incomplete to you?

MR. TINDALL: That's correct.

CHAIRMAN SOULES: And he is in agreement?

MR. TINDALL: He is in agreement. When I mentioned Rusty's observation about the

statutory writ of error--

CHAIRMAN SOULES: Well, in order to clear our docket of this, I submit that we--I suggest that we reject this at this time with a letter to him, to Mr. Jackson, that we invite him to do such adjusting as he may feel to be appropriate to this suggestion and resubmit it for our consideration in connection with our next agenda.

MR. TINDALL: I would support that.

CHAIRMAN SOULES: Any opposition to that? Okay. Well, we will send Mr. Jackson that information, also suggesting that-- also reminding him that he indicated agreement to that action.

MR. TINDALL: That's correct.

CHAIRMAN SOULES: And now we go to page 151, and we have already rejected that, mostly from an inability to understand it. And you may be able to--

MR. TINDALL: Well, whatever-- I talked to Skipper Lay. He's a classmate of mine. And evidently, the oil, gas and mineral law section lobbied something through the legislature that takes care of their concerns in

this regard. So he says, "Don't worry about it."

CHAIRMAN SOULES: It has been withdrawn by the proponent.

MR. TINDALL: So that one can be pulled down.

CHAIRMAN SOULES: Okay. We're going to make a note, then, that this proposal for a new 329(d) has been withdrawn by its proponent, Mr. Lay.

MR. BEARD: If it is still something that's statutory now, we ought to get that-- it would be here. That's the problem with all of these statutes.

CHAIRMAN SOULES: You said it. Does anyone have anything on the agenda that we have not addressed? Let's go to Hadley's-- on page 97, I guess. He has seen some new session laws that are in conflict with the Rules. One is this family law citation matter. Harry, why do you-all keep going and getting statutes changed that conflict with our Rules?

MR. TINDALL: Well, I thought-- see, our Family Code had the old language on the notice of citation, and we have added, in

detail, about appearing on-- and I thought we only conformed it to the language of the Rules of Civil Procedure. Let me--

CHAIRMAN SOULES: Why don't you do it that way. Say "Citation as provided in the Texas Rules of Civil Procedure?"

MR. TINDALL: Well, we considered that; but it has been-- since 1973, it has been very specifically set forth in the Family Code; so we just took what was in that Rule-- 99, is it-- and folded it over in the Family Code. Let me read this.

MR. McMAINS: We changed that rule last time.

MR. TINDALL: We changed it in '87.

MR. McMAINS: But we just got through changing it.

CHAIRMAN SOULES: No. We did in '87.

MR. McMAINS: I thought we just--

CHAIRMAN SOULES: I propose a resolution from this committee-- your committee-- that revisions to the Family Code are made that are procedural that you-all propose to conform-- to just adopt the Rules of

Civil Procedure in the Family Code so that when those rules are adjusted by the court system statewide from time to time by this Committee, the adjustments flow automatically to your litigation as well as all other state litigation.

MR. TINDALL: I would agree with that, and that is certainly what was the intent of Senate bill 307, which was a technical corrections bill; and one of those was to conform it to the '87 change. Now, you say you have changed it again?

CHAIRMAN SOULES: I don't know if we have.

MR. McMAINS: I don't remember.

CHAIRMAN SOULES: We just got through changing some J. P. rules, I guess, is all.

MR. McMAINS: That may be.

CHAIRMAN SOULES: Who pushes the procedural changes in the Family Code? Is that the family counsel?

MR. TINDALL: That is the Family Law Counsel.

CHAIRMAN SOULES: Is there a

resolution-- would this committee accept a resolution directed to that counsel when they amend their code so far as practicable to simply reference the Rules of Civil Procedure for procedural guidance? Is that a unanimous consensus here?

I will, as Chair, prepare that resolution and submit it to the State Bar Family Law Counsel.

MR. TINDALL: That would be easier. I don't know why it was done that way in '73. It was a detailed citation, rules all set out in the code.

CHAIRMAN SOULES: Unless I hear from the Supreme Court to the contrary?

JUDGE HECHT: No.

CHAIRMAN SOULES: No objection from the court that you're on, Judge?

JUDGE HECHT: I don't think there will be an objection to that.

MR. TINDALL: Where is the new 99?

CHAIRMAN SOULES: Oh, it's in the rule book. We don't have a 99. I was wrong. We didn't change it. We have been dealing with the service rules in the J. P. courts.

His other point is-- on 96-- that we have got a statute that requires 12-person juries in two Montogomery county courts of law. I guess they have given the family law jurisdiction. I wonder if it is 10/2.

MR. McMAINS: Probably unanimous, too.

CHAIRMAN SOULES: Probably unanimous 12.

MR. BEARD: That meant some legislator got shafted by a six-man jury in Montgomery county in a county court at law.

CHAIRMAN SOULES: Does anyone-- maybe we can--

MR. BEARD: We don't know what all is in that.

CHAIRMAN SOULES: I'll submit that the standing Committee on Rules-- what is the number of jurors rule? What number is that? Okay. To the committee that deals with these rules for study and agenda item at our next session-- that is Hadley? Okay. We'll send it back to Hadley, and I guess we'll have to have our Rules of Civil Procedure adjusted to have two courts in Montgomery county.

MR. McMAINS: All counties other than Montgomery county?

CHAIRMAN SOULES: All counties other than County Courts at Law Nos. 1 and 2 of Montgomery county shall have six unless otherwise provided by the legislature.

MR. McMAINS: From time to time.

MR. HATCHELL: As their whim may be.

CHAIRMAN SOULES: Let me ask now, is everybody comfortable that we have disposed of the docket for this Committee for this year because if there is anything left, we won't have another meeting. Because we won't have another meeting, Holly will red-line these changes out to you right away as well as the minutes of this meeting. We'll try to get them out next week. We will get them-- probably get them out next week-- Holly and Sarah.

MR. TINDALL: Can I ask what was done on the sealing of records? Has that been continually studied?

CHAIRMAN SOULES: Yes. Oh, incidentally, I should report on that. Orlando Garcia sponsored that bill in the legislature. He did it in a way that was very accommodating,

I think. He was given a fairly specific proposal to carry, which he did not choose to carry. He chose to do it, and he negotiated with the proponents to just get a resolution and let the Supreme Court do it, which is one way to do it.

And we formed a committee last time with Chuck Herring and Lefty Morris as chairs, and we agreed to include other lawyers and we have added two that are outside of this Committee, John McElhenney, who represents Dallas Morning News and Chip-- what is his name?

MS. HALFACRE: Babcock.

CHAIRMAN SOULES: Babcock, who I think represents the Dallas Times Herald. And I told Orlando in that conversation that we would be happy to have the general counsel to the state association of newspapers, whatever its title is, as a member also there and that we were attempting, also, to find somebody from family law people and from criminal law and somebody practicing juvenile law so that we can get a balance and that we will in every way try to draw a line where the Constitution permits or doesn't permit that kind of record sealing and

something that is acceptable to everybody. We don't want to pass a rule that's unconstitutional or have a statute that's unconstitutional. He was all in agreement with that.

He asked whether or not we would permit actual members of the press, who are not lawyers, to be on the committee. I told him that I would like to discourage that because we have never had any people participate in this other than to come as public members and address us and tell us what their concerns are.

We have had court reporters do that and process servers do that. That's fine. We can hear from them. But in terms of actual service on a subcommittee, we would prefer to have lawyers that represent the newspapers or the press or whomever is involved. He seemed to accept that without any problem.

So where it stands is, we're forming a committee. Fuller is on it. You may be on it if you wish. That is the way it is constituted at this time, and I think it is probably going to grow. I told Orlando that we couldn't have a lawyer for every newspaper in the State of Texas

on the committee. He agreed with that. So we had a good dialogue with him, and we'll cooperate with him. What is your opinion about--

MR. TINDALL: Do you anticipate a rule being adopted before the next legislative session that will be in this batch?

CHAIRMAN SOULES: Yes. I think that that is an ad hoc project that we will-- they can do by order. He asked me what I thought the time frame was, and I told him that-- and he said "Do you think it's going to be about a year project?" I said, "Yes." So that didn't seem to be a problem with him that it might take a year to get it done. I think he is more interested in being able to comfortably represent that the work product is a product of input from every source that has a need to have input than to try to rush it out. Of course, we are, too.

We have been writing letters to senators and to representatives that are involved in the procedural processes across the street, keeping them advised of what we are doing, particularly when we are doing something

that is responsive to resolutions that they have ushered through. And we're doing everything we can to keep communications with the legislature in the best shape we can in this committee, the court on rulemaking.

Anything else? I just can't tell you thanks enough for all of the work. It's amazing to me every time I come here to see how dedicated you all are to the work in this Committee and through the efforts of the courts. Thank you, again. I guess we're adjourned until sometime next year.

(Meeting Closed)

STATE OF TEXAS)

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COUNTY OF TRAVIS)

I, KATHERINE A. BUCHHORN, Certified Shorthand Reporter in Travis County for the State of Texas, do hereby certify that I did, in shorthand, report said proceedings; and the above and foregoing typewritten pages contain a full, true and correct transcription of my shorthand notes taken on said occasion.

WITNESS my hand and seal of office this the 1st day of September, A.D., 1989.

Katherine A. Buchhorn

Katherine A. Buchhorn CSR
Certificate #2788
Expiration Date: 12-31-89

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