PART 3 of 4

BEFORE THE

SUPREME COURT ADVISORY COMMITTEE

AUSTIN, TEXAS

FEBRUARY 10, 1990

Austin, Texas

ANNA RENKEN & ASSOCIATES
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HEARING HELD IN AUSTIN, TEXAS, ON FEBRUARY 10, 1989

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B-E-F-O-R-E

LUTHER H. (LUKE) SOULES, III
CHAIRMAN

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SUPREME COURT:
Justice Lloyd Doggett
Justice Nathan Hecht

COURT OF CRIMINAL APPEALS:
Judge Sam Houston Clinton

COAJ CHAIR
Justice David Peeples

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Harry L. Tindall
Sam D. Sparks (San Angelo)
Sam Sparks (El Paso)
Harry M. Reasoner
Judge Paul Rivera

OTHER SPEAKERS:
Pat Hazel

P R O C E E D I N G S

Saturday, February 10, 1990

Morning Session

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CHAIRMAN SOULES: Judge Peeples is here, and the first thing on this agenda, just on Page 1, is a letter from the COAJ where they did an edit of our typographical errors. And we made every change -- I appreciate Judge Peeples -- I guess he is out there getting coffee -- the work they did on this.

MR. SPIVEY: If he is out, I move we take that off the table.

MR. DAVIS: In all seriousness, do we have a quorum? Can we preceed without a quorum? I understand -- I don't want any -- I am not trying to cut off any --

CHAIRMAN SOULES: If you will look at Page 1, you will see

MR. DAVIS: I was just asking the question.

CHAIRMAN SOULES: Well, there is no quorum rule for this Committee.

MR. DAVIS: If it is raised later, I wanted to be sure.

CHAIRMAN SOULES: Okay. The Chair declares we are in session and that we have a quorum.

Okay, if you will open your books to Page 1, we will get some -- this is housekeeping, anyway. We have made all of the changes that the COAJ suggested on Page 1, except H.

Where is Judge Peeples?

MR. HERRING: He was here just a minute ago.

CHAIRMAN SOULES: And the one we did not make -- and they are right, they were errors. Some of the errors that they caught were not in what we typed up, but they got into what was published in the bar journal. In other words, there were errors in that. So -- but we have made all these corrections.

MR. SPIVEY: Except H.

CHAIRMAN SOULES: Except H.

MR. SPIVEY: I move we accept H.

CHAIRMAN SOULES: H doesn't fit. If you will turn with me to Page 428.

Judge Peeples, I was just saying we have done all these corrections that you sent us in the letter except H.

JUSTICE PEEPLES: I talked to Holly about that. Apparently, we were wrong on one or two of those.

CHAIRMAN SOULES: Well, at this point, that is the one -- the only one. Is that what is wrong?

JUSTICE PEEPLES: It is the kind of thing, if you read it, it is obvious whether it is a mistake or not.

If you-all looked at it, and it is not a mistake --

CHAIRMAN SOULES: So can we withdraw Item H on Page 2 of the agenda?

MR. SPIVEY: Withdraw?

CHAIRMAN SOULES: I am asking Judge Peeples. It is his committee.

JUSTICE PEEPLES: If somebody looked at the thing and what we said was wrong, that is fine.

CHAIRMAN SOULES: All right. I did, and if you all want to get some comfort on that, if you will look at Page 428 -- I am sorry, let's see, 429, and look at the underscored lines there, one, two, three, four, five, six, the sixth line starting with "If the" -- "If the attorney in good faith believes that the order has been violated, the attorney shall take the necessary actions provided under Chapter 14, Family Code." And it is fine the way it is on Page 429, and if we make the change that is suggested on H, it will not be. They want to stop the sentence after "violated" and capitalize T, "The attorney." Then you have got two incomplete sentences. So that suggestion, you agree it should be --

JUSTICE PEEPLES: That is the only one?

CHAIRMAN SOULES: That is the only one. The rest of them we followed your lead. So do we have a motion to make all the corrections except H and to withdraw H?

MR. SPIVEY: So moved.

CHAIRMAN SOULES: Moved. Second?

MR. HERRING: Second.

CHAIRMAN SOULES: All in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? Okay, that is done unanimously.

Next is, let's see, 3(a). Somebody objected, said we ought to just eliminate local rules. But --

MR. COLLINS: I second the motion.

CHAIRMAN SOULES: But since we can't do that --

MR. COLLINS: I thought we had a motion on the table.

CHAIRMAN SOULES: Is there a motion to leave 3(a) the way it is, the way it has been recommended?

MR. HERRING: So moved.

CHAIRMAN SOULES: Okay, moved. Second?

MR. SPIVEY: Second

CHAIRMAN SOULES: All in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? Okay.

The next one is -- I guess the next is Rule 4. The FE&D lawyers want to be exempt from the provision that takes Saturdays, Sundays and legal holidays out of any period

under five days, five days or under. That would be the only exception. They have got a five-day period --

MR. SPIVEY: Is that Rule 6?

CHAIRMAN SOULES: Rule 4, it is on Page 9. A way to handle this -- they consider it second best -- is to change the five day rule in the FE&D -- the five-day time period in the FE&D rule -- to six days and then they are not in a five-day or less period.

MR. LOW: I think that is just for federal rule to intervene. The problem is like if something comes up on Friday, you know, and you have got to have a hearing on Monday, you know, that is --

CHAIRMAN SOULES: Well, the judge has to set that. The only item before the Committee is do we exempt FE&D practice from the Saturday, Sunday and legal holiday exception or do we just change their period to six days and do it that way. We would have to expressly exempt them in Rule 4 or tack a day -- move a five-day period to six-day period. Which rule is this in, Elaine?

MS. CARLSON: It is in Rule 4, but it dovetailed to 748, 49, 49(a) and 49(b) and (c).

CHAIRMAN SOULES: Okay, back here you see on 749(a) in the rule book, it says, "Appellate", that is the tenant, "is unable to pay the cost of appeal and so forth, he shall nevertheless be entitled to appeal by making proof of

such inability within five days." Can we change that to six and that fix it?

MR. BRANSON: Buddy Low and I have voted and we have decided that E&D stands for eating and delivering, but what does F stands for?

CHAIRMAN SOULES: I don't know what the F stands for. We are on the record.

Elaine, do you want to cover that with us?

MS. CARLSON: Yes, Ken Fuller's subcommittee, which I am on, made the recommendation on Page 9, and my subcommittee on the 700 series of FE&D endorsed their recommendation to exempt it because it really dovetailed with a lot of other time periods back in the 700 series. So we would endorse the recommendation on Page 9 of the materials.

CHAIRMAN SOULES: All right. Is there a second?

MR. HERRING: Second.

CHAIRMAN SOULES: Made and seconded. Any opposition? Those in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? Okay, we will add that, then. It is on Page 11, isn't it, Elaine?

MS. CARLSON: It is actually on both.

CHAIRMAN SOULES: Is it? I didn't see it. Okay.

JUSTICE HECHT: I am not clear on that.

CHAIRMAN SOULES: If you go to Page 11, you will see something underscored. That is a change from what we voted on the last time. It is an addition to what we voted on last time. It doesn't change anything we did as far as the words were concerned, but it does add an exception.

JUSTICE HECHT: So we are going Page 11 instead of Page 9?

CHAIRMAN SOULES: Yes, Page 9 is the original rule.

Okay, next --

MR. EDGAR: Luke, I think if we adopt that in toto, it is really not grammatically correct. You start out by saying Saturdays and Sundays shall be counted, and then you say Saturdays and Sundays -- you start out saying Saturdays and Sundays shall not be counted, then you say and they shall be counted. Don't you want to say except -- shouldn't that be an exception rather than an and? It just seems to -- I hate to be picky because we have got a lot of things to cover, but I think we ought to be grammatically correct.

CHAIRMAN SOULES: I think we ought to take out "Saturdays, Sundays and legal holidays shall be counted," just take that out the second time it is said, because you say it in the first.

MR. EDGAR: That is right.

CHAIRMAN SOULES: Then just pick up "and" -- the words that would be added are these: "and for purposes of the five-day period provided for under Rules 748, 749, 749(a), 749(b) and 749(c)." Does that fix that?

MR. EDGAR: How is it going to read?

CHAIRMAN SOULES: Well, if you look at Page 11, if you take out from the underscored language, these words, strike through them, "Saturdays, Sundays and legal holidays shall be counted." Leave the rest of them in. That is the way it would read.

MR. EDGAR: Okay.

CHAIRMAN SOULES: That all right? Okay. That is unanimously approved, then.

Next is -- this has got a lot of -- it is Page 29, I guess is the next one. The Committee recommends that we leave five as we passed it the first time. There was some effort to -- someone wanted to extend time periods when there is courier delivery. Okay, those in favor of leaving it like it is as recommended by the Committee say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? Okay, that stays as is.

Next is Page 33, Rule 10. Let's see, Tom, that is your letter, Tom Ragland. They recommend that we add

the words, "the party's last known address." If you look on Page 35, this is the Committee's recommendation. The Committee recommends that we require on withdrawal of counsel that the motion states the party's last known address and that we delete the language, "The court may impose further conditions upon granting leave to withdraw." This is on Page 35.

Is there any opposition to the Committee's suggestion? There being none, that will stand recommended as unanimous, the text as we see it on 35.

And we go to --

JUSTICE PEEPLES: Luke, we deleted that sentence in the middle there?

CHAIRMAN SOULES: Yes.

JUSTICE PEEPLES: Okay. What was the reason for deleting that?

MR. BRANSON: Well, the subcommittee judged -- it was brought out that some people had had some rather unusual stipulations put on them by some trial judges in order to get out of lawsuits.

MR. SPIVEY: One of them was a defense firm was required to bill about $120,000 worth of hours that was already uncollectible because the defense judge -- the judge just wouldn't let them out period, even though they qualified to be let out.

JUSTICE PEEPLES: That is a case of bad cases -- hard cases making some bad law for the rest of us, but that is fine. Let's don't spend any time on it.

CHAIRMAN SOULES: Then we go to 18(b) on Page 45 -- 18(b) on Page 45.

MR. O'QUINN: What are we doing on 45, please?

CHAIRMAN SOULES: Elaine, do you have anything you want to say about this 18(b)?

MS. CARLSON: Does everyone see the loose handout for some proposed changes to 18(b)? Mine was at Page 50.

CHAIRMAN SOULES: It is at Page 50?

MS. CARLSON: Yes.

MS. HALFACRE: Or it is just loose.

CHAIRMAN SOULES: Okay.

MS. CARLSON: It is entitled Proposal to Amend Rule 18(b).

MR. O'QUINN: Which one should we consider, Page 45 or --

MS. CARLSON: This is a change for 45.

CHAIRMAN SOULES: How big a change is it, Elaine?

MS. CARLSON: There are three things. The second one, I think, is totally noncontroversial, the cross-references are not proper. A(5) and AB(3) should be 2(e) and

2(f) under Roman Numeral II in the middle of that page.

UNIDENTIFIED: So moved.

UNIDENTIFIED: I am sorry, I am lost. I don't have any idea what you-all are talking about.

CHAIRMAN SOULES: If we will go -- let's turn to Page 45 in the materials, okay? Elaine, tell us what we need to do to Page 45, 46 and 47 to make it conform to your suggestion here.

MR. BRANSON: What are we changing in that rule? Can we talk about that rule for a moment?

CHAIRMAN SOULES: Let me try to get -- we will talk about it, Frank, no question about it. Can we get what Elaine has suggested first so -- in a form that everybody can look at it and then we will talk about it?

MS. CARLSON: On Page 48, Subsection 6.

CHAIRMAN SOULES: Forty-eight, Subsection 6.

MS. CARLSON: Second line makes reference to 2(e) and 2(f)(3).

CHAIRMAN SOULES: Okay, what should that be?

MS. CARLSON: A(5) and AB(3).

CHAIRMAN SOULES: A(5). So it is --

MS. CARLSON: No, actually, it has been changed already, so that is one of the changes. 2(e) and 2(f)(3) is correct. So that is one of the changes. And that is just cleaning up the cross-references.

MR. O'QUINN: Wait, wait. Elaine, I am confused. Are you saying that what you just said is a change from the existing rule or a change in the proposed rule?

MS. CARLSON: A change in the proposed rule.

CHAIRMAN SOULES: I see what happened. Holly already fixed that. On Page 48 it is correct already. What else, Elaine?

MS. CARLSON: There are two other comments that we received, types of comments. One was that the new provisions for recusal, in fact, were overlapping or could be considered overlapping as grounds for disqualification with the problem that grounds for recusal can be waived while constitutional grounds for disqualification can't. And the problem is that we are trapping, in part, a federal provision for recusal under a new proposed amendment that we put on the table last fall, and we are kind of mixing. It is not purely one for disqualification. Some are not purely grounds for recusal.

So I just suggested to kind of alert the bar to that and to respond to the inquiries that we got. But on this handout under Roman Numeral I, the Subsection 5 be added -- one sentence be added to the existing Subsection 5 which currently reads in the bottom of Page 47, "The parties to proceedings may waive any grounds for recusal after it is fully disclosed on the record." Adding the sentence,

"Constitutional grounds for disqualification cannot be waived." And that would simply alert the bar that they are going to have to assess whether there is specific basis for what we call recusal, also could be overlapping as a constitutional right.

JUSTICE PEEPLES: Why shouldn't you be able to waive a constitutional right? You can waive every one of them.

MS. CARLSON: I know. It is just existing case law.

JUSTICE PEEPLES: In a criminal case, you can waive every one you have got, almost. If it is knowing and intelligent, why shouldn't you be able to do it?

MR. DORSANEO: I agree with Judge Peeples. I think that whatever existing law may be, that this is a bad sentence.

CHAIRMAN SOULES: We have actually talked about this in this Committee before, and didn't want to do it because we weren't sure -- I mean, a judge may be sitting there, and he may be a law partner of one of the parties in the case and everybody is perfectly happy with the judge sitting on the bench even though he is constitutionally disqualified, and he decides the case and somebody comes out with a bad result and they say, woops, judgment is void because the judge didn't have the power to sit. And the

cases hold, these old constitutional cases about the judge's disqualification. If he is disqualified, he doesn't have the power to hold court in the case.

MR. LOW: Just like jurisdiction, you can't waive it.

CHAIRMAN SOULES: I am not sure the court today would make that -- those are old cases.

MR. SPIVEY: Yes, old law is bad law.

CHAIRMAN SOULES: Okay, did we want to put this sentence in and reduce the rule?

MR. BEARD: Simply just saying other than constitutional grounds, "any grounds for recusal comma other than constitutional grounds."

CHAIRMAN SOULES: Why put anything in at all? Do we put anything in at all about this?

MR. BEARD: It is all right with me not to put anything at all.

CHAIRMAN SOULES: Okay, is that a motion? Have you made a motion?

MS. CARLSON: No, I am just putting the concerns raised --

MR. SPIVEY: I think it ought to be Beard's motion. He hasn't done anything since we have been meeting.

CHAIRMAN SOULES: Make a motion, Pat.

MR. BEARD: I move we leave it as it is.

JUSTICE PEEPLES: Second.

CHAIRMAN SOULES: All in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed?

MR. EDGAR: No.

CHAIRMAN SOULES: Okay, the ayes have it. Page 45, 46, 47, 48 will go to the Supreme Court as they now appear, without change.

MR. EDGAR: I want to change my vote. I thought you were voting to put this in. It is unanimous.

CHAIRMAN SOULES: Okay, unanimous.

MR. O'QUINN: Are we talking about subparagraph -- question, please. Are we talking about Subparagraph 5 on Page 47?

CHAIRMAN SOULES: That is correct.

MR. BRANSON: Mr. Chairman, is that the only thing we changed in the rules?

CHAIRMAN SOULES: Yes, that is the only -- we didn't change that. We voted not to change it. Is there anything else on 18(a)?

MS. CARLSON: Yes.

MR. O'QUINN: Mr. Chairman, perhaps this was put together at a prior meeting I wasn't at, but has the Committee been through -- it looks like to me this is a substantial change in Rule 18(b). Has the Committee been

through that and we are just doing some housekeeping?

CHAIRMAN SOULES: That is right.

MS. CARLSON: A third area of concern raised from Senator Glasgow who suggested that the prohibited relationship between a judge and a lawyer requiring recusal should be limited to a relationship within the first degree and not the third, and he made reference in a letter to, I guess Justice Hecht, to a new statute which I set forth on the handout, Section 82.066 of the Government Code, which actually speaks in terms of attorney prohibition, not the judge's obligation to recuse. The reason an attorney may not appear before a judge or justice in a civil case, if the attorney is related to the judge or justice by affinity or consanguinity within the first degree.

CHAIRMAN SOULES: Well, we -- actually, the complaints we have been getting are that in some rural counties the judges are holding court in cases where their siblings are appearing and having favoritism, and this would be -- we try to do something to help those people. This would reverse some of what we already did, I think, and in effect it would say a judge could sit in more cases where his family members are before him than less.

MS. CARLSON: That would be the effect.

CHAIRMAN SOULES: The movement of the Committee was to try to reduce that rather than increase the

judge sitting in his own family cases. Frank Branson.

MR. BRANSON: I was just wondering, in some of the rural counties, if you got a judge on the bench and his relatives are practicing lawyers, what are they going to do? It would make it impractical for lawyers' families to practice in some areas.

JUSTICE HECHT: The only complaints that I remember getting, Luke, from the Committee were first degree complaints when we had some father and son complaints, and I don't remember. And Senator Glasgow said that was the complaint that they had had at the Legislature, and that is why they passed the statute. All he raised was the question of do we want to go as far as the third degree, and some counties in the state where a good number of percentage of the population is related within the third degree.

MR. DORSANEO: It also depends on how you count, and it is not clear how you count.

MR. O'QUINN: Should we make that clear?

MR. DORSANEO: That is why nobody complains about the third degree. They are not sure how to count.

CHAIRMAN SOULES: Where on Pages 45, 46, 47, and 48 does this appear?

MS. CARLSON: Luke, it would be at the top of 46. It is actually 2(f).

CHAIRMAN SOULES: 2(f). It is the first

sentence on Page 46, and the question is do we make third, do we change that to first?

MS. CARLSON: That is correct.

CHAIRMAN SOULES: Okay.

MR. BEARD: I move we change it to the first.

JUSTICE PEEPLES: Can I ask this? This is published in the bar journal. How many people in these rural counties that would be affected complained about the third degree?

MS. CARLSON: The only correspondence the subcommittee received was from Senator Glasgow.

JUSTICE PEEPLES: Boy, I heard some horror stories about coziness beyond, you know, father/son.

MR. LOW: You have to be kin to have that.

MR. O'QUINN: Mr. Chairman, I move if you are a friend of Buddy Low they can't sit.

JUSTICE PEEPLES: That is a greater evil than what Frank was talking about.

CHAIRMAN SOULES: I have got a motion to change it to the first. Is there a second?

MR. EDGAR: Second.

CHAIRMAN SOULES: There is a second. Any discussion? Lefty.

MR. MORRIS: Yes. When you talk to the third degree, Bill, you said it depends on -- how are you defining

-- how do you think the law defines third degree?

MR. DORSANEO: We don't have that much time.

MR. SPARKS (EL PASO): The trouble is, Lefty, that for educational purposes it is calculated one way, for criminal purposes it is calculated another, and there are conflicting opinions as well as statutes on it.

MR. O'QUINN: Don't we already have something in that regard? Wasn't that in the constitution already, about relationship?

MR. TINDALL: That is the parties, not the lawyers.

JUSTICE RIVERA: I think there is a statute that states, wife, nephew, niece, and so forth.

MR. O'QUINN: That has already been construed, at least in the context, has it not, of a judge being related to a party, and is it on the third degree? I think we have got some judicial interpretation in that area. I remember reading some cases on that. And they used the tight rule, the rule that limits disqualification, the way you count, like you do in the guest statute cases, count the tight way. You have to go up and down when you do your counting rather than just go up the common ancestor and count down.

But anyway, so I don't know how much discussion, but I feel kind of strong about this rule. I think that there are cases, like Justice Peeples says, where the

relationships, not just father and son, but uncle/nephew, uncle/niece, whatever, and just leaving aside the fact that there is a terrific danger of something going wrong or there being undue influence there, how does it look to the public when somebody goes in with a lawyer who is not related to the judge and knows the other lawyer is, particularly in a divorce situation, which from my practice of law, nothing is more bitter than a divorce situation, and nobody has more discretion in a case than a divorce judge, in my perception, about children, what happens to people's children, what happens to people's property. And let's say the other side just wipes them out, gets all the property, gets the kids, he will always think it was because of this family relationship. I think just that is bad business. I don't think that is a good way to run our business.

CHAIRMAN SOULES: Let me just get a consensus on this so we will know. How many feel -- I am going ask for third degree and first degree. How many feel that third degree is proper? How many feel first degree is proper? That is pretty one-sided. Are we ready to vote, then?

Okay, those in favor of leaving it third degree and leaving 18(b) as it is all the way through show by hands. Opposed?

MR. SPARKS (EL PASO): I have a question. I don't want to open up the can of worms, but on Paragraph 2,

it says, "A judge shall recuse himself in any proceeding," and then we get over to five where you can waive any grounds after disclosure. Did we have any resolve as to whether that was a conflict or can you waive, Luke, the grounds in Paragraph 2? I just --

MR. BEARD: I think we enjoined the view you can waive anything. Maybe we will reverse these old cases about nonwaiver on constitutional grounds. You ought to be able to waive anything.

MR. LOW: In other words, you want to give the court one more chance to get it right.

CHAIRMAN SOULES: The next item is on Page 21 -- on Page 61, Rule 21.

MR. O'QUINN: May I ask a question?

CHAIRMAN SOULES: Yes, sir.

MR. O'QUINN: Back on Page 45, on Page 45 under Paragraph 2, the part that was X'ed out. If you look at the fourth line of the part that was X'ed out, it talks about -- the old rule apparently talks about recusal if a judge had a personal bias and prejudice, quote, "concerning the subject matter or a party," and now I look down to the replacement, which is Paragraph B, who said he has a personal bias and prejudice concerning a party. Did we intentionally leave out the concept that a judge can be recused who has a personal bias or prejudice concerning the subject matter?

Did we do that on purpose or knowingly, because we have left that out, unless it is somewhere else.

CHAIRMAN SOULES: I don't think it is anyplace else.

MR. DORSANEO: Financial interest in the subject matter rather than bias or prejudice.

MR. O'QUINN: Is that what the Committee wanted to do? Apparently the rule had previously been a judge -- if a judge had a personal bias or expressed a personal bias or prejudice about the subject matter, he was to be recused, but now that can no longer be a ground of recusal. That bothers me why they took that out.

MR. BRANSON: If you can recuse a juror for that, you ought to be able to recuse a judge for that.

CHAIRMAN SOULES: I think what John is suggesting is that we put after the word "concerning" in (b), that we restore the words "the subject matter or".

MR. TINDALL: I second.

MR. BEARD: Can we take the judge on voir dire to determine whether he has a bias against the subject matter?

MR. O'QUINN: I don't think you can. I think he has to express it in some way where you can just report it to the record. I don't believe you can put a judge on the stand and start asking him about his personal feelings.

JUSTICE PEEPLES: Would (a) immediately above that not cover it? "His impartiality might reasonably be questioned"?

CHAIRMAN SOULES: Probably does. Okay, we got a motion and a second. Let just vote up or down. Those in favor of adding "the subject matter or" back say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed?

JUSTICE PEEPLES: No.

MR. BEARD: No.

CHAIRMAN SOULES: Okay, I believe the ayes have it.

Next is Rule 21 on Page 61. Let's see, we had pretty extensive debate on this. The complaint is -- principally, we got complaints about changing the rule to require service on all parties rather than just the adverse party, and Tom, I know you participated in that discussion somewhat at length. Does anyone feel that our decision to require the filing of papers on all parties when they are -- the service on all parties, does anyone feel that we ought to change our earlier decision to require service on all parties? No one feels we should make that change? Okay, then that will stand the way we passed it.

Then there was a complaint about the three-day notice period, and we have done something to fix that by

taking Saturdays, Sundays and legal holidays out of it. Does anyone think we should do more?

MR. MORRIS: Where are you now, Luke?

CHAIRMAN SOULES: I am still on the same rule. I am reading David's written comments on Page 63. The Committee recommended, bottom line, no change at all to Rule 21. That is the last sentence on 63. After they studied it.

MR. SPARKS (EL PASO): I so move.

MR. O'QUINN: Mr. Chairman, the problem regarding the three days and the weekend, the subcommittee recommended no changes with regard to that problem.

CHAIRMAN SOULES: That is correct.

MR. O'QUINN: I thought thought they recommended removing Saturdays and Sunday out of that?

CHAIRMAN SOULES: But that is back in four.

MR. O'QUINN: Don't cure the problem with 21 is what they said.

CHAIRMAN SOULES: Yes, they say now three days is enough if you take Saturdays and Sundays and legal holidays out of it.

MR. O'QUINN: Now I understand.

CHAIRMAN SOULES: Okay, it has been moved there be no change Rule 21 from our prior work. Is there a second?

JUSTICE PEEPLES: Second.

CHAIRMAN SOULES: Those in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? 21 stays as is. Okay, next is going to be --

MR. EDGAR: Page 73.

CHAIRMAN SOULES: Page 73, Rule 21(a).

MR. EDGAR: May I ask a question generally about Rule 21(a)? Does this rule mean that if you are going to use the United States mail to effect service you have to do it by registered or certified mail?

CHAIRMAN SOULES: Yes.

MR. EDGAR: You can't just use a regular post office.

CHAIRMAN SOULES: That is right.

MR. EDGAR: Well --

CHAIRMAN SOULES: For service.

MR. EDGAR: Well, but it is somewhat deceiving when you look at the sentence, the second sentence in that rule where it says, "Service by mail shall be complete upon deposit of a paper enclosed in the post paid properly addressed wrapper and post office." That seems to indicate that you can, and I have been concerned about that. I think, frankly, we just add to the expenses of litigation when everything you do has to be by certified or registered mail.

CHAIRMAN SOULES: Well, we have debated that.

MR. EDGAR: I think the rule itself is less than clear.

CHAIRMAN SOULES: All right, and we dropped a word out of there. That used to say properly addressed certified wrapper. I don't know why that word is out of there.

MR. EDGAR: I don't think it has ever been in there, Luke.

MR. JONES: Mr. Chairman, I have a small problem with this rule, too, if you are at a point where you want to listen to it.

CHAIRMAN SOULES: You are right, Hadley. Where does it say certified?

MR. EDGAR: It says right up above that that is one of the alternates you have to effect service, but then the second sentence indicates that it is not necessary. At least I think I could argue that. I am not sure but what I wouldn't be correct and probably logical.

MS. CARLSON: I think that is what Dave Beck's memo on Page 77 is directed at.

CHAIRMAN SOULES: Okay, Franklin, you had a comment you wanted to make on this.

MR. JONES: I hope both of these will be noncontroversial. You might want to include them both in the

same procedure. And mine has to do with this noticing by FAX or telephonic photocopier or whatever they call that thing. My suggestion is that we require the telephonic document transfer notice be made between 8 and 5. I don't know how many of you-all have the experience, but I have it continually where my FAX goes to lighting up at six, seven o'clock at night when the janitor is there and it, in effect, deprives you of a day that I don't think we intended to deprive anybody of.

MR. BRANSON: I don't see any problem moving it back before 5, make it three o'clock.

MR. DAVIS: There is a proposal on Page 76 that I think may solve one of those things.

MR. JONES: Yes, that --

JUSTICE PEEPLES: The COAJ recommended that, and I think David Beck agreed with that recommendation on 76.

MR. JONES: I haven't seen that.

MR. DAVIS: The one serviced by telephonic copier on 76, I think.

CHAIRMAN SOULES: I think that may work better, Franklin, for this reason. If we say that it has got to be made between 8 and 5 and then somebody makes it at 6, somebody is going to argue that is no service at all.

MR. DAVIS: Motion we adopt the suggestions.

CHAIRMAN SOULES: The motion is made that we

adopt the suggestion on Page 76.

MR. JONES: Second.

MR. DAVIS: Read it into the record or not?

CHAIRMAN SOULES: I second it.

MR. DAVIS: I would be glad to. I am looking at it.

MR. EDGAR: Luke, you wouldn't consider moving it back to earlier in the day?

MR. TINDALL: Why?

MR. BRANSON: Because five o'clock --

JUSTICE PEEPLES: The thing about it, a hand delivery at 4:59 is okay. Why shouldn't a FAX at 4:59 be okay?

MR. SPIVEY: A lot of times you don't know.

MR. SPARKS (SAN ANGELO): You send it, but you don't know if it is received.

MR. DORSANEO: What is three days are added to any response, Mr. Spivey, by FAX. So what is the difference between a few hours.

MR. BRANSON: On a hand delivery, you know you get it. Now, you cannot be standing at that FAX machine right before you leave your office, whereas if it comes in at three o'clock in the afternoon there is a pretty good chance that somebody will pick it up before you get out.

MR. LOW: We have a girl that stays there till

eight o'clock. Her and the maid. She will sign for anything that comes in. If she won't, the maid will.

MR. TINDALL: You can always turn your machine off.

MR. SPARKS (SAN ANGELO): Our janitor will sign for it and throw it away.

CHAIRMAN SOULES: Is somebody proposing an amendment that we make it earlier in the day?

MR. BRANSON: I move we move it back to four o'clock, which is an hour before some people leave.

CHAIRMAN SOULES: Is there a second to the amendment?

MR. JONES: If that is my motion, I have no objection to that amendment. I would accept it.

CHAIRMAN SOULES: The only concern I see is that here we don't even get a full day's work in in order to FAX it out. We have got to stop the FAX at four o'clock and if we still got a paper in the typewriter, then we got to send a runner with it. We can't FAX it.

MR. TINDALL: I think you have got to apply that to all methods of delivery, then. The messengers can't deliver after four o'clock. The mail can't come after four o'clock. I mean it is really creating a --

MR. BRANSON: There has got to be somebody there to receive those things. This is a machine. Right now

people are delivering things at midnight.

CHAIRMAN SOULES: We are talking about cutting an hour off of a regular work day for FAXing a letter. That is fine as long as everybody understands that is what we are voting. We are going to vote it up or down.

MR. O'QUINN: Mr. Chairman, I oppose that for a lot of reasons, one of which, I don't see any rationality or distinction between a guy walking in and handing me a paper at five o'clock and sending it to me on my FAX machine.

CHAIRMAN SOULES: Or sliding it under your back door.

MR. O'QUINN: I think the receiving thing will probably be more -- a worse problem now if we limit the FAX to five o'clock because it is true people walk in at all times after five o'clock and get anybody to sign a piece of paper.

CHAIRMAN SOULES: How many want four o'clock? Show by hand. How many say five o'clock is okay? Okay, five o'clock it is.

Okay, the motion is that we adopt the suggestion on Page 76, "Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day." Those in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? That is unanimously approved.

We have debated at length the certified versus first class question. I don't know that anybody could discuss it beyond what has been discussed here on several meetings. How many believe that service should be accomplished by just ordinary first class mail? One, two, three, four, five.

MR. O'QUINN: Which is the easiest of the two?

CHAIRMAN SOULES: Why we have always been gun shy is that somebody would say they mailed something, and there is no green card, there is one lawyer swearing against the other.

MR. O'QUINN: Which one is the green card? Certified. Okay, can -- what do you do on first class?

CHAIRMAN SOULES: You just put it in the mail, just mail the letter.

MR. O'QUINN: I understand the motion. I apologize for interrupting.

CHAIRMAN SOULES: We have always felt like forcing somebody to have a green card was a safety valve, because we are talking about service and there are all kinds of defaults that occur if you don't respond timely after you have been served with something. Servicing for interrogatories, servicing for request for admissions.

MR. O'QUINN: If we vote in favor of first class, then there will be no official record of whether it got mailed or not?

CHAIRMAN SOULES: That is right, or whether it got delivered.

You have deemed request for admissions automatic and the other side doesn't even have a green card.

MR. O'QUINN: I like the safety valve myself. I am not trying to redebate this.

CHAIRMAN SOULES: The debate has always been two things. One, it is expensive and cumbersome to do certified mail, therefore we ought to do first class. The other side is but there is so many things that happen after service. We are not talking about receipt. We are talking about, quote, "service," which is a very formal concept in these rules. Service by certified mail. There are so many things that happen in the discovery process, pleadings, and otherwise that we want whoever sent something to us to have to prove it by a green card or some sort of receipt. That is the debate.

MR. O'QUINN: It has always been my experience, I don't know about your experience, but if I am in front of a judge and my opponent does not show up, and I am asking that judge for reset, he always says where is your green card. I think that is a feeling on the part of the

judges, too. They like to know if the other lawyer doesn't show up that he did get it.

MR. LOW: Luke, another thing, if you believe this service by mail is complete upon delivery, it doesn't make a darn whether I got it or not. I might never have seen it. There is no question. The lawyer swears, yes, I mailed it, and it went to Taiwan.

CHAIRMAN SOULES: That is two sides of it. We are talking about service, first class versus certified. How many say first class should be enough for service? One, two, three, four, five, six, seven. Those who want to maintain certified practice show by hands. One, two, three, four, five, six, seven. It is about 11 to two.

MR. DORSANEO: Mr. Chairman, I move that in the sentence that Hadley Edgar identified that we add the words "certified or registered" between "by" and "mail" such that it would read "Service by certified or registered mail shall be complete."

CHAIRMAN SOULES: Okay, the Chair will accept that as an editorial change, and we voted on the substance of that just now already.

MR. BRANSON: I have one other problem with Rule 21(a) on the FAX issue. The way we have it now, you can -- the only way you can deliver notice is using the party's FAX number. Now, that many plaintiffs have FAX

numbers, but I can see where a defense lawyer could get screwed up if you FAXed your notice to General Motors on their FAX machine and didn't send it to their lawyer. So I suggest we make parties -- we make them FAX it to the party's lawyer and not to parties.

MR. TINDALL: I think we have a general rule that all communications go to the lawyer.

MR. BRANSON: That is not what this thing says.

JUSTICE PEEPLES: Luke, I thought our Committee recommended something like that and for some reason David Beck didn't go with it. I think Frank has got a good point. If there is a lawyer on the case, you ought to serve the lawyer, not the party. If it is General Motors or a husband or a wife in a divorce case, it ought to be the lawyer that gets the notice or it is no good.

MR. BRANSON: Telephonic document transfer to the party's current telecopier number.

MR. TINDALL: Which "party" means lawyer if they are represented by a lawyer.

MR. DORSANEO: That is assumed in these rules generally. It commonly talks about service on a party all throughout these rules.

MR. O'QUINN: Does it say it or is it just assuming?

MR. DORSANEO: If you make it specific here, make a distinction specific here, then you possibly create the opposite inference in all the other places. I personally wouldn't have a large problem if you sent it to General Motors if I were deciding the case. I would think that you wouldn't probably prevail under the argument that they got it.

MR. DAVIS: I think your Supreme Court Code of Professional Conduct provides that you must serve copies to the attorney, if that is sufficient.

MR. BRANSON: We shouldn't tell them in the rules to send it to the parties, then.

JUSTICE PEEPLES: If you will look about six lines down, the words "as the case may be" used to be in the rule, and those were taken out. And I think that the COAJ said those need to be put back in, so you send it to the party or the lawyer, as the case may be, which I think under the rule as it exists right now said if you have got a lawyer, you got to serve that lawyer.

MR. BRANSON: If the person is pro se, you serve the parties. If you have got a lawyer, they ought to get it.

CHAIRMAN SOULES: I am sorry, Judge Peeples. I am not on the line you are on.

JUSTICE PEEPLES: Page 73, six lines down at

the very end. The words "as the case may be" we propose to strike out. And I think those words in the existing rule had the effect of saying if it is pro se, you serve the party. If there is a lawyer, you serve the lawyer.

CHAIRMAN SOULES: Those words went back to notice or document as the case may be. But we can make them fit something else. That is no problem.

JUSTICE PEEPLES: Well, "as the case may be" to the party to be served or his agent.

MR. EDGAR: I think "as the case may be" should be after -- on Line 8 after "record comma".

JUSTICE PEEPLES: Yes, I think that is right.

CHAIRMAN SOULES: After "record"?

MR. EDGAR: Yes, after record "comma as the case may be comma". Then that would solve the problem, I think.

CHAIRMAN SOULES: It has been made and seconded. All in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Okay, that change will be proposed. That is unanimous that change will be made in the one, two, three, four, five, six, seven, eighth line of these materials on Page 73 after the word "record," insert "as the case may be" after the comma and then put a comma at the end of it.

MR. O'QUINN: While that is helpful, I am not sure that makes it clear what we are saying, and I am still concerned because of what, for the first time, because what was said about what is meant by party. And I would propose that we just add a sentence somewhere with this rule that says where the party is represented by an attorney to notice -- or the delivery has to be made to the attorney. Make it real clear.

MR. BEARD: Rule 8 says, "As attorney in charge, all communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge." And that is just attorney in charge. Part of that implication, everything goes to the lawyer.

MR. O'QUINN: If it is covered by the rules, I withdraw my suggestion.

CHAIRMAN SOULES: Okay, next item. Okay, Elaine.

MS. CARLSON: Back on Page 73, the tenth line down, does it make sense to have a comma after registered mail?

MR. EDGAR: I couldn't hear you, Elaine.

MS. CARLSON: I am sorry, on Page 73, on the, tenth, I think, line down, it begins "registered mail comma." Does that make sense to have that comma there?

MR. O'QUINN: I think it is grammatically

incorrect, myself.

MR. EDGAR: I don't even think they have registered mail any more. I don't even know why it is there.

MR. O'QUINN: That is not the point of her comment, Hadley. The point of her comment is the comma arguably is grammatically incorrect because there should not be a comma there to separate what goes before the comma from what comes after the comma.

CHAIRMAN SOULES: The Committee recommended we delete that comma. Any opposition? Okay, that will be deleted.

MR. DORSANEO: One more there. Does three days extra telephonic document transfer make any sense?

CHAIRMAN SOULES: We voted for it. Okay, what is next?

JUSTICE PEEPLES: If we can look, compare Page 73 to Page 106.

CHAIRMAN SOULES: 106, everybody turn to Page 106.

JUSTICE PEEPLES: Well, if you will look on 73 about ten lines down where it is underlined, "or by telephonic document transfer to the party's current telecopier number," somebody is going to argue that you can serve the party by FAX even if he has got a lawyer. So what we proposed on 106 was to say "to the recipient's current

number."

CHAIRMAN SOULES: Okay, any objection?

JUSTICE PEEPLES: If it is a lawyer instead of a party.

CHAIRMAN SOULES: Any objection to changing the word --

JUSTICE PEEPLES: "Party" to "recipient".

CHAIRMAN SOULES: In the 11th line, change "party's", singular possessive, to "recipient's" current telecopier number. Any opposition to that? Okay, that will be done.

Anything else on 21(a)? Okay, the next --

MR. COLLINS: What if you can't read the FAX document?

CHAIRMAN SOULES: I am sorry?

MR. O'QUINN: Then it wasn't served. I think that is what the trial judge would say if you showed it to the judge and said, judge, this is what they sent me. Can you read it? How can I respond to something I can't read?

CHAIRMAN SOULES: Okay, 177, 21(b). We are now turning to Page 177. That is the next listed rule, Page -- it is Rule 21(b), and the Committee recommends no change. The Committee's report is on 178.

MR. TINDALL: By no change, you mean no change from what we approved in August?

CHAIRMAN SOULES: Exactly. The rule that appears at the front of each of these is the rule that we have recommended to the Supreme Court, and when I say no change, it means that our recommendation does not change.

MR. LOW: I move we go on.

CHAIRMAN SOULES: All right. Motion has been made not to change our previous recommendation. Is there a second?

MR. O'QUINN: Second.

CHAIRMAN SOULES: Made and seconded. All in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Okay, 21(b) will go to the Court as is on 177.

The next item is Rule 57. It is at Page 183. Committee's report is at Page 184. The Committee recommends no change.

MR. TINDALL: So moved.

CHAIRMAN SOULES: Moved. Second?

MR. O'QUINN: Second.

CHAIRMAN SOULES: All in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed?

JUSTICE PEEPLES: Luke, are we going to leave things as they are? Doesn't it just -- proposed changes die

for lack of a motion? We can just move on, can't we?

CHAIRMAN SOULES: I guess I need some indication. I don't want to -- I really like to know.

MR. O'QUINN: I think Luke is making a record. If anyone ever accuses him of sneaking one by, he can say no, it is in the record.

CHAIRMAN SOULES: Okay, so Rule 57, then, will go to the Court as shown on Page 183.

The next rule is Rule 60 on Page 187. The Committee's report --

MR. O'QUINN: That is a change of rule reference is all.

CHAIRMAN SOULES: Is on 188 and the Committee recommends that we delete the last clause, "Notify the opposite party's attorney of the filing of such pleadings within five days from the filing of same," because we put all the notice rules back in 21 and 21(a), and this is -- now it should be dropped since we have combined all those.

MR. LOW: So move.

MR. RAGLAND: I have a question. This speaks in singular about opposite party. My limited experience in that, there has been more than one party in a lawsuit where someone intervened.

MR. LOW: We are voting to do away with that. It wouldn't make any difference.

CHAIRMAN SOULES: I think what Tom is suggesting is that we take the words "the opposite" out of the second line and put "of a party."

MR. RAGLAND: "All the parties."

CHAIRMAN SOULES: "Of any party." You are saying all parties. All parties don't have to join a motion to strike, do they?

MR. RAGLAND: I am talking about the notice part of it.

MR. DORSANEO: Again, that is a pervasive problem. You can say take out the word "opposite" and put "a", but it is problem that appears everywhere. These rules are written on the assumption that we have one party on one side and another party on the other side and there is nobody else involved.

CHAIRMAN SOULES: We fixed a lot of that. You see what I am saying is on the second line change the "opposite" to "a party" and then any party can file a motion to strike. Any opposition to that? Okay, that will be done.

And then the Committee has moved to delete after 21(a) in the fourth line the balance of the language in the rule on 187. Any opposition to that?

MR. O'QUINN: I have got a problem. If we take out the last two lines, which I understand we are going to take those two lines out, where is it in the rules that is

provided for when that has got -- when an intervention has to be served? I can't find it.

CHAIRMAN SOULES: There is not a time -- you mean in the trial process how late can an intervention be done?

MR. O'QUINN: I was told that we are taking the last two lines out because they are unnecessary because some other rule spells out the time period for serving intervention. If that is the reason we are taking it out, then I can't find it in Rule 20 or 21, how many days you have to serve an intervention.

MR. RIVERA: 21(a) says all papers, all documents.

CHAIRMAN SOULES: 21 and 21(a) require notice to be made contemporaneous with any filing.

MR. O'QUINN: But it doesn't say when.

CHAIRMAN SOULES: Contemporaneous, that is when.

MR. BEARD: There is no rule as to when you have to answer a pleading in intervention unless you are served with a citation.

MR. O'QUINN: But Rule 21 says a true copy should be served on other parties, but it doesn't say when. I am saying these rules could be construed -- these rules, 21 and 21(a), that I could file an intervention, put your

copy in my file for two months, and then send it to you, and I haven't violated 21 or 21(a).

MR. EDGAR: Where does 21(a) talk about contemporaneous, Luke?

MR. O'QUINN: It doesn't say it. Can I put the copy I owe you in my file for two months and send it to you after two months?

CHAIRMAN SOULES: All right, turn with me to Page 61.

MR. TINDALL: Luke, the old rule that we appealed, 72, used the words "at the same time". Said you had to serve at the same time, deliver or mail. Do you think we ought to keep those words?

CHAIRMAN SOULES: That is what I am trying to get into. The first paragraph on Page 61. We could either say, "A true copy shall be contemporaneously served on all the parties" or "served on all of the parties at the same time".

MR. O'QUINN: Well, I think "at the same time" should modify the word "served".

CHAIRMAN SOULES: "Served at the same time on all of the parties". Any objection to that on Page 61?

MR. O'QUINN: Small point. Let me change what you just said. I think you ought to say, "and at the same time a true copy should be served". That makes it clear "at

the same time" is talking about at the same time you file it with the clerk.

CHAIRMAN SOULES: Okay, so we insert the words "at the same time" after the word "and" and before the words "a true copy" in the one, two, three, four, five, in the sixth line of Page 61. Any opposition to that?

MR. SPARKS (SAN ANGELO): That doesn't mean they have to be served at the same time, it has to be attempted to be effectuated at the same time.

MR. O'QUINN: I think that is true, and I think, Sam, the service means that if you put it in the mail, you have served it.

CHAIRMAN SOULES: Right. Okay. And actually, then, when we get over here on Page 187, everything after "party" in the third line should be deleted because everything after the word "party" deals with service, and that is covered by 21. Any opposition to that? Okay, the last -- except for the word "party" at the beginning of the third line on Page 187, the third, fourth, and fifth lines will be deleted.

MR. TINDALL: Luke, Carol Baker all through here wrote dozens of little technical changes. I assume all of those were folded in. I see her letters every other rule.

CHAIRMAN SOULES: Just a second. Let me make a note here, Harry.

The various committees got all of Carol Baker's letters and made their recommendations off of that.

MR. TINDALL: All right.

CHAIRMAN SOULES: Okay, the next one is Rule 63 on Page 191. The subcommittee recommends no change on Page 192. All in agreement say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? The next item is Rule 87 at Page 197.

MR. EDGAR: Now, David recommended that 63 pick up the 14-day rule, right?

CHAIRMAN SOULES: Let me see, Hadley.

MR. EDGAR: Looking on Page 193, and we have just approved the 7-day rule. Is that -- I don't have any problem with that as long as we know what we are doing in case of this recommendation.

MS. CARLSON: I think he is just acknowledging the suggestion.

MR. EDGAR: He says the Committee urges the adoption of a 14-day rule.

CHAIRMAN SOULES: The comment under --

MR. EDGAR: I apologize to you. I misread it.

CHAIRMAN SOULES: Okay, you agree with what we have done, then?

MR. EDGAR: Yes.

CHAIRMAN SOULES: Okay, next is they recommend that we do adopt a change to 87, Rule 87 that begins on 197. And the subcommittee's report is at Page 200.

MR. BEARD: I move that we adopt that.

CHAIRMAN SOULES: The heading should be changed to Motion for Rehearing because it more accurately describes it. That would be at 87 five. It is a heading change. So on Page 198, we would strike the words "no rehearing". We strike the word "no" and substitute for the word "no" the words "motion for". And we, I guess, would put in parenthesis that we are just changing the language in the heading. And that is the only recommendation that the Committee makes. All in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? Okay, that will be followed, then.

Okay, the next rule is Rule 106 on Page 205. The Committee's report -- let's see, Carol Baker says we may have already made this.

MR. TINDALL: I think we have on the preceding page.

CHAIRMAN SOULES: Attempting -- no, we haven't changed it here. She says that it ought to read "Service has been attempted under either" -- "Service has been attempted" -- i-n-g should be e-d. Okay, any opposition? That ought to

be done.

MR. TINDALL: I think the rule "has attempted". We just got it boxed in. We really don't need to make that.

CHAIRMAN SOULES: We do. We got to do it in this text because if the Supreme Court adopts this, West won't go back.

MR. TINDALL: West has "attempted".

MR. O'QUINN: The is not the point, Harry. We are turning in a proposed rule, and it has to read correctly.

CHAIRMAN SOULES: They won't have it next time. They will print our error if we don't fix it. Okay.

Next is Page -- Page 207, Rule 107, and Carol says we need to put S's after the word "rule" -- on the word "rule". Any opposition? Okay, that will be done.

Next is Rule 128 on Page 209. The subcommittee's report is at Page 211. They recommend no change. Those who would agree with the Committee say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? Okay, that will be submitted, then, as is shown on Pages 209 and 210.

The next is 166, which we took care of yesterday. Then we get to 166(a) at Page 235.

MR. McCONNICO: Luke, our subcommittee doesn't have any proposals to change 166(a).

CHAIRMAN SOULES: Is the recommendation of the subcommittee to leave it as it appears on Pages 235 through 237?

MR. McCONNICO: Yes.

CHAIRMAN SOULES: Okay, all in favor, say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? 166(a) would remain, then, as it is printed in the book.

The next one is 166(b) at Page 245, and Steve, what is your Committee's recommendation -- do you and Bill need to confer?

MR. McCONNICO: Yes, let's go ahead and do this and then we will confer.

CHAIRMAN SOULES: 166(b) at 245. Steve, you have the floor.

MR. McCONNICO: Yes, we do have a couple of changes we propose to make in this. Specifically, the first one is on Page 248, and if you look down at the D part, which is the party communications, our comments on this are on Page 253, and what happened here -- and Paul Gold pointed this out -- we think an "and" was changed to an "or", and it changes the meaning of the rule. If you look down and read the rule, it says, "When made subsequent to the occurrence or transaction upon which the suit is based and in connection

with the prosecution, investigation, or defense of the particular suit," and then it becomes disjuntive "or". Paul pointed out that that should be an "and", and we agree with that.

We believe if you leave it as an "or" you could get into the confusion and you could go back to pre-Terbedine, pre-Stringer, pre-Flores, because then you could just go up to the first part of the rule and if you show that a communication was made subsequent to the occurrence and it was made in connection with the investigation or defense of the particular suit, it is privileged. And if you put "and" in there, you are going to avoid that problem, hopefully.

CHAIRMAN SOULES: I think that change was inadvertent. I think we said something there we didn't intend to. Those in favor of changing "or" to "and" in the text on one, two, three, four, four lines up from the bottom of Page 248 say "Aye."

(RESPONDED AYE.)

CHAIRMAN SOULES: Opposed? It is unanimous. Next.

MR. McCONNICO: The next rule change is a rule change that is proposed, and it will be on Page 251. It will be at the very end of 166(b)(4). Luke Soules proposed this. And what it is is the addition appears on Page 254, our comments and the reasons for the change. There would be an

addition that would go in at the end of 166(b)(4) which would state, "The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objection or motion." Then you would have the addition, "But any matter that is withheld from discovery pursuant to any objection or motion for protective order, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely, supplemental production of the matter pursuant to paragraph six."

And the purposes of that is simply to make clear that a party can object to discovery, then not set a hearing, hide the material he has objected to, and then use that as evidence at the time of trial. We agree with that proposal and think it should be added to the rule.

MR. O'QUINN: I need some help on where we are at. I see the proposed change on Page 254. Now, where does that go in the rule that appears on 250 and 251?

MR. McCONNICO: Okay, hold on. Let me go back. It goes on Page 251 and it goes -- let's see where we would put it. It is 249, right.

MR. O'QUINN: Where on 249?

MR. McCONNICO: Second sentence.

CHAIRMAN SOULES: If you go to Page 249, count up six lines, you will see a line that begins with the word

"order" at the tailend of the sentence, and then it picks up the words, "the failure of", and that is a sentence that we have already passed, and what is -- on Page 254, the way the rule would be modified, if we so vote, would be this: That sentence that starts with "the failure" and ends with the words "objection or motion period", the period would be changed to a semicolon, and the language that is underscored on Page 254 would be placed after that sentence to complete that sentence, and the sentence as it would read, then, is what is inset on Page 254 in its entirety.

MR. O'QUINN: The additional material would go into that sentence which begins six lines up from the bottom of Page 249?

MR. McCONNICO: Right.

CHAIRMAN SOULES: Exactly.

MR. O'QUINN: So the way this rule works is I make an objection and my opponent doesn't do anything, I don't waive my objection.

CHAIRMAN SOULES: That is right.

MR. O'QUINN: But I can't use the material that I am hiding by my objection.

CHAIRMAN SOULES: That is right.

MR. O'QUINN: That puts the burden on the other party to get the objection ruled.

MR. McCONNICO: Yes.

CHAIRMAN SOULES: Any opposition? Those in favor say "Aye."

(RESPONDED AYE.)

CHAIRMAN SOULES: Opposed? Okay, that is unanimous.

The next item is -- is that all on 166(b)?

MR. McCONNICO: That is it.

CHAIRMAN SOULES: Okay. Steve, the next item is on 167(a), Rule 167(a), Page 288.

MR. SPARKS (SAN ANGELO): Before we get off 166(b) we had some discussion yesterday on -- which would be 166(b)(5), protective orders, and it had some discussion, Rusty came up with some ideas how to change protective orders where if they involve public health or safety, and I am still concerned about that. And I am not talking about sealing or anything. I am just saying that we ought to have some -- in those areas. I am not talking about oil and gas or geological or --

CHAIRMAN SOULES: Sam, let me tell you where we are right now. Where we are right now is we are looking at -- we got this agenda this morning is going to be divided into two pieces. The first is to try to fix anything that we didn't get fixed during 1989, and we are looking now at the 1989 agenda. Then we are going to go into all the new suggestions that we have received. That is why you will --

the index seems to run through the rules twice.

MR. SPARKS (SAN ANGELO): As long as we are not through with it.

CHAIRMAN SOULES: Any new matters about 166(b), and there is some others over there. This last sentence was something that was kind of needed to fix -- we tried to fix McKinney, but we didn't quite get it done. So if we will go through the 1989 work first, if that is okay with you all, and then we will pick up and go with all the new information. So we are at 167(a) and at Page 288.

MR. McCONNICO: The big change, of course, in this is it allows psychologists to do independent medical examinations, and this drew a lot of written response and comment in our commentaries on Page 295. The argument -- and we have all been through this, and so I am just going to state the argument real quickly -- is that under Coats v. Whittington, you cannot let a psychologist do an independent medical examination if there is an allegation that someone has a mental injury. The problem is that the plaintiff can have the psychologist come in as an expert and testify as to the extent of the mental injury and then the defendant can't go out and hire his own psychologist to examine and do an independent medical exam. The federal rule was recently changed. How long ago was it, Bill?

MR. DORSANEO: November of last year.

MR. McCONNICO: November of last year to allow psychologists to do independent medical examinations. That is kind of the pro side. The other side is -- and as Bill Kilgarland pointed out in his written commentary, you know, what is a psychologist. There are all different types of psychologists. There are clinical psychologists, there are school psychologists, there are occupational psychologists. There are about six different categories of psychologists, neuropsychologists. We don't limit the types that can do it. Second, we don't put any type of limitations on anything they can go into.

As Paul Gold pointed out in his written commentary, this is going to make possibly for another ex parte deposition.

The other problem we get into is what we saw yesterday in the difficulty in sealing records that anytime anyone alleges mental trauma in a case, or mental injury, they could have a psychologist come in, do an independent medical examination, and then anybody that wants to go to the trouble of finding out what that psychological examination is might be able to do it, based upon what we did yesterday.

So those are the problems. We didn't reach any consensus. My feeling is that -- this is just individual feeling -- that this rule could be abused. I could see a situation where anybody alleges mental injury, that the other

side is going to immediately have a psychologist say let's go ahead and let's do an examination of them. But by the same token, as Gilbert Adams said on the subcommittee, it doesn't seem fair for plaintiffs to be able to get the independent medical examination or psychological examination and then for the defendants not to.

My proposal is maybe to have an amendment, which we have not written in here but I have just kind of written down myself, and that is to leave the rule the same and then just to have a provision that if the one party lists a psychologist as an expert who will testify to the mental condition of a party or of a person in the custody or under the legal control of a party, the court may order the party to submit to a mental examination by a psychologist or to produce for examination the person in his custody or legal control and just have that as an alternative.

MR. JONES: I move the adoption of your suggestion.

MR. TINDALL: Steve, that really won't work in family cases. The courts often want to appoint psychologists without going into the long psychiatric background. There are a lot of reasons why you want to look at the existing family structure, and I really think that that is not going to cure our problem. Coats Vs. Whittington has been a chaotic ruling for our cases. I really think it ought to

just be psycholigists. I read Kilgarland's comments. It would be a rare day that a school psychologist, it wouldn't be a clinical psychologist appointed, very rare. I think it has got to be like a federal rule, just another health provider.

MR. BRANSON: I disagree.

CHAIRMAN SOULES: Let me get the record straight on something right quick. Franklin made a motion that we adopt McConnico's suggestion. It has been seconded by Buddy Low, now the comments.

MR. SPARKS (SAN ANGELO): Have I understood his motion, that is, that if one party lists a psychologit, that the other party shall have the right of an examination by a like classification psychologist?

MR. BEARD: If the court orders it.

MR. McCONNICO: But I don't say a like class. I don't think we can get into defining it.

MR. LOW: You can iron that out.

MR. McCONNICO: I just think you have to say a psychologist because --

CHAIRMAN SOULES: One at a time. Finish your response.

MR. SPARKS (SAN ANGELO): I was just trying to get where you are going exactly.

MR. McCONNICO: The other thing, and this is

for Harry, this really does impact on the family practitioners a lot, and there were no family practitioners that had any input on this on the subcommittee, and I don't really know what impact it has on your practice, but it seems to me that you would be dealing with this a lot more than most of us.

MR. TINDALL: In every custody case, you will have a psychologist and most litigants prefer psychologists because they are not as oriented towards analysis and they get their work done a lot quicker and report to the court, and often times there will be motions down there to appoint psychologists to evaluate the parties and all the children. If you limit it to those cases where the other side has hired a psychologist, then you hogtie the court's authority to appoint a psychologist to evaluate the parties.

CHAIRMAN SOULES: Just a moment. Okay, let me see the hands so I can take them in order and we will just start here. Anybody -- there are a lot of hands up. O'Quinn.

MR. O'QUINN: Harry, how have you been getting court ordered psychologists before we have been talking about putting that in the rule? How have you been getting it?

MR. TINDALL: We just did it. No one objected. We sort of knew what 167(a) said, but we also have a family code that talks about temporary orders and we sort

of mush it around and do it.

CHAIRMAN SOULES: Sam Sparks is next, El Paso Sam, and then Ragland.

MR. SPARKS (EL PASO): In school law cases, particularly in special education, when the cases are appealed from the administrative decisionmaking to the state courts, the losing party always gets a psychologist to testify in a trial. And the winning party generally is totally satisfied with the reports because the evidence is a little bit loose in administrative hearings, and we are seeing more and more and more of these now that Congress has allowed attorneys fees, and we are going to see more and more, particularly in the metropolitan areas. And those school lawyers are going to have to have the ability to have psychologists evaluate the minor children or in some -- anybody under 25. So I don't know how you are going to split the level, but there is another evolving area of the law where psychologists are necessary for examination.

CHAIRMAN SOULES: Tom Ragland.

MR. RAGLAND: I wanted to direct a question to Harry. It seems like to me that I recall that the district court or the family law court, when the welfare of the child is placed in issue, has an inherent power to order such examinations and consultations.

MR. TINDALL: Well, we thought so until this

Coats v. Whittington which says the rule doesn't allow for a psychologist. It stopped the practice until we get this rule amended.

CHAIRMAN SOULES: Harry and Ken Fuller made a very -- they pursuaded us -- it wasn't a one-sided vote, it was a fairly close vote -- to add psychologists to this rule, I guess, two meetings back.

MR. TINDALL: That is right. If they are licensed health care providers and they get third party reinsurance, why are we distinguishing between psychiatrists and psychologists? It makes no sense to me.

CHAIRMAN SOULES: I guess what we are really discussing here is whether to limit having a forced psychological examination to cases where a psychologist is listed as an expert. Is that right, Steve?

MR. McCONNICO: Yes. That is the proposal.

MR. TINDALL: It is really just relief from the rule -- I mean from the holding. I hate to get into these special case provisions. I know the Committee is generally against that. Yet say in conservatorship cases, a court can appoint a psychologist.

MR. BRANSON: The problem is obvious, though, in the personal injury area. Anytime you have got an allegation of mental anguish --

MR. TINDALL: Pain and mental anguish, they

are going to want to have a psychologist exam.

MR. DORSANEO: Is it any better if a psychiatrist does it?

MR. BRANSON: They have medical standards that you can go back and psychologists really don't. It is a lot better.

CHAIRMAN SOULES: Judge Rivera.

JUSTICE RIVERA: We might be able to take care of this by providing for mental examination by a doctor and psychological evaluation by a psychologist. I remember that distinction where we signed in orders when the Department of Human Services come in, they are terminating rights or they are doing something. There is always counseling, psychological evaluation, and that seems to be different from the mental examination, and it wouldn't cross, you know, the doctor and psychologist.

MR. BRANSON: Judge, I am not able to follow you. If you had a request, for example, with a personal injury case where the plaintiff was claiming mental anguish, which of those two would you think --

JUSTICE RIVERA: I am saying there is a distinction. They come in and ask for a social study. It doesn't have to be a psychologist. It doesn't have to be a doctor. It can be a social worker. They come in and ask for a mental examination, then it has to be a doctor, and that is

what the case says. I do remember and we do authorize a psychological evaluation, which they don't call an examination, in a lot of the abused children where the department has taken away children and they seem to make that distinction. I know we have several places in San Antonio where we send them for evaluations on motions of the state. It doesn't mention doctor, it doesn't medical or anything.

CHAIRMAN SOULES: Let me get a consensus. I don't know how much time to spend on this. I can't really tell from the comments how the mix is. How many feel that we need to make any change in 167(a) other than the way it appears on 288 and 289? How many feel we need to make a change?

MR. McCONNICO: Luke --

MR. MORRIS: I don't understand what you are asking.

CHAIRMAN SOULES: What I am asking is if we have got a real one-sided consensus, that we just leave this alone, then I want to find that out.

MR. O'QUINN: You don't have that. In fact, you have got your subcommittee chairman recommending an amendment. You have a motion on the floor to second to make that amendment. That is what you have got right now.

CHAIRMAN SOULES: I am not trying to be out of order. How many feel that the text on 288 and 289 needs to

be changed?

MR. SPARKS (EL PASO): The text includes the underlined part?

CHAIRMAN SOULES: Everything.

MR. JONES: The rule as proposed.

CHAIRMAN SOULES: We need to work on this, then. Thank you for giving me that consensus.

Judge Rivera, you are suggesting, I think as I understand it, to get down to specific words, that in one, two, three, four, five, in the sixth line just before the word "psychologist", you would insert the words "psychological evaluation by a psychologist". So that it would read, "A mental examination by a physician or a psychological evaluation by a psychologist."

JUSTICE RIVERA: That should take care of it.

CHAIRMAN SOULES: Is that your recommendation?

JUSTICE RIVERA: Yes, because you don't have a psychologist doing a mental examination here.

CHAIRMAN SOULES: That doesn't change your motion. Does anyone oppose that?

MR. EDGAR: I would like to find out from Harry. Harry, would that solve your problem?

MR. TINDALL: The suggestion the judge -- yes, that would solve my problem, but I am not sure it satisfies --

MR. BRANSON: It doesn't solve my problem.

CHAIRMAN SOULES: Hold on just a second. All we are doing is fixing a very small problem here. We are not dealing with Franklin Jones' question yet. It seemed to me like what Judge Rivera was suggesting was helpful to the rule regardless of how it comes out.

MR. BRANSON: Can we take that up while we have got a motion pending?

CHAIRMAN SOULES: I don't know, probably not.

JUSTICE RIVERA: I haven't had a request for a psychologist in a personal injury, but I have had a request for a psychologist in a family matter, but they asked for a psychological evaluation.

CHAIRMAN SOULES: And that is not a problem for you?

MR. TINDALL: No.

CHAIRMAN SOULES: Okay, I will come back to that since it was off on a tangent. How many feel, then, that the psychological examination, or I guess what we are debating now, should a psychological evaluation -- should the court have the power to order a psychological evaluation in circumstances where there is no psychologist designated to testify by the other side.

MR. JONES: You can state it that way or you can state it the way Steve stated the motion on the rule,

either way, but that is a motion before the house.

CHAIRMAN SOULES: And if we get that consensus, we will work on the language. How many feel that that should be the law?

MR. BRANSON: Which?

CHAIRMAN SOULES: That a court would have the power to order a psychological evaluation only where the party to be so ordered has listed a psychologist as a, I guess, either -- as a witness.

MR. O'QUINN: Testifying expert.

CHAIRMAN SOULES: As a witness, either fact witness or expert witness.

MR. DORSANEO: What you are talking about is not who can do it. You are talking about good cause and the end controversy requirements. That is what is confusing the issue. The second half of Coats doesn't say that you can get a mental examination whenever somebody claims mental anguish. It says just the opposite of that. What you are really talking about is when you can have these examinations done by whoever the hell it is, and that is a whole different question.

MR. O'QUINN: You have got me confused now, Bill. Now the way Steve stated the issue, I understood it, with all due respect. Are you saying you don't like the way Steve stated it or what? You have got me confused.

MR. DORSANEO: I am saying that what he is talking about is a specific situation when a psychologist could do an examination on court order, and what he is saying is that when one side puts, in effect, puts the condition or makes it clearly so that the condition is in controversy, it is going to be something that is litigated, because they list a witness, then you can establish your need for a competing examination, if I understand what he is saying.

MR. O'QUINN: What I hear Steve saying is simply this: If the person seeking the exam wants to use a psychologist instead of a psychiatrist, an additional requirement is going to be required in addition to whatever else Rule 167(a) requires, and that is, the other side must be using or must have listed a psychologist as a witness that needs to be dealt with. Have I got it right, Steve?

MR. McCONNICO: That is right, but I think you are both saying the same thing.

MR. DORSANEO: Same thing. It doesn't happen that way. It happens the other way. They list them and then you file your motion.

MR. O'QUINN: I just said that the other guy had to have the psychologist.

MR. DORSANEO: You said it the other way chronologically, though.

MR. SPARKS (EL PASO): I am hearing in another

area of law, family, you sometimes need a psychologist without either party asking for it.

MR. TINDALL: Right, that is 98 percent of the cases.

CHAIRMAN SOULES: Just a minute. Harry has got the floor. We are not getting a record now. Harry, state your position, then Pat Beard.

MR. TINDALL: Many times in these custody cases the parties will hire independent psychologists and psychiatrists, and when you get their reports, they conduct the same tests. You send them to a psychiatrist, he immediately sends them over for the standard battery of psychological tests administered either by a parapsychiatrist or by a psychologist. It is very -- it is impossible to distinguish the services they render unless they become treating health care practitioners as to what they are doing with these people that they are clinically evaluating by talking to them in their office.

CHAIRMAN SOULES: Pat Beard.

MR. BEARD: Well, a defendant can always have his expert psychiatrist, psychologist sit in on an examination of the plaintiff and can testify from all the records. I am reluctant to order people in for psychological examination. At one time the domestic relations lawyers, with all due respect, especially women lawyers, would demand

a psychological examination of the husband on all occasions. I think you can reach the result by just having your experts sit in and advise you what questions to ask.

MR. TINDALL: It doesn't work that way.

CHAIRMAN SOULES: Anything new? Judge Rivera.

JUSTICE RIVERA: I think if we keep the suggestion that I made and limit and adopt Steve's suggestion but let that apply to cases other than family, we can do it, because I do know in family, they come in together and say, Judge, we need a social study. We want a psychologist because it is complicated or we need an evalulation and they come in together, but they have not listed any witnesses before.

MR. SPARKS (EL PASO): Luke, I -- I am sorry. I am hearing now that Harry's problem really isn't a problem. The courts already have the power to do this.

MR. TINDALL: No, they have stopped since Coats. Before that, what the Judge is describing is the world we live in.

MR. DAVIS: We can exclude family law from there, can't you?

MR. TINDALL: If you want to exclude family law, I will be glad to go with Franklin's suggestion. I know that Luke's philosophy has been, and generally the Committee, we don't like to carve out special cases.

MR. LOW: I do a little family law practice, too, and I know some of the people. They wouldn't necessarily want to go. I have been before the bar myself and I wouldn't want to have to go before a psychologist.

MR. O'QUINN: That proves he is mentally healthy.

MR. LOW: Need to know child -- maybe you have a child, but it shouldn't apply in every family law case.

MR. TINDALL: That is up to the judge generally to evaluate. Sometimes they order it.

CHAIRMAN SOULES: Anything new? Okay, those in favor of Steve's and Franklin's motion show by hand.

MR. EDGAR: Now, we have got -- didn't Judge Rivera ask that his suggestion be implemented into that as well?

CHAIRMAN SOULES: Let me get to that next. It is just this motion. All in favor show by hands. One, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13, 14, 15. Those opposed? Fifteen to four. Okay, 15 to four, and you will have to write some language, Steve, for me to be put into the rule.

MR. TINDALL: Mr. Chairman, can I move that we exclude writing the same language, we exclude family law cases from the coverage of that rule and the court can refer the parties to psychologists.

MR. DORSANEO: Make a Title II case.

MR. TINDALL: Title II case. Is there any objection to that?

MR. RAGLAND: Are you speaking solely with regard to the matter of the child?

MR. JONES: I won't mess with your --

MR. TINDALL: Thank you, Franklin. Title II cases, suits affecting the parent/child relationship.

CHAIRMAN SOULES: Okay, Harry moves that the -- this restriction -- that word be, I guess, written up to make in suits affecting, what, parent/child?

MR. TINDALL: Right, Title II family code.

CHAIRMAN SOULES: Title II family code cases.

MR. EDGAR: I am reluctant to approve something until we see it all in writing and see how it works out together.

CHAIRMAN SOULES: I know, but I have got to get past 167(a) somehow.

MR. EDGAR: I understand that, but I think sometimes we create problems for ourselves when we think we know what we have done, and then we look at it when it is in writing, we have created a problem.

CHAIRMAN SOULES: All I am asking for is a consensus on whether to even work on Harry's problem or just forget it. That is all I want to know. How many would be

favorably disposed towards exempting the Title II family code cases from this restriction and permitting psychological evaluations in those cases in any event when ordered by the court? Okay, that is a consensus.

MR. DORSANEO: I am opposed to that.

CHAIRMAN SOULES: Opposed. There is a consensus that we exempt it. Harry, will you get with Steve and sometime here this morning, we will try to write that up? And then now, finally, Judge Rivera's suggestion that we put in here "a psychological evaluation by a", insert those words after the word "or" and before the word "psychologist" in the sixth line.

MR. BRANSON: I don't think we need that now.

JUSTICE RIVERA: I think we do because, otherwise, it looks like they are ordering a psychologist to perform a mental --

MR. TINDALL: Judge, they really do that, anyway. But I think they are cured as long as -- they can deal with that as long as they know that.

MR. BRANSON: Judge, I think our problem is cured.

MR. TINDALL: Unless plaintiff is going to use a psychologist, they are not subject to the perils of the court ordering one.

CHAIRMAN SOULES: Judge Rivera, do you want to

make that a motion?

JUSTICE RIVERA: I will.

CHAIRMAN SOULES: Is there a second?

MR. EDGAR: Second.

CHAIRMAN SOULES: Motion has been made and seconded that in the sixth line of rule on Page 288 after the word "physician or" put that -- strangely enough, that appears twice -- after these words "physician or mental examination by a physician or" that is this insert to be made, quote, "A psychological evaluation by a," close quotes. That, then, would be inserted before the word psychologist all in the sixth line of Page 288.

Motion has been made and seconded. Those in favor say "Aye."

MR. REASONER: Luke, would you have somebody delineate the difference again between a psychological evaluation and a mental examination?

CHAIRMAN SOULES: Judge Rivera, would you do that for us, please.

JUSTICE RIVERA: I don't know if there is really any difference, but that is what they call it because a psychologist is not a doctor, not an M.D.

MR. REASONER: It doesn't really seem to me it is our place to invite ambiguity or to invite conflict whether there is a difference between the two.

JUSTICE RIVERA: I think we need to distinguish because it looks like we might be ordering a psychologist to do a mental examination that only an M.D. can do.

MR. REASONER: I don't understand that distinction.

JUSTICE RIVERA: Association is they have the people that are qualified and licensed to do that. A Ph.D. is licensed in different places.

MR. REASONER: Judge, it is my understanding that other than prescribing drugs, a psychologist could do whatever mental examination a psychiatrist can do.

MR. TINDALL: Judge, that is right. They are on the faculty of Baylor College of Medicine. They can't admit, but they then treat after they are admitted.

JUSTICE RIVERA: But I have never seen "psychological examination". It is always "evaluation". It goes into testing rather than diagnosis.

MR. BRANSON: In their report, they say they do a mental status.

CHAIRMAN SOULES: Okay, those in favor, say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed.

(RESPONDED NO)

CHAIRMAN SOULES: Okay, nays have it. That will not be included.

MR. EDGAR: Luke, before we leave this, I don't really know what Paul Gold had in mind. In his letter, he talked about ex parte depositions, but it seems to me that by, as I understand it, simply because under the current law just alleging mental anguish does not put mental anguish in controversy to require a mental examination. Isn't that correct?

MR. DORSANEO: Right, you have to say something like traumatic depressive neurosis in your pleadings.

MR. EDGAR: Under this addition where we say "or mental examination by a physician or psychologist", that will now permit a party, the defendant, to ask for a mental evaluation. Is that correct?

MR. DORSANEO: If he can show good cause and end controversy, which is what you just talked about.

MR. EDGAR: So then this really is not changing that. This is not intended to change that aspect of the law.

MR. O'QUINN: If you look at the prior line --

MR. EDGAR: I understand that, but since we have added "or a mental examination", it just kind of concerned me. I wanted to make sure that that is not our

intent.

MR. O'QUINN: It is not, because if you look at the prior line, line five, we had in there previous physical or mental examinations. We already had mental examination. We simply, for clarity, we reworked the way the rule is laid out.

MR. BRANSON: Justice Hecht, would you agree with that, that is the way you would interpret that?

JUSTICE HECHT: Well --

MR. BRANSON: I am not asking for a valued opinion. I am just asking --

JUSTICE HECHT: You want Lloyd and me to vote on it?

MR. BRANSON: The reason I asked the question, Judge, you were shaking your head and I couldn't tell whether you were in agreement or disagreement.

JUSTICE HECHT: The sense of the group has not been to tamper with the first part, which ended with good cause and end controversy but --

MR. BRANSON: When I see a Supreme Court judge sitting there shaking his head, I just wonder what he is shaking it at.

CHAIRMAN SOULES: Okay, the next rule is Rule 168 on Page 293. Steve, what is your Committee's report on that?

MR. McCONNICO: We suggest that the rule be left, save and except for one addition suggested by Pat Hazel. What happened -- and I think we all knew this -- but Rule 167 where we talk about requests for production, we put in what happens with the originals, but we never did that with 168. Pat believes that we should add the addition which he has on Page 303, and state what where the custody of the originals and who keeps them. And this is consistent language here with Rule 167. We move that it be adopted.

CHAIRMAN SOULES: Second?

MR. O'QUINN: Second.

CHAIRMAN SOULES: Those in favor say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed? That is unanimously approved, then, for a new paragraph seven, Rule 168.

MR. DAVIS: Could we hold it just a second? We were talking about one of the phantoms that everyone was concerned with yesterday was how long attorneys have to hold, if it is a court record. What is the affect of this on that? Doesn't that --

MR. McCONNICO: No more so than 167. They just don't state it.

MR. DAVIS: But in effect, it would mean that we would have to maintain custody of it, doesn't it?

MR. McCONNICO: Well, 167 states that you have to keep custody now of certain requests for production, and all this is going to add is that you are going to have to keep custody of the originals of the answers to interrogatories. It does not state how long.

MR. DAVIS: But we have nothing, then, that really addresses the problem as to how long we have to --

MR. McCONNICO: No.

MR. DAVIS: -- maintain original depositions, answers to interrogatories or requests for production.

MR. McCONNICO: Right.

CHAIRMAN SOULES: Probably need a general rule on that, Tom.

MR. DAVIS: That is what I am saying. That is where we are.

CHAIRMAN SOULES: We don't have any guidelines at all on that. Next is Rule 169.

MR. SPARKS (EL PASO): I have received some communications from other lawyers. It has become a common practice in a lot of collection cases and debt cases, things of that nature, and I think also in the personal injury field, if you ask a request for admission, you know answer yes or no, you cannot, if No. 1, above is not admitted, then an interrogatory filed, and they are all together, and the clerks, according to the authority of someone named Luke

Soules, Luther Soules, has said that they don't accept requests for admission because interrogatories aren't supposed to. So the clerk just won't file the request or anything else.

Is it our interpretation or intent that interrogatories should be separate from requests for admission, first of all, and did I see back in an earlier rule where on summary judgment questions -- I am really talking about collection cases, debt cases, things where interrogatories can be filed for use in summary judgments on those type cases. Did I see that right?

CHAIRMAN SOULES: Yes.

MR. SPARKS (EL PASO): And still is it our intent that interrogatories should be a separate document from admissions?

CHAIRMAN SOULES: Well, it was, and we really reached Tom Davis' concern, I think, at Rule 169. We have got a situation where requests for documents and responses to requests for documents, interrogatories, responses to interrogatories are not to be filed. Requests for admissions and responses are to be filed. And to me, that means they have got to be separate. I don't know, that is just the way I see it. I mean, maybe some clerks file them, some don't. If some of them have asked me the way I see it, that is the way I see it. I have so advised them. Tom feels that the

requests for admissions, in order to facilitate this alternative practice of alternating requests to admit and interrogatories, and maybe then followed by a request for documents. You know, do you admit? And if you don't, say why. And then have you got any documents that support you?

MR. SPARKS (EL PASO): Give me the documents that support the petition.

CHAIRMAN SOULES: In order to accommodate that practice, first, if we go to the point where we say that if you alternate all three, that you can file, then we are going to have district clerks back filing interrogatories and responses again. We may want to do that, I don't know.

MR. COLLINS: I have a comment about that.

CHAIRMAN SOULES: The other alternative is to say that requests for admissions and responses don't have to be filed. If we eliminate that problem, then you could alternate and you don't have a problem, because the clerk is not even going to have the responsibility to file requests for admissions. That is why I wanted to put 169 into this discussion, because that is a way to fix it. It may be the way to fix it, I don't know.

If that needs fixing, first, I guess, let's decide whether we need to accommodate the practice of alternating requests for admissions and interrogatories and requests for

documents in the same document in the same discovery request. If we want to accommodate that, then we will go to what is the best way to do it.

How many feel that we should accommodate that approach that you can alternate requests for admissions, interrogatories, and requests for documents, if you so wish, in the same discovery request, that that should be accommodated by the rules? How many feel that should be?

MR. O'QUINN: Accommodated in what way?

CHAIRMAN SOULES: Supports.

MR. DAVIS: Not prohibit you from doing it, if you want to.

MR. O'QUINN: You are saying we are presently prohibited from doing that?

MR. DAVIS: They won't file it.

CHAIRMAN SOULES: How many feel that we should accommodate that practice? Show by hands. How many feel that it should not be permitted? Okay, let me count them again. I didn't realize it was going to be that close. How many feel that that practice should be accommodated by the rules? Show your hands. Let me count them. One, two, three, four, five, six, seven, eight, nine, 10, 11, 12.

How many feel that it should not be? One, two, three, four, five, six, seven. Twelve to seven. We are going to do -- we are going to do something to accommodate

that practice. The problem now, John, again is requests for admissions and responses must be filed. Other discovery is not to be filed.

MR. O'QUINN: Must not be filed.

CHAIRMAN SOULES: That is right, must not be filed. So whenever you come to the clerk's office and the clerks that are, you know, space conscious and cost conscious are going to say, "You got interrogatories and requests for documents, I am not going to file it. You bring me some requests separate, and then I will file it."

MR. TINDALL: Why don't we file admissions?

CHAIRMAN SOULES: That is one of the fixes is should we just eliminate the requirement to file requests for admissions and responses, and if we do that, then we take care of the problem.

MR. BEARD: I move we eliminate the filing.

MR. SPARKS (EL PASO): One reason we have filing of those are the time limitations when they are deemed -- there are some things that go in there.

CHAIRMAN SOULES: John, do I need to recognize you before a motion is put before the court? Okay, John Collins.

MR. COLLINS: When we made the rather innocuous rule change of not filing discovery matters, we have opened up a whole new can of worms that we did not

anticipate, at least I did not anticipate. For example, how long do you have to keep it, who keeps it, what is the Court record, what happens if it is lost, who is liable if I lose the original of McConnico's deposition? All of these questions no one anticipated.

And we are beating our head against the wall right now on what is filed, what is not going to be filed, when is it filed, who keeps it. And my point is we have not thoroughly examined the implications of the no filing rule. And it is going to create an absolute nightmare for somebody one of these days. Everybody has an anecdote about it already now, but I defy anybody today in a multi-party case that is pending to go to the clerk's office and find out what has been done in that lawsuit. You can't do it.

And if you intervene, you are even in a worse spot. If you are a formal party and you are trying to find out what discovery has been done in that case, it will take you a week and a half to call all the lawyers to see what discovery they have got, who exchanged what when, and somebody has lost their file, and it is impossible to reconstruct the discovery that has been done in that case. And I am just saying that that is going to create problems that we cannot foresee, and I would propose that this Committee set aside some special time to address that problem from a broad picture standpoint rather than trying to patch it, which is what we are doing

right now.

CHAIRMAN SOULES: All right, that responsibility is assigned to Steve McConnico's Committee for study in the interim, and that will be also assigned to -- let me see, who is chairman of the first set of rules?

MR. McCONNICO: Beck.

CHAIRMAN SOULES: Beck, 76(a). He will have to work with you, because 76(a) is a part of that. So I am going to assign you two, I guess, as a special committee to study the consequences, I guess, of not filing discovery, make some report at our next meeting, whenever that is, you and David you can get. And I want -- John Collins will be a special member.

MR. COLLINS: I am already on McConnico's Subcommittee.

CHAIRMAN SOULES: Now, Tom Davis.

MR. DAVIS: I take it from what action you are taking that we will take no action on that problem at this meeting.

CHAIRMAN SOULES: That is right. But we do need to take action on whether or not we are going to file requests for admissions. Somebody made a motion, I think it was Pat Beard, but I didn't get it on the record, and Tom, you have the floor.

MR. DAVIS: I agree with John. I think that

in order to accommodate the convenience of some district clerks, which is a worthwhile thing to do, if you can, we have created a monster, and we have sacrificed other matters just for their convenience. I mean, if they don't have room to get all of these, I am sorry, but I don't think we ought to suffer for it or we ought to change the whole practice of discovery because of that problem. Maybe the problem is to eliminate getting more space to file it. I would make the suggestion, since it is going to be before the subcommittee, that you have the alternatives either that we go ahead and file everything again like we use to and get by pretty good, or we do not file requests for admissions, or if an interrogatory and a request to produce is combined with a request for admission that must be filed, then that will be filed. Those are, I think, are the alternatives, but I think the convenience of the clerk, to me, does not weigh too heavily against some of the problems we have raised.

CHAIRMAN SOULES: Okay, those comments are in the record, and the Committee will have the benefit of those comments.

Now, does anyone have a motion to make about Rule 169? This problem that we decided we were going to address and accommodate, that is, the alternating interrogatories, document requests, and requests for admissions in the same discovery document.

MR. BEARD: My motion is --

CHAIRMAN SOULES: Pat Beard.

MR. BEARD: Make it uniform and simply not file the requests for admissions.

CHAIRMAN SOULES: Is there a second?

MR. LOW: I second.

CHAIRMAN SOULES: There is a motion and a second that we take out the requirement for filing requests for admissions. Discussion. Hadley.

MR. EDGAR: Requests for admissions fall in an entirely different category than other discovery requests. For example, you don't have to introduce any evidence on it. It is admitted. And there can well be some controversy on whether or not a party actually responded to requests for admissions. And the requesting party comes in and says "Well, you never did respond." And the party to whom the requesting party says "You never did respond." The responding party says, "Oh, yes, I did." And there is a controversy over that and whether or not he or she did, in fact, respond is absolutely essential and vital to the lawsuit. And when you have to file it, then it is either filed or it isn't, and you know whether or not you have complied or not. And I think you are going to create more problems than you can shake a stick at if you abandon filing requests for admissions and answers thereto.

CHAIRMAN SOULES: Buddy.

MR. LOW: You get the same thing. You didn't answer the interrogatories, therefore it is too late. I can't help it if the judge won't let you answer them.

CHAIRMAN SOULES: Wait a minute. Lefty Morris had his hand up. He is next. Then you, Frank.

MR. MORRIS: Well, I am going to just emphasize what Hadley did. On a request for admission, you are actually removing things from the lawsuit. If the judge is reviewing the file prior to the proceedings and everything, and if things have been admitted to the court, I think in the record -- and I think that is part of why we drew that distinction at the time we did -- the Court, in reviewing the record, needs to know what is in issue and what is not. And if something has been taken out by an admission, then the Court knows not to worry with that. And I think that that, appropriately, should be in the court's record.

CHAIRMAN SOULES: Any other discussion? I am sorry. Frank, did you want to say something?

MR. BRANSON: I suggest before we send Steve and John off to redraft this, it might be worth getting a consensus of -- just kind of a straw pole of the Committee -- about whether we would like to go back to filing everything. Because I sense that the majority of the Committee would like to return to the way we -- the days of old where we filed

things at the courthouse.

CHAIRMAN SOULES: The only thing I can do is send that to the subcommittee under the time constraints today, and I have done that. Anything else on this?

MR. BRANSON: Couldn't you just put that in, so they will know what to work with?

JUSTICE PEEPLES: Yes, one other thing. As a trial judge, when you get a file, whether it is the case on the merits or summary judgment, you want to look at the file and you need to see the pleadings and interrogatory answers and requests for admissions. You never -- I never did -- look at depositions. The distinction that was drawn last year, whatever, was a good one. I think we may have made a mistake by saying you don't file interrogatories. We have been talking about it for 30 minutes now.

MR. LOW: Production, would you look at that?

JUSTICE PEEPLES: No.

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS (EL PASO): We talked about this in multiple, but I hate to take a position in this meeting that might be inconsistent with the general solution that we might at the next meeting. I suggest we continue the question of filing this hybrid pleading until we hear from the subcommittee so we have one rule that covers all the discovery rather than attacchments.

CHAIRMAN SOULES: Okay, the only thing I have got to add to the discussion is that we can -- what we are looking at here in this discussion is Page 304. The motion, the essence of the motion is to delete the last sentence in the first paragraph. An alternative would be to add this clause in the middle of that sentence. Now, and after the comma following the word "objection". We could say "whether or not other discovery requests or responses are combined therewith." Now, that is the alternative, and then we are going to put the clerk to filing any combination.

So the motion is that we delete this sentence. Does anyone --

MR. O'QUINN: Was that the motion or was the motion to do one or the other?

CHAIRMAN SOULES: The motion that is on the floor is to delete this sentence. It has been seconded.

MR. DAVIS: Why don't you offer that as an amendment?

CHAIRMAN SOULES: Tom Davis offers this as an amendment.

MR. BRANSON: Second.

CHAIRMAN SOULES: Is that amendment acceptable to you, Pat? Okay, now we have a substituted motion which is to, in the last sentence of the first paragraph of Page 304 after the word "objection". Let me read it all the way down

to where this would go in.

"A true copy of a request for admission or of a written answer or objection comma whether or not other discovery requests or responses or objections or combined therewith comma together with proof of the service thereof as provided in Rule 21(a) comma shall be filed promptly in the clerk's office by the party making it."

MR. DAVIS: If you file a combination, the clerk will file it. Is that correct?

CHAIRMAN SOULES: Right, but probably it also compels the filing of a combination response.

MR. RAGLAND: That creates a problem.

MR. LOW: That includes production of about ten boxes of paper.

CHAIRMAN SOULES: Well, no, because the response, the production response does not include the documents. It just says I will do it, and I have got some stuff, and I will give it to you, and here is when, and to our convenience. So that doesn't include the documents themselves.

All right, any further discussion on this substitute motion? Tom Ragland.

MR. RAGLAND: I have a problem with this filing a combination response because the attorney is going

to answer, respond to the request for admission. But we have got another rule on interrogatories where the witness must sign. I am not going to have some of my illiterate clients making some admissions or vice versa, lawyers answering the question.

CHAIRMAN SOULES: Well, you would have to handle a combination response. You would have to have different sets of signatures. You are going to have -- the party is going to have to answer the interrogatories and the lawyer can answer all the rest. But the lawyer can answer requests for admissions and document requests, cannot answer interrogatories. So you have got the design the signatures accordingly, is what I understand.

Anything else on this? Those in favor of the substitute motion say "Aye."

(RESPONDED AYE)

CHAIRMAN SOULES: Opposed.

(RESPONDED NO)

CHAIRMAN SOULES: Let me have a show of hands on that.

MR. McCONNICO: Luke, be sure to -- you know, we had two motions out. Let's make sure we know which one we are voting on.

CHAIRMAN SOULES: All right, the substitute motion is -- the motion on the floor, it is the only

motion -- is that the last line of the first paragraph of 169 would read as follows:

"A true copy of a request for admissions or of a written answer or objection comma whether or not other discovery requests or responses or objections are combined therewith comma together with proof of the service thereof as provided in Rule 21(a) shall be filed promptly in the clerk's office by the party making it."

MR. DAVIS: The clerk must file a combination request.

CHAIRMAN SOULES: Those in favor show by hands. Fifteen.

Those opposed? Fifteen to one, two, three, four, five. That carries by a vote of 15 to five.

MR. REASONER: Luke, can I ask one question for clarification? I thought Hadley's point about the importance of this was a persuasive one, but as I read this rule, you are not required to file your responses to requests for admissions with the clerk.

CHAIRMAN SOULES: It says "a true copy of a request for admission or of a written answer or objection." They all have to be filed.

MR. REASONER: You think that will cover it.

MR. O'QUINN: That is the way it is right now.

MR. BEARD: Luke, what is the federal court doing about all this?

MR. LOW: They don't file anything.

CHAIRMAN SOULES: Not only that, but they are not consistent. You go to one clerk, he does it one way, another clerk does it a different way.

MR. BEARD: But surely the same problems are arising in the federal court that we are here. So there must be something --

CHAIRMAN SOULES: They don't file anything.

MR. BEARD: I know that, but surely some committee is studying that in federal court.

CHAIRMAN SOULES: Anything else on Rule 169? Except for that change, then, 169 -- excuse me, let's get attention to this.

Except for that change, 169, then, will go to the Supreme Court as previously recommend. Is that correct? Any opposition to that? All right, that is the way it stands.

JUSTICE HECHT: Mr. Chairman.

CHAIRMAN SOULES: Yes, sir, Justice Hecht.

JUSTICE HECHT: I know that the Committee had elected to adjourn at 12:00 today, and it is 10:15, and I can't let you get out of here without saying that I know that the Court is very interested in comments to changes that have been proposed in the charge rules, and I hope that friends of

business will not prevent you from debating those fully before the conclusion of this meeting. We are interested in all the comments on all the rules, but I just know that a number of questions have been asked about those issues.

MR. DAVIS: I move we take that up out of order immediately.

CHAIRMAN SOULES: Okay.

MR. COLLINS: Second.

CHAIRMAN SOULES: Okay, motion has been made and seconded that we take that up out of order. That is fine with the chair.

MR. EDGAR: That is going to take some debate. Why don't we take a break for a minute and then we will come back in?

CHAIRMAN SOULES: Well, on the break, I want -- I ask the Committee to think about this: We are not yet 40 percent through the rules that we did in 1989. There are two and a half pages of those rules. If we are going to go to the charge rules, which we are going to do right after this break, we cannot finish this work by noon. And I want -- I would like to have the Committee's guidance on what to do about that whenever we return.

MR. COLLINS: Let's return another day.

MR. DAVIS: How about Friday? Thursday?

CHAIRMAN SOULES: I want your guidance when we

come back. Whatever you say is what we will try to do.

MR. McCONNICO: Mr. Chairman, before we break, we only have one more discovery rule.

CHAIRMAN SOULES: We have one more discovery rule. We are going to take it before we break. What is it, Steve?

MR. McCONNICO: It is 208, and we propose no change, be adopted as is.

CHAIRMAN SOULES: All in favor say "Aye."

MR. O'QUINN: What are we voting on?

MR. McCONNICO: Okay, Rule 208. It is the only remaining discovery rule. It is on Page 327. It is depositions by written questions, and we vote -- our proposition is that this not be changed and be adopted as recommended.

MR. O'QUINN: What was somebody trying to get you to change?

MR. McCONNICO: Nothing.

MR. SPIVEY: Everybody is in favor.

CHAIRMAN SOULES: 208 stays as is.

(Whereupon a recess was had, after which time the hearing continued as follows:)

P R O C E E D I N G S

Saturday, February 10, 1990

Afternoon Session

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CHAIRMAN SOULES: We are in session on the charge rules.

Okay, we are on the record, and we are going to take the charge rules which are in the book on 271 through 275. Of course, they are now 271 through 279 in the rules that are operative today. They are found at pages -- beginning at Page 342 and ending at Page 424 -- no, at Page 414. And there are two areas -- I think there are two, there may just be one -- where the complaints have been -- where a lot of complaints have been made about these proposals.

One is the trial judges want an appellate consequence to failing to submit in substantially correct form questions and instructions, because they feel like that gives them, I guess, a hammer or something more to force the parties to help them at the charge in generating a jury charge, a proper charge.

The second question, unless that is just part of the same one, is how to preserve error in the charge. The questions -- the latter one -- let's see, 272, we have got

a -- okay, on Page 354, we have Hadley's Committee's recommendation for a substitute 272 on Page 354.

JUSTICE PEEPLES: You said Hadley. That is my Committee.

MR. EDGAR: Can I make a report? I think I can clarify that.

CHAIRMAN SOULES: Okay, and if that is done, then the first problem goes away. If this is not done or something like it, then there is another way to fix -- give the judges some more -- a bigger hammer than they have right now under the proposed 271 through 275. And Hadley, or who wants to open with a report? Is it Judge Peeples or Hadley? Hadley, okay.

MR. EDGAR: First of all, with respect to these rules generally, Luke, the comments were certainly favorable to your reorganization of the rules. I mean, combining them into six rules or however many there are is very well received, and following a letter Judge Peeples gave me the credit for doing that, I would like to go on record as saying that was your project.

But the problem, really, and all of the objections -- and I guess we got probably a hundred people voiced comments concerning what appears on Page 357, Rule 273, Paragraph No. 1 in which, as now stated, would say that only an objection only to the charge will preserve

error.

Many trial judges and others voiced concern that there should be -- when something is entirely omitted from the charge, then the complaining party should at least request that it be placed in the charge, and by request, we mean a request in writing. And that is really the basic issue that I think we need to address.

Now, the Committee, on the administration of justice, via Pat Hazel -- and I think Pat is here. He is supposed to come to another meeting, but he can't find it. And I am glad he is here -- wrote a letter which appears on Page 355 and 356 on behalf of the COAJ voicing the concern which I have just expressed. And he attempted to reduce to writing the COAJ's recommended solution, and that appears on Page 354.

Now, mechanically, he is combining two rules which we have before us into a single rule, but if you would look at No. 5, Paragraph No. 5 on Page 354, it focuses in upon the manner in which they suggest that preservation of error be achieved, which basically requires a request if the court's charge completely omits a definition, special instruction, or entire ground of recovery or defense, except when the court's charge can be cured either by amending what is submitted or by adding to the definition, special exception, or question, then either an objection or request is proper.

I really think the first thing we should address, though, is a broader issue, and that is should there be circumstances under which a request is required, or should only an objection cure error which is as now proposed on Page 357.

MR. COLLINS: Hadley, I have a question.

CHAIRMAN SOULES: John Collins.

MR. COLLINS: On Page 354 there under 5(b), a request is required when the court's charge omits a definition, instruction, or ground of recovery. Does that mean, for example, if I am the plaintiff in the case and the defendant omits an element of his defense, am I obligated to tell the court "Look, Buddy Low has screwed up and he hasn't submitted part of his defense and here is a substantially correct question"? Am I required to do that to represent Buddy's client?

MR. EDGAR: Well, if you want to complain of the omission of that element, you would have to object. You wouldn't have to request.

MR. LOW: The way this is written, Hadley?

MR. McMAINS: Not true the way it is written.

JUSTICE PEEPLES: Why not under 5(c), Rusty? You can cure that either by an instruction or changing the wording of the question. Doesn't 5(c) say you can object or request?

MR. LOW: It is not totally omitted like John said.

MR. EDGAR: Now, what is omit. Let me make a suggestion. Before we get into that, I think we should address the broad issue, and that is whether or not there should be circumstances in which a request is required, and then let's deal with what we are going to require be requested. But the broad issue, I think, is should in all instances an objection only preserve error, or should there be instances in which a party should also make a request? Now, that is the first issue I think we should address.

MR. BRANSON: I move there should be instances where you would need a request.

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

MR. BRANSON: That is an unusual combination.

CHAIRMAN SOULES: All right.

MR. SPARKS (EL PASO): Is there going to be a problem later on?

CHAIRMAN SOULES: We voted the house to one last meeting to have objections be the sole necessary predicate for appellate review. Now, I just want to remind you that we voted that strong after about two hours of discussion. I don't care. All I am trying to do is focus back on that discussion so that we -- if we need to redo it, we can, fine. If we don't, that is fine too.

MR. EDGAR: I think we should also focus on the fact that of all the trial judges that have complained about this, of appellate judges that have complained about it, those that are represented by the Committee on the Administration of Justice, I think we ought to take that into consideration, too, and I think that is one reason why the Supreme Court had the round table forum to just see how well received those suggestions were.

CHAIRMAN SOULES: I agree. There was another thing in this proposal which we voted down that was responsive to this, and that was that if a judge, hearing an objection made, requested that the lawyer making the objection tender to the court a solution to that objection in substantially correct form, that the lawyer had to do that or that objection was waived.

In other words, there wasn't any distinction between something that was omitted, something that was committed, these distinctions that are so apparently hard to grasp in the practice. It is just that you make objections, and that preserves error unless the judge says wait a minute, stop, you submit what you want in substantially correct form in writing on that objection. Then if the lawyer doesn't do that, that objection is waived.

Now, I had that in my original draft and felt like it was important to have the judge be able to force a

lawyer -- I mean, this charge conference is compressed, and if the judge becomes concerned about that, to have say, okay, you give me that in writing, and then if you don't do it, you waive.

The debate on that, as I recall, was, well, if we give the judge that lever, he will just say I want all your objections. I want to cure all your objections by something in writing. I really think that is a small percentage problem. I think most of the time judges are going to hear those objections and go along until they really do have a problem, or maybe the adversary has a problem and says, "Hey, Judge, I think he may be right on that." At that point, you do some drafting on some minor points.

Now, that is a way to fix this without getting into, and do as Frank has said, meet some cases -- find some cases where requests should be necessary without preserving these distinctions that are so hard to follow in the case law.

MR. EDGAR: Of course, I wasn't at that meeting, as you know, but I would have found another problem with that, and that would literally then require you to have to object to the omission of one of your opponent's definitions or questions. And I don't think that -- to me, that should not be the law. So I see a problem with that. So in my view, we still have to come back to whether or not

we want to go solely by objection or whether we want to incorporate the request procedure in some instances.

CHAIRMAN SOULES: Okay, Rusty, do you have a comment at this time?

MR. McMAINS: In light of the fact, because we really haven't had -- Hadley and I haven't had much intercharge in the Committee. Hadley hasn't had much interchange, and Hadley did miss that meeting, circumstances beyond his control.

The real focus of the controversy and the debate at the meeting was because basically what everybody on the Committee realized is that there was no agreement at all, except on one regard, and that is that you shouldn't have to be formulating the issues, instructions, or definitions of your opposition.

You need to be in a position to object to something that is there, but you just ought not to be doing that. Now, there is no question that the current rule required that, but we are trying to fix that to some extent, and we got into the problem, as you have articulated before, of it is just not that easy to tell sometimes whose burden it is on any particular question because it may be both parties' burden, such as in the definition of negligence when you have got a case that has got to be proven, and for one purpose it is somebody's burden and for some purpose it is another.

So old practice didn't function effectively in light of the general charge in broad form submission and the incorporation now of defensive matters as well as theories in the instructions. So that your threshold question of should you be required to do something by request is actually a series of questions, because it assumes that we can define in what context that request should be required. And that is what we couldn't do and couldn't agree on and is why we went to the context of the objection practice which was defined more broadly, in fact, or more specifically than what is done in this proposal to require that you point out how to fix the problem it is that you are objecting to.

So to the extent of giving all the guidance in the trial court and with regards to it having appellate consequence, I do not think there is any difference in appellate consequence with regards to the procedural change we have other than you don't get tricky do'ed around by the court of appeals determining that something was your burden to do when you didn't think it was at the time.

MR. BRANSON: Would you have the court reporter record the spelling of tricky do'ed?

CHAIRMAN SOULES: Who's next? Hadley, you feel free to respond.

MR. EDGAR: I was just going to respond by saying that trial judges feel differently than that, and they

have voiced almost -- well, all of them that have responded have been unanimous in saying that we need help, and one way that we get it is have something in writing. And because of the compression and the frustration that goes on in the charge conference, they just feel more comfortable and want something in writing and want a requirement that it be in writing in order to preserve error.

CHAIRMAN SOULES: That is right. Buddy Low.

MR. LOW: I remember Justice Hecht expressed a lot of concerns about wanting to simplify what is omitted, what is defective, and there was also concerns about, you know, not doing the other lawyer's work. And I proposed something and apparently hasn't been discussed much, because some smart lawyers knew what they were doing, so I didn't press it further. But I had proposed that we make it in terms that no matter if it is definition, an issue, or instruction, that if it is -- can properly be a part of your case, that negligence may be a proper part, then you have to submit it in proper form. But if it is not properly a part of your case, all you have got to do is object to it. That is kind of what I proposed, but I guess that never did get very far because I sent it to you and sent it to some of the others. But that seemed to me to satisfy and simplify. But maybe I overlooked a lot.

That is what I propose, that you don't care whether

it is an objection -- I mean whether it is a definition, whether it is omitted, or defective, or what. If what you are talking about is properly a part of your case, cause of action, or defense, then you had better submit it in proper form or you won't complain on appeal. If it is not proper, then all you have got to do is tell the judge I object to it, it is part of his, now you make him draw it. That is what I have proposed. And I drew something up on that and sent it to you back a long time ago, but then Hadley came up with another one that I thought was probably better than mine.

MR. SPARKS (EL PASO): Buddy, that was exactly the way it was before we started fooling around with it.

MR. LOW: No, that isn't how it was.

MR. EDGAR: That is not quite true because if, for example, if an instruction or definition had been omitted, then you have to preserve error by request.

MR. LOW: Deemed admissions and all that.

CHAIRMAN SOULES: Franklin Jones had your hand up.

MR. JONES: I just have some comments, Mr. Chairman, which probably should be appropriately defined as addressing whatever burden of proof exists by reason of the fact that the Committee did adopt this rule last time and particularly that I was there. And I have changed. The reason I have changed is because of the letter from both of

the trial judges in my county telling me to change. That is the primary reason.

Now, there is another reason, and I think it is appropriate at this time that we talk about this or at least think about it, and that is that I was moved to go along with this procedure because it is basically the federal proceeding. Harry Reasoner, two or three or four years ago when I wanted to do something that would put federal rules in the state practice, made the poignant observation that these federal judges have these $50,000 clerks that have nothing to do but keep them out of error.

And I think another observation in that regard is that there are statisticians who tell you that 95 percent of our litigation today is in the state court system as opposed to the federal system. Our judges, our trial judges, do not like what we have done, and I think that it is incumbent upon us to undo it and to simplify this thing and protect them in the structure of their charge and the sanctity of it on appeal.

CHAIRMAN SOULES: On 354, the suggestion for Rule 272, this substitute rule on 354 cures all of the complaints that I have read from the judges about what we did, that is, they want substantially correct form written requests on --

MR. EDGAR: Well, anything that is omitted

that the complaining party, if it is a definition, instruction, or as Pat has suggested, an entire ground of recovery or defense, then that has to be requested. Basically, everything else is by objection. Simply stated, that is the recommendation. But at least it recognizes there are instances in which a request is required. And that is, again, the threshold issue that we need to resolve, and if we get over that, then we can determine what we want to request.

CHAIRMAN SOULES: Okay, is it the consensus that in some circumstances a trial judge -- that we should be required to make a request for the judge to act, and failing that, have no appellate review? All that --

JUSTICE RIVERA: I think so.

CHAIRMAN SOULES: Is that the consensus? Show by hands.

MR. JONES: In some instances.

CHAIRMAN SOULES: Those opposed? Okay, so we now voted that we are going to require requests in some circumstances. But in what circumstances?

MR. EDGAR: Now, the second situation is under what circumstances. The proposal is that if a definition, request, or theory of recovery or defense is omitted from the charge, then you must request.

Now, that really doesn't change the current law, I don't think, because if a definition or instruction is

omitted from the charge, then you are now required to request in order to preserve error. So basically what this says is that if an entire ground of recovery or defense is omitted, then you must request in order to preserve error.

Now, it seems to me that I personally have some problem with that wording because let's assume we have a comp case, and Pat and I have talked about this, and as a matter of fact, we have had several discussions this week, and in talking to him, he realized that we need to make another little change in what he has proposed here on 354, but that doesn't really deal with the issue we have before us right now.

But for example, in a comp case, if we have an omitted question, and you see, this presumes that you can always submit a case in broad form, and that broad form will cover you on all problems. And it may not because it may not be feasible to submit in broad form such as comp case. So assume that there is an omitted question in a comp case. Now, the party -- the plaintiff in this instance or maybe the defendant, can he or she preserve error by merely objecting or should we require tender?

I think we should require requests. I think requests should be required if it is part of your theory of a cause of action. But literally, you wouldn't have to because it is not an entire ground of recovery or defense.

Now, I think we could cure that, and I have talked to Pat about this, and I don't really -- we just talked about it a few minutes ago. Rather than saying an entire ground of recovery or defense, we might consider referring back to Rule 277 and saying a question in proper form as provided by Rule 277, whatever that means, because you see there it just says "whenever feasible, the court shall submit on broad form questions".

Pat, I would like your comment on that, if you don't mind.

MR. HAZEL: I would like to say, first of all, the attempt in this rule is because the Committee on the Administration of Justice has opposed what we are doing, and this was an attempt to write present law into one rule so it would give better guidance because I think you-all did an excellent job, whoever did it, of getting the framing of the questions into one.

Now, on that, what I worry about that, frankly, is that if a court doesn't submit a broad form question and breaks anything even into two elements, and an element is missing and I am on the other side, an objection wouldn't take care of it. I have got to request one, as I hear under what you are saying. If it is not an entire -- if it is an element rather than a paragraph. If it is entire ground recovery and they leave it out and it is theirs, I don't give

a hoot. They waived it.

MR. COLLINS: You have also waived it, too, if you don't request it.

MR. HAZEL: I don't want it, if it is their ground of recovery or of defense.

MR. COLLINS: Maver vs. Transport Insurance is the authority for that principal.

MR. HAZEL: Sure I have waived it, but if it is their ground of recovery, I don't mind waiving it. If you are the plaintiff, you waived it. I had that happen to me, but it is my ground of recovery then.

MR. EDGAR: I suppose it would depend, though, on whether or not the court entered a judgment against you, because then you might get a deemed finding against you, Pat. That would be an instance, though, in which you might be required to submit it under penalty of an adverse judgment.

MR. HAZEL: That is one of the things you have got to always consider is what is the deemed situation or a judge finding. I think -- the only thing I know about what Rusty is saying, when you have to request something that the other side is relying on, in effect, the only time I know is if it is an omitted definition or instruction. Other than that, I don't know when you would ever, unless it is an entire ground of defense or ground of recovery, you wouldn't want to do that. I can see what John is talking about.

MR. EDGAR: Does your proposal solve the problem -- and I give you an actual situation where we have a situation in which we have multiple parties, and the plaintiff is seeking to recover based on employee, agency by estoppel, agency by ostensible agency, and alter ego. Now, these are questions that are going to have to be submitted to the jury separately.

Now, neither one of them in and of themselves is an entire ground of recovery or defense, and by failing to submit that, is the plaintiff required only to -- and this is the plaintiff's issues -- preserve error only by objection, or would tender be required?

MR. HAZEL: Well, this is the one we discussed earlier, and I think there is some problem with it in that, depending on what else is submitted, what else is submitted, the rest that is submitted is necessarily referrable to that ground of recovery, then I can have a deemed finding or -- but the judge can find against me and I suppose an objection is all I need really to preserve, because it becomes part of my ground of recovery.

The problem that I see is where you have two defendants, you have got one going on negligence, another one on whether or not he was in the course and scope if it is against another defendant. And that one is left out. Well, is what was submitted on negligence is certainly to the

driver, if that is the situation, accident, you know, the ground of recovery. The full ground of recovery against the driver.

But as against the employer, where they got to be in the course and scope, the problem I see is what was submitted necessarily referrable to that because it can find him without finding me.

And Jack Ratliff says, yes, it is. He thinks the court is going to say it is, but I don't know. But I see those problems exist now. I mean that is the problem. We are trying -- all I was trying to do is write this rule so it would reflect present law. And that is a problem with present law, and I don't know what you do about it, you know, other than submit these things in broad form and then you don't have so much work.

MR. O'QUINN: I have a question. Pat, when you said "I tried to write," where is the one you wrote?

MR. EDGAR: On Page 354.

MR. O'QUINN: That is yours, okay.

MR. HAZEL: Now, it has been rewritten since Hadley and I discussed it.

MR. EDGAR: There were a couple of things that were omitted.

MR. O'QUINN: I got the impression what is on 354 is what you wrote.

MR. EDGAR: No.

MR. REASONER: Mr. Chairman.

CHAIRMAN SOULES: Yes, sir. Harry Reasoner.

MR. REASONER: I guess listening to you-all struggle with these distinctions really persuades me we ought to rethink whether the objections is not the proper approach because the proper objection is ultimately going to be one that tells the trial court what is wrong with this charge or its waiver, and if you then want to add something, the other party is going to supply a request, or you can force the objection of the party to elaborate enough on its objection to say what is needed to cure it.

My difficulty when you get into distinctions like this, I was talking to John O'Quinn, and I don't think either one of us think we are good enough lawyers, but if this is the rule, we are not going to request and object to everything we care about, which just multiplies the paper that is burdening the trial judge, makes his decision all the harder. The difficulty you get into when you are trying to make these decisions, look at 5(c), when the court's charge can be cured either by amending what is submitted, well, I submit to you any charge can cure by amending it or by adding to the definition, special instruction, or question, then either an objection or a request is proper.

It seems to me you are just compounding procedural

litigation when you get into this kind of thing, and just requiring a clear objection would be a must simpler way to practice and better for trial judges, as well.

MR. EDGAR: Again, the only thing I can say is the trial judges don't agree with you.

CHAIRMAN SOULES: Their resistance to this is that they don't feel that they have the tools to force the lawyers to give them what the lawyers should give them for composing a charge just by what is in 271(1), just ordering them to do it. They want an appellate consequence to attach to force the lawyers to do a thorough job.

MR. EDGAR: I think it is more than that, Luke. You -- I have been in situations not too recently where the charge conference was completed at 2:30 in the morning. People are tired, judges are tired. They are under pressure. They are really not listening to objections as carefully as you and I are listening to one another right now. And they want a backup. They want this done properly, and they want something in writing if you are going to complain of it on appeal if it has been omitted from the charge.

If it is in the charge, although imperfectly, then an objection is okay, because at least they have some visual reference from which to work. But if it is not there, they are just simply saying that they want something in writing.

So I think it is more than the problem that you stated a moment ago.

CHAIRMAN SOULES: Okay, well, my experience is these charge conferences, even though you have got these written requests, generally they are listened to by the judge, the judge listens to the matters orally, and he says okay, what is this one about? You tell him, and he says I refuse that or I grant it. They don't sit down and study -- until you really have their attention on a particular problem, they don't study what they are given in writing. They usually listen to it orally presented, but you have to do it in writing in order to preserve error.

The middle ground, and again I am not necessarily advocating it, I just don't want to absolutely lose sight of the possibility of having objections preserve all error unless the judge says I want that in writing, submit that to me in writing, and I want to see it, otherwise you object -- that objection -- you waive that if you did not then comply with what the judge has asked you to do, and your written request then would be the appellate predicate and the objection that you made would not. Now, that is a possibility.

MR. BRANSON: You you are saying we shouldn't have to do it in writing because the judges don't read it?

CHAIRMAN SOULES: No, no, not at all. Not at

all.

MR. SPARKS (EL PASO): Aren't you jumping, though, into the problem that Buddy does, and that is, if you are objecting, say, to a definition of, say, alter ego that your opponent has and you make objection to the definitions wrong, then you are having to perfect the objection to do your opponent's work.

MR. EDGAR: You are going to have to cure your opponent's error in order to preserve error.

CHAIRMAN SOULES: You have to do that right now.

MR. REASONER: What I don't understand, an objection, if it is adequate, should tell the court how to cure it. So there is really no distinction. You have told him how to cure it if your objection is good. You just haven't written it out in the form of a request.

MR. SPARKS (EL PASO): I agree.

MR. BEARD: Luke, what I see in the trial court are that they are going to have to draw the charge before any -- as now, they are looking to the lawyers, the plaintiff to give his issues, the defendant to give his. You don't have to do anything, and if the trial court is saying under this proposal I will have to draft up the charge and give it to them and then they will start objecting. Now, that is the complaint I am hearing as much as anything.

CHAIRMAN SOULES: The first paragraph of the first charge rule is on Page 271 -- I mean Rule 271 on 342 says "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. BEARD: Well, if they will enter such an order, but they are just generally thinking in terms of that they are going to be preparing the charge, because a lot of places they don't have any pretrial orders or requirements and they go there expecting the lawyers to hand them those issues and definitions.

CHAIRMAN SOULES: Well, this is not looking to a pretrial order.

MR. BEARD: Well, I think if the courts could understand that they may order the parties to submit the charge to them, I think it would eliminate the problem that they are worrying about.

CHAIRMAN SOULES: Well, there it is in black and white.

MR. EDGAR: Except for the fact that you have also got to temper that, though, with the language on Page 358 in Rule 270 -- proposed Rule 273(5) which says that noncompliance of that provision shall never be a basis for waiver.

CHAIRMAN SOULES: And right there is where the

sentence was deleted from last -- in our last meeting which said unless the trial court, upon hearing the objection, has requested that the -- whatever cures the objection be submitted in substantially correct form. And if that occurs, then it must be submitted -- requests in substantially correct form in order to preserve the error.

MR. EDGAR: You are back into the problem, though, of being placed into the position of having to tender something that helps your opponent.

CHAIRMAN SOULES: You already have to do that now. At this time you can't tell whether a -- something that should be in the charge should be in a question or an instruction, because it can be either place. The courts have told us you can put anything you want that would ordinarily be an instruction, you can put it -- be in a question, you can put it down in an instruction. So now -- and we know that instructions, in order to preserve error in instruction, you must request that instruction in substantially correct form.

MR. EDGAR: That is not necessarily true, because if you go back and look at Scott vs. Santa Fe and City of Austin vs. somebody, the court pointed out very carefully that if it really pertains to the resolution of a question, and instruction is considered part of a question rather than an instruction.

CHAIRMAN SOULES: All right, then you read that with comfort. I don't. That doesn't help me a bit when I am trying to preserve error in my charge, because I don't know how that appellate court is going to look at that.

MR. EDGAR: Well, I am just assuming that the rule book changes.

CHAIRMAN SOULES: The way we have to preserve error now is both object and request, or if we get some comfort out of -- what is the case where the request will do for an objection?

MR. DORSANEO: Florence vs. Hold, Volume 742.

CHAIRMAN SOULES: Then you request on everything. Okay, I mean, there is no -- if we are going to differentiate between a commission and an omission -- Bill, you talk a minute. Then I will get to this other point. I can't -- is an element a matter that is to be in a charge? If we look at 354, let me go ahead and raise this.

JUSTICE PEEPLES: If it is part of a ground of recovery or defense.

CHAIRMAN SOULES: If 354, where it says an objection is required when the matter complained of -- wait a minute, a request is required -- what was I looking at?

MR. EDGAR: Page 354.

MR. O'QUINN: 5(b).

CHAIRMAN SOULES: Okay, 5(a) and (b). An

objection is required when the matter complained of is contained in the court's charge but claimed to be defective. What -- is an element a matter?

MR. EDGAR: Yes.

CHAIRMAN SOULES: What if the element is not in the charge?

MR. EDGAR: Well, does it render what is there defective?

CHAIRMAN SOULES: And what is there -- the omission of that element is a valid complaint.

MR. EDGAR: Well, then it is a matter.

CHAIRMAN SOULES: And it is not there.

MR. EDGAR: It is a matter.

CHAIRMAN SOULES: Okay, then you have to request the element.

MR. EDGAR: No, it says objection.

CHAIRMAN SOULES: Not under this Rule 272 on Page 354.

MR. EDGAR: That is the way I read it, and that is what Pat's intention was. I don't interpret it that way.

CHAIRMAN SOULES: If you read, if an element is a matter that is omitted, then it is not contained.

MR. EDGAR: When the matter complained of -- you are complaining of an element -- you are complaining of a

question because an element has been omitted.

CHAIRMAN SOULES: Maybe. That is one way to look at it.

MR. EDGAR: Well, and I think that is what Pat meant.

MR. HAZEL: When it says entire ground of recovery is the only thing omitted that you have to request. If that is your entire ground of recovery, yes, but that is -- you just said it was an element.

CHAIRMAN SOULES: It is an element.

MR. BEARD: Well, if it is just an element, then it ain't the whole thing.

MR. REASONER: We also have to worry about definitions and special instructions, whatever they are.

MR. EDGAR: If they are omitted as well, then they would have to be requested.

MR. HAZEL: I am sorry.

CHAIRMAN SOULES: Bill Dorsaneo.

MR. DORSANEO: Well, my first experience with the Texas charge, like most of you, was in law school, and I was impressed by the complexity of the overall system. In fact, I was bewildered by it, and it took a fairly long period of time before I appreciated the detail. Now, we have come a long way toward simplifying the entire process. I think, well, pretty substantial benefit of the system.

Why we refuse to simplify it in this respect is, frankly, beyond me. Law professors can sit and debate and we can disagree among ourselves about what all of these prior cases mean, but I will tell you it takes a lot of learning and a lot of conversation to come to particular points of disagreement on these matters. And this seems to me to be the practical world of what needs to be done in order for you to be able to say on appeal the charge should have been this way or that way.

Pat, you think your famous case is one where an objection and request was combined and that screwed up everything all along the way. You are doing the wrong thing, you are doing it the wrong way, combining requests with objections, and that part of Texas practice, this complexity, is just, you know -- I am looking at it this way. I am really sorry to see all of old venue law gone, because I knew all that law and all the details of it, and I miss it. And I suppose I will miss all of this complexity when it goes away. And I think I understand it better than other people understand it, so I think I may miss it more, but it needs to be simplified. That just is all there is to it.

I will say one last thing. If we are going to leave it the way it is, complicated, then let's not rewrite it and change it to something that is different from the way it is but is just as complex. Let's don't screw with it or

change it to something that is simple, because if you take somebody's word for it and this is codified existing law, that is not going to be everybody's point of view, and it is not really going to codify the existing law that exists. It is the confusion about what it is that we are meaning to do.

Simplify it will handle it, and a clear objection simplifies it. If the objection is not clear enough, well, the objection is no good. If there is a problem with that sentence that the trial judge is misreading about that they can't ask somebody to do something, then let's soften that sentence a little bit, soften it a little bit instead of saying that you can just tell the judge to piss off, and have the sentence read a little differently, if that is the problem, the sentence that you were talking about earlier, Pat.

MR. BEARD: I really think that that Committee is the problem. They think they are going to have to draft the first draft in that charge. And if they don't think that, then I think we have eliminated all of the problem, and the objection procedure will be satisfactory.

MR. DORSANEO: Under the current rules now, they have to draft the first version of the charge, they do because this request procedure is at the back end in terms of preserving a complaint, and lawyers who are not reputable slide that stuff in at the end to try to trick the judge to

trap him, and that is the request preservation procedure. It is not request up here at the front end. It is request in time to get the judge to sign it refused, after the meeting, after the charge conference, and that is what the rules provide.

MR. BEARD: But the normal practice is the judge gets those charge requests, he asks for them maybe when the trial starts, maybe at the end, but he gets them as a normal matter.

MR. DORSANEO: That is what the rules says to me. It just says at the end, and you don't have to get the thing stamped refused, in so many words. You can preserve your right to complain about what the judge didn't do by a clear objection that maybe does, in fact, combine I object because you should have put it this way combined with what would have been thought of as a request. Maybe that is the degree of clarity that is sufficient.

But rules that say you have to wear a red hat and a bandana and keep one eye closed in order to preserve your substantive argument don't make any sense to me.

JUSTICE PEEPLES: Can I be heard? I think that we need to simplify existing law but not change it entirely the way the proposal does. I think what has the trial judges around the state concerned is that the existing proposal says all you have to do is object to preserve error

on an entire failure to submit a complete ground of recovery or defense.

Now, I think we were wrong to do that. I think that whoever has the burden, if a ground of recovery or defense is totally left out, the person with the burden ought to have to submit it in writing or it is waived. But I would be willing to change a few words in 5(b) so that if it is an instruction or a definition or any defect in something that is already there, you preserve by objecting.

And I think we could do it by changing in 5(b), taking out the words "a definition, special instruction, or", and so it would say, "A request is required when the court's charge completely omits an entire ground of recovery or defense".

MR. SPARKS (SAN ANGELO): Maybe you are just talking about the degree of objection. You know, I object because that is a bad charge, Judge, or do you have to specifically tell him why it is bad, or do you have to go to the next step and request it in writing in the correct form? That is the degree of objection.

JUSTICE PEEPLES: I am saying if it is an entire ground, you ought to have to do it in writing.

Here is the problem: The charge is prepared, and I have got it right there and what I think the lawyers are really serious about, and I have made my best effort to

submit, and someone comes up with an objection on their eighth cause of action, and the objection might be good or it might not. I can't see it. I had to listen to it one time. I have got to have my reporter read it back. And if I decide to submit it, we have got to stop and have someone type it up. If it has got to be submitted in writing, and I like it, I just put a number on it and unstaple what I have got and put it right in there.

What is unfair about requiring the person with the burden on an entire ground of recovery or defense, requiring that person to have it in writing? There is nothing unfair or tricky about that.

MR. DAVIS: How can you draw the distinction sometime between what is an entire admission or an entire ground of recovery or defense? It is just not clear sometimes which is which.

JUSTICE PEEPLES: If an element of it is submitted, then it is not entirely omitted. If that element is necessarily referrable to another ground of recovery or defense, I think it is not entirely -- that it is entirely omitted. I don't know if that made sense.

You have got a case where breach of contract and DTPA and breach of fiduciary duty and bad faith and a bunch of things are pleaded, and the party is only serious about one or two and you have got it in the charge, and they come

up with an objection about the others when the jury is waiting and it is all stapled and typed up, they have got copies. And if I have got to change the charge and have someone type up something new, there is a lot of delay, and I haven't been a believe to see it in writing.

Under the present law, it has got to be in writing substantially correct where I can put another number on it and put it in the charge and have it copied and distribute it. And that makes sense. And I think we ought to implement that and we can omit the part that says if it is just a definition or instruction you have got to tender it. If that is all it is, everybody objects and that preserves it. That simplifies most of the stuff you were talking about, Bill.

CHAIRMAN SOULES: Judge, the objection is, Your Honor, you did not submit my cause of action in my eighth round of recovery in my pleading. And that is the objection, and you open it up and there it is. You don't -- it is not submitted. If you had the power, then, to say submit that to me in substantially correct form, then I will include it. And then the lawyer doesn't do so, he waives that then. Isn't that enough?

JUSTICE PEEPLES: No, it is not enough because we have got to wait for him to do it and he is doing it in handwriting and we can't submit that, and if I like it, I have got to have it typed up. There is a lot of time lost.

I say there is nothing unfair about requiring him to have in writing something that he pleaded in his live pleading.

MR. TINDALL: Judge, what is wrong with Rule 271, though, that would require you -- as a trial judge, you could require it the day they start trial.

JUSTICE PEEPLES: Yes, and I think very few lawyers, if any, would say I am not going to do it. What they will do is they will come up with something that really doesn't come close. It is not good enough to submit. That complies with that rule, but there is no waiver if they can make an objection at the very end.

MR. SPARKS (EL PASO): Would you change Paragraph C at all in the past proposal?

JUSTICE PEEPLES: As I understand 5(c), it states the rule of Scott VS. Atchison and Topeka Railway. In other words, if you can reword a question or add something to an instruction, then you can object or request either one of those preserves.

MR. DORSANEO: What would you do now in the delay problem if the lawyer came up and gave you something that you could consider to be inadequate at the beginning stage and then --

JUSTICE PEEPLES: Inadequate?

MR. DORSANEO: Yes. I mean, aren't we in that same position now? If I come to you at the very end before

the charge is really finished and provide you with this written thing, I mean isn't there a delay problem in our system already, even when you need to make the request?

JUSTICE PEEPLES: If it is raised by the evidence and if it is substantially correct, I can either submit it like that or have it reworded slightly. But if all he has to do is object, there is a lot more delay and I don't have the benefit of seeing it in writing, which a unanimous Supreme Court five years ago said is very important in an opinion by Justice Kilgarland, and I agree with that.

MR. DORSANEO: To me, the delay problem is not a significant enough concern. I understand what you are saying, but I think Luke's proposal is the middle ground where I would like to see things perhaps land, if we can get a middle ground, but I don't know what language you had and I didn't really understand the language either.

JUSTICE PEEPLES: Look at 5(b). If we take out the words "a definition, special instruction, or" and add the word "and", it would read as follows: "A request is required when the court's charge completely omits an entire ground of recovery or defense."

CHAIRMAN SOULES: What page are you on, Judge? I am sorry.

JUSTICE PEEPLES: Three fifty-four. And I suppose 5(a), we might want to say "or an instruction or

definition is omitted". Now, that would change existing law. But I have thought it is a little unfair to require me to tender an instruction or definition that the other side relies on.

MR. DORSANEO: What you are saying is a request is required when the court's charge omits an entire ground of recovery defense.

JUSTICE PEEPLES: That makes sense.

MR. DORSANEO: That is the part where I have the biggest problem on my own position, okay. That is where I have the biggest problem with my own position. I wouldn't come out that way, but that is progress to require it only in that situation, in my view. That does do ample simplification, I think, without creating commensurate problems. That is getting closer, although if I had the votes, I would vote otherwise.

JUSTICE PEEPLES: Pat, what do you think about that, what I said?

MR. HAZEL: I think that is fine. You have got to understand, I am not against what Luke is proposing. I am trying to find a way to write the present law in one rule.

JUSTICE PEEPLES: What we tried to do on 354 was put it down in black and white something that implements existing law as we thought we understood it.

MR. HAZEL: That is all that was done for. Now, Hadley has got a new way that I rewrote that seed and that you have got.

MR. EDGAR: I will pass that out. I didn't want to do that until we got where we were because it would just confuse everybody.

MR. JONES: Mr. Chairman.

CHAIRMAN SOULES: Franklin Jones.

MR. JONES: I am trying to be as objective as my judge will allow me to be. What I would like to hear from is some of the other -- I would like to hear from some of the trial lawyers and the trial judges in the room who actually are in the courthouse.

Now, my recollection is when you get ready to have your objections to the court's charge, you have already had your charge conference, you have already sat around the room, everybody has bantered about what they think the evidence is, they have requested the instructions and the issues, and the court puts the charge together and he says now, is this everything everybody has got and they say yes. All right, let's go in the courtroom on the record and get everybody's objections.

Okay, we go in there and then some guy gets up and says I want to object because the court has omitted an entire ground of recovery, or the court has omitted as a fact an

element of the charge. As that guy is in trouble, and I think that is what these district judges don't want changed. And I defy anybody in this room to tell me how changing that is progress.

It boggles my mind to say that a district judge, after he struggles with a charge and gets it put together and walks in the courtroom, is obstructing progress when he wants to know he has got everybody's theory in the charge. Am I wrong about that?

JUSTICE HECHT: If the lawyer says, Oh, my God, that is right, you pointed that out, I see that now, I didn't realize that before, I don't know what happened to those issues, I thought I had them in my briefcase. Judge, just give me a few minutes because this is really critical to me. I have got to have these issues, and I just -- I need them, and I will write them out, I will do whatever you want me to. I will give them to you. And the trial judge just says no, I am sorry, you are too late. I agreed with that objection, you waived your cause of action and we are going to the jury.

Don't you think there would be some problem with that on appeal if a lawyer tried to submit the action and was precluded from doing so.

MR. JONES: Judge, somewhere we have got to draw the line on where crying won't get it, and in my

judgment, it ought to be when that charge is put together, because this is -- my experience has been this has happened seven and eight and nine o'clock at night and occasionally eleven and twelve o'clock at night, and the parties struggle to save the time of the jury. We don't like to -- at least in the rural districts, have the jury waiting on them while they are putting the charge together. They try to get it together and have it ready for the jury at nine o'clock and then do their objections at 8:30. And the gist, I think, is the practical real world that these trial judges, all hundred of them, are talking about, and I would like to hear if there is somebody, if there is a trial judge in the room or a trial lawyer in the room that really disagrees with what these judges are saying.

MR. SPARKS (SAN ANGELO): I will say something. I think when you start -- and I have had some -- and Judge Bunton is a great judge, but you go to federal court and -- let me finish -- when justice starts being sacrificed for the expediency of time -- and I think that is what Judge Hecht is saying -- we may be doing a disservice to our very profession. I don't think you can just say well, I have got to get reelected. That jury has been sitting out there for four hours, let's get something done and forget justice. I don't care if that comes out right. It is a little broader problem.

MR. JONES: We have been doing that for --

MR. SPARKS (SAN ANGELO): That doesn't mean it has been right, Franklin, because it has been done that way.

CHAIRMAN SOULES: We can address the same thing that I propose here and I am trying to get it typed up now, we can address the omission of an entire ground of recovery or defense and simply say that compliance with 271(1) is mandatory in order to preserve that error, and I am having it done now. So at least we will have language we can look at to fix that problem. And I will have it out in just a moment.

MR. JONES: Mr. Chairman, I ask for a ruling from the Chair that Judge Bunton cannot be cited as authority.

MR. SPARKS (SAN ANGELO): Let the record reflect that Judge Bunton has set such an outstanding example for the rest of the judiciary, in my opinion. They may follow him.

CHAIRMAN SOULES: Let the record reflect that Judge Bunton is the judge.

Basically, what I am writing up now is this two -- let's turn a moment to -- let me see if we can get the ball advanced at all here. I think on Page 385 that the words "in substantially correct form" should be added to No. 1. This is on Page 385.

MR. EDGAR: What paragraph?

CHAIRMAN SOULES: No. 1. It says, "The court may order any party to submit to the proposed jury questions, instructions, and definitions." We should insert if we are going to use this at all "in substantially correct form". That should have been in there all along. "At any reasonable time for the discretion of the court."

MR. TINDALL: Shouldn't we add in writing? Someone wrote me about that.

CHAIRMAN SOULES: In writing and in substantially correct form.

MR. DORSANEO: Say written.

CHAIRMAN SOULES: Submit written proposed jury questions. Okay, I am going to put "in writing" and "in substantially correct form" after "definitions".

Now, the real problem that they are fussing about is in terms of where it is located is on Page 391, because having this power to order this be done, if lawyers don't do it, it doesn't have any appellate consequence. And they feel like they don't have enough leverage because of what is written in 273(5) on Page 391. "Compliance or noncompliance with Rule 271(1) shall never constitute waiver of any objection to the court's charge made in compliance with Rule 272 or 273." Okay?

What I am writing up now makes two exceptions to

that, and one is if the judge requires it, orders you to do it at the charge conference, and the other one is if the objection is the omission, the failure to submit an entire ground of recovery or defense. If the judge orders you to do this at the charge conference to cure an objection, tender something that would cure an objection, you have got to do it in order to keep the objection preserved.

MR. BEARD: Luke, does this allow the court to argue the charge to both sides of the case, not limited in what he can order?

CHAIRMAN SOULES: He can order anybody to do anything, but he orders the objecting party to cure the objection.

MR. SPARKS (SAN ANGELO): So at the beginning of the trial, a judge orders a defense lawyer to submit him a substantially correct charge on the whole case?

CHAIRMAN SOULES: Could do that.

MR. SPARKS (SAN ANGELO): And he doesn't order the plaintiff's lawyer to. So therefore, the plaintiff's lawyer gets to preserve all of his objections -- all of his problems by objections, but the defense lawyer has the problem of submission in writing in substantially correct form.

CHAIRMAN SOULES: No.

MR. SPARKS (SAN ANGELO): It seems reasonable,

but I am wondering.

MR. DORSANEO: How about the one exception on the ground of recovery?

CHAIRMAN SOULES: That is fine.

MR. DORSANEO: I am willing to go with that, if that will satisfy COAJ.

CHAIRMAN SOULES: Take out the middle complaint. Let me get it out here on the table. Holly is running it now.

MR. SPARKS (SAN ANGELO): One of the problems I have got is if the judge doesn't want to draft the charge, then to achieve justice, you have to, in writing, submit substantially correct form. If a judge is willing to work, then you just have to object. It is the working judge -- you shouldn't be punished because you have got a good judge that wants to work. I am having problems with the concept.

CHAIRMAN SOULES: All the judge has to do is ask for help, order you to help him, whether he is a working judge or a lazy judge.

MR. SPARKS (SAN ANGELO): What I am saying is a working judge is going to have his own charge. He is going to say have you got any objections? He is not going to order anybody to do it. A lazy judge says you-all do that for me. When he says that, I will say you better do it right or you are in a different shape than with a judge that does work. I

think you ought to have different degrees of justice out here realizing there are good lawyers and bad lawyers and we are really looking for justice.

MR. BRANSON: It is nice to have them take the time to look at what you got in case they might vote with you.

MR. JONES: I am being moved a little bit further into Judge Hecht's corner. Now, there has got to be some point in time where you address this problem. Otherwise, I don't think the judge should be allowed to make authority to draw the battle lines before trial, maybe even the day of trial. Probably, if we are going to draw a line on where the judge can draw the line, it should be at the close of the evidence.

MR. DORSANEO: Yes.

MR. JONES: And I don't think any party ought to have to anticipate every issue they want submitted to the jury before the evidence is in. So I think that ought to enter into our thinking.

JUSTICE PEEPLES: Luke, under your proposal, what would prevent a judge from saying routinely, in every jury case, the day before the charge is prepared, lawyers, you will have your requested issues on my desk at nine o'clock in the morning?

CHAIRMAN SOULES: Nothing would prevent that.

JUSTICE PEEPLES: But what we have right now is the law says that for the judge, says you have them in here if you are serious about it or it is waived. What is wrong with having the rules of procedure say it instead of making the judge say it?

CHAIRMAN SOULES: Again, my practice is usually at least by the time the trial begins to wind down, the judge asks for your questions and instructions.

JUSTICE PEEPLES: People submit them if they are serious about them because they waive it if they don't.

CHAIRMAN SOULES: Not at that point.

JUSTICE PEEPLES: By the time of submission, they waive it if though don't.

MR. BEARD: I don't think they are projecting the issues before they start for trial.

JUSTICE HECHT: It is never that simple. As you know, people request things but what actually gets -- falls through the drafting process or gets given or compromised on is something different, and that is the point where you start to worry about preservation of error.

If I might summarize the debate for a second, we started on this because we thought it was a good idea to simplify the rules period, and then we said, well, here is some charge rules, they are pretty complicated, let's simplify them. That seemed like a good idea. Then we said,

well, what is the law? We will just write down what the law is, and then we will have it in one place. So we spent two hours arguing about what the law is and nobody could agree.

So we said, well, then let's put down what the law ought to be. And then we will have that in one place. We spent another two hours arguing about that and we couldn't agree.

The problem is if you have to request in writing anything to preserve error, I do not understand why the prudent lawyer is not going to request everything that he objects to, because otherwise, he is worrying about an appeals court disagreeing with him about whether it falls into a category or not.

Now, after hours of discussion, that is where we came out. We said this ought not to be a trap for lawyers who are trying their case and trying to preserve error, and that is why we came up with the rule that we did, and it was after the weariness of having debated it fully that we finally decided we couldn't come out any other way.

Then we get letters, not from a hundred trial judges by my count, but more like 15 or 20. And you are welcome to read the letters. I would say they are fairly strong in their -- some of their wording, but none of them reflect the kind of agonizing discussion that this Committee had gone through now for some hours in trying to decide how

do you preserve error in the court's charge.

And so, I mean, we swing and we swing, but if the trial judges -- if the trial judges who have complained have complained that they are not going to be able to get stuff in writing anymore in order to make up the charge and it is not fair to compare them to federal courts who have all this help.

Well, if there is any way we have taken that out of these charges, then we ought to put it back in because I think it was the intention of the Committee that the trial judges ought to get all the help they can get in writing as often as they want on what is in the charge. The only question that the discussion addresses is should a lawyer lose his right to appeal on a certain point because he didn't jump through the hoops the right way at what is, I think everybody agrees, one of the pressure points of the trial, and that is the preparation of the charge.

And it seems to me that the better rule is that a lawyer ought to get to state his objection in court. It ought to have to be clear and unequivocal. If the judge wants to see it in writing, they can take time to go write it down, but that he ought not to have to do any more than that to go back to his office and know that he either preserves it or it isn't preserved.

MR. ADAMS: My question on that is is that

true for the party who has the burden of proof as distinguished? I mean, it seems like to me that the party with the burden of proof should have the duty to come forward with the substantially correct construction of the issue or whatever else, that he cannot even object to it in the sense that a thing about some wording in it. But if he has got -- but the thing he is trying -- he has got the burden of proof on, he ought to come forward. I think it is the same thing they were talking about when we started. It just seems like we are overly complicating this thing by leaving out the element of the burden of proof.

JUSTICE HECHT: I think, to summarize, the discussion -- this is not a fair summary -- in a general charge, you can't always tell who has got the burden of proof.

MR. LOW: The way we did that was whether it could properly be construed as a part of your case, defense, or whatever.

JUSTICE HECHT: Do you want your right to appeal to rest on that kind of a characterization? You are going to be arguing in the court of appeals, yes, this is properly a part of the case, no, it is not properly a part of the case.

MR. LOW: Generally a lawyer ought to know that much about his case or his client is in bad trouble to

start with.

MR. BEARD: There is no burden of proof on instructions.

MR. LOW: Well, instructions, there is not a burden of proof on that, but you might have a burden of proof, say, on negligence and the other side, too. So you would tender them.

MR. SPARKS (SAN ANGELO): What about --

MR. LOW: Could very well be the same.

CHAIRMAN SOULES: Pat Hazel.

MR. HAZEL: I keep -- as I hear you, it seems to me you are talking about two separate phases or functions. One of them is to guide the trial judge in trying to frame the court's charge. That is -- if you have got something where the trial judge is going to order folks to submit your stuff in writing to you, that ought to be back in the rule on the framing where I think you have got it.

The other is complaining about the court. Once the court has done it, now I want to make my complaints and I want to preserve them for appeal. To me, that is a separate function, and that is where, if you are going to leave in -- personally, I like the idea of simplifying it and getting just the objections. But if -- that is where the rule ought to say. But now, if the trial judge orders, hey, I want your objections put in writing and I want them in substantially

correct wording for me to rule on them, then the trial judge can, in his or her discretion, do that. And it would be a separate function.

I wanted all this stuff to start with to help me how I am going to draft mine, but now we are in a different stage. I have drafted. Here is what I am going to the jury with. If you don't complain, objection would do it. But if a trial judge -- and I would put in the discretion not just if he wants to or whatever that language is, because that a little bit worries me because they might just say, well, I will show you, because if a trial judge said put everything in, that might be exceeding discretion to do a thing like that. But to be -- able to then drop that stuff. That all ought to preserve the error. I mean, if you don't do it, it ought to preserve.

It seems to me you are talking about two different functions -- guiding the judge and framing the thing to start with, and then complaining once the judge has done it to preserve error. That is all I was trying to address and the Committee on the Administration of Justice was trying to address was that last one.

And I like the -- personally, I like the idea of the simplification, but I think the judge, in order to satisfy what these trial judges apparently are complaining about primarily, they are saying "Look, we are afraid of

being sandbagged," as I see it. I don't want to go in there and have a bunch of objections that may be right and saying I ought to ask a question or submit a question or definition or instruction and I don't see it. I want to see it before I do it. And I think they ought to have the power to order that be done. And that ought to be good on appeal -- I mean required for appeal.

MR. BRANSON: Justice Hecht, from a trial judge's standpoint, would it have been just as easy to sort out a properly formed objection as it would have to see the instructions in front of you?

JUSTICE HECHT: Yes, it would have been just as easy, and if there was any doubt in my mind about an objection, I would simply say, well, let's take a break, write it out. If it is complex, you are going to have to write it out. You would just say have you written it out? Yes, it is right there in your stuff. Now, have you written it out? No, I haven't written it out. Well, would you write it out for me.

I don't want the trial judge to be sandbagged, either, but we have tried to cover that in this rule by saying it has got to be an exact, explicit, specific objection so that they won't get sandbagged. And if there is any question in their minds, all they have to do is say is an exact -- submit it in writing. And then they can look at it

there. I just don't see why the right to appeal ought to be conditioned on jumping through these kind of hoops.

CHAIRMAN SOULES: I passed around a one-page typewritten item that fixes two of the problems, if we want to do it that way, that have been raised, Pat, that the trial judge should have some neutral party to try to get something in writing whenever an objection has been made that the trial judge things may have some particular objection. That is B -- A, and then the B is Judge Peeples' concern that when there is a complete omission of a ground of defense that that should not be preserved simply by objection, which of course, we voted again house to one, I think he being the one last time.

But this cures those two problems, maybe. At least it is an attempt. Franklin.

MR. JONES: Can I make one comment, Mr. Chairman? I apologize for being out of the room temporarily while this was being discussed.

MR. EDGAR: Can't hear you, Frankling.

MR. JONES: But I want to make a comment in this matter that may have been touched on while I was out of the room, I apologize if it has, but I think it is a point that will be dear to every trial judge, well, no, not trial judge, but every trial lawyer in the room, and that is that we don't want a rule, I don't think, that says a trial judge

can call for requested instructions, definitions and what all the week before trial, the day of announcement, or day of docket call, or anything like that on pain or forfeiture of waiving.

And I don't know whether that has been discussed or not, but Judge Hecht made the point you don't want to do that to a busy trial lawyer. At some point after the close of the evidence, (inaudible) the lawyers be burdened with that not stating something it is the consensus of this Committee. If not, I would like to get a consensus.

CHAIRMAN SOULES: I think it is a consensus, and these rules which we voted to adopt protect you in that regard. You have no appellate consequence for doing anything until the charge conference.

MR. JONES: We are talking about changing those rules.

CHAIRMAN SOULES: No, I am talking about the changes that we have -- yes, but the changes that are being discussed won't affect the fact that you are not stuck with anything until the charge comes. At the charge conference, if you don't act, you waive. But up until that point, whatever you do, you are in safe harbor in terms of appeal. You don't have any appellate consequence.

MR. JONES: (Inaudible).

COURT REPORTER: Can't hear.

CHAIRMAN SOULES: Franklin, if you would speak up. I am sorry, we have got this thing running here and she couldn't hear what you said.

MR. JONES: I am just saying a lot of judges have required you to do this on the day of docket call and, you know, you start drawing charges in cases that don't settle, then what?

CHAIRMAN SOULES: What I have passed around omits something I underlined later, and that is where it says if it omits entire ground of recovery or defense, compliance with 272 is mandatory. That really shouldn't be worded that way. It should say, "Compliance with Rule," whatever it is, "271(1) prior to the jury being charged is mandatory." So that it moves that point to the charge conference rather than back at the time Franklin is talking about. I did that innerlineation a minute ago.

MR. EDGAR: Where did you underline something?

CHAIRMAN SOULES: You see in B where it says compliance with 271(1) is required, compliance with 271(1) prior to the court charging the jury is required, so that it doesn't go back and root into what you tried to give the judge before the trial started somewhere midway. You are not stuck with that. Maybe it needs a little bit more work than that. Elaine Carlson.

MS. CARLSON: What about using inclusion in

both your proposed 5(a) and (b) within a reasonable time after the close of the evidence? Put that in (a) after the word objection in the last sentence. To preserve error, you have got to do this within a reasonable time at the close of the evidence.

MR. BEARD: You don't know when you are going to get the charge. You work on it and work on it and say, okay, meet at 8:30 in the morning and you will see the final charge. You have got to see that final charge.

CHAIRMAN SOULES: I think that A is covered because a judge is going to order you to do it. He will probably put a time in and you have got to comply with the order.

MS. CARLSON: That was Franklin's concern, as I understand.

MR. SPARKS (SAN ANGELO): What if you like B but you don't like A?

CHAIRMAN SOULES: That is another mark up is to take A out and leave B only in, and I think that is something that maybe Judge Peeples favors. I am not sure.

MR. DAVIS: Take B out and leave A only.

CHAIRMAN SOULES: Well, B, the problem of an entirely omitted ground of recovery or defense has been a problem, but it is serious.

MR. DAVIS: My problem is being able to always

identify when that condition exists. And I think that is where you get into differences of opinion and there you are again. It is easy to put on words, but then you get that in a context and maybe it is and maybe it isn't, so what do you do? Well, you submit it. It isn't as clear as it appears by the words.

CHAIRMAN SOULES: Does the Committee feel that what has been drafted there at least speaks to the problem that we have been trying to grapple with, whether we adopt them or not?

MR. DORSANEO: I think it identifies the problem and potential solutions. I have a problem with both proposals, and I end up on balance coming back to my initial point of view that probably the exceptions create difficulties. I think that the second objection may create fewer difficulties statistically, but I don't know if that is so. Just talking about that, and I am not sure about it, whether that is helpful or harmful.

CHAIRMAN SOULES: Where I am headed is if these do address them, then we could vote either A, not to change the rules that we have sent to the court, leave them like they are, B, change to include both of those exceptions, or C, change to include just one of them and not the other. But I don't know if we are there.

MR. BEARD: I am ready to move that we keep

the rule that we proposed at our last one be the one we have submitted.

CHAIRMAN SOULES: Is there a second?

MR. DORSANEO: I will second that.

CHAIRMAN SOULES: Moved and seconded. Is there any discussion that we should have about that that is new, something that hasn't been discussed, because we understand the discussions up to now to have been on that topic anyway.

MR. EDGAR: I thought earlier today we almost unanimously determined that a request was necessary.

MR. DORSANEO: Except for the substantially correct form.

MR. EDGARD: But that is not what Pat just said.

MR. TINDALL: I think we have changed our position.

CHAIRMAN SOULES: Well, that is right. We did that.

MR. BEARD: With that change --

CHAIRMAN SOULES: What change? That changes everything. That is what we have been debating for the last two hours.

MR. BEARD: I go back. My motion is to reaffirm what we submitted to the bar.

CHAIRMAN SOULES: But put in the words "in writing and in substantially correct form" in 271(1). We approved that.

MR. TINDALL: That is not controversial.

CHAIRMAN SOULES: That was not controversial.

MR. JONES: If I understand, Mr. Chairman, this motion is to undo what we did thirty or forty minutes ago.

MR. BEARD: That is right.

MR. TINDALL: What we did in August.

MR. BEARD: I would just say that I think that the judge may protect himself with appropriate orders. That was one of the things that bothered me when you said they didn't want to draft the charges. So in light of the fact that I believe the judge can protect himself in that, I move that motion.

JUSTICE DOGGETT: Is the effect of your motion to leave it in the same form that all these trial judges have written us complaining about?

MR. BEARD: Yes. We just have to explain to them they can protect themselves by making this a requirement.

MR. DAVIS: We are just recommending. You are the ones that do it.

CHAIRMAN SOULES: Sam Sparks, El Paso.

MR. SPARKS (EL PASO): Paragraph one on 271 on Page 385, does that speak to -- that the court may order any party to submit blah, blah, blah at any reasonable time for the convenience of the court? And it doesn't seem to me that that speaks to Jones' concern about submitting, you know, before the trial at docket call. I am just a little concerned about that time definition -- any reasonable time for the convenience of the court. That could be --

MR. BRANSON: Right after the close of evidence.

MR. SPARKS (EL PASO): I would love that.

MR. TINDALL: When all parties have rested.

MR. SPARKS (EL PASO): The question is what does that mean.

CHAIRMAN SOULES: The function of 271(1) is just is to give the trial judge assistance in proposing a charge, and it has no appellate consequence whatsoever unless we give it appellate consequence by the A or B that is now in the room. This is just telling the judge anytime you want some help from the lawyers on what they think the charge ought to be, you can ask for it, you can order them to give it to you. John O'Quinn.

MR. O'QUINN: First, I need to ask a question. What are we voting on adopting? Are we voting on adopting what is on Page 354 --

CHAIRMAN SOULES: No.

MR. O'QUINN: Or are we voting on adopting this thing I was handed?

CHAIRMAN SOULES: No.

MR. TINDALL: 385, John. It was a handout.

CHAIRMAN SOULES: We are voting to adopt pages -- the rules that appear at pages -- voting on whether to adopt the rules that appear at the following pages:

MR. EDGAR: Pages 385 to 400.

CHAIRMAN SOULES: 385 and sequentially through 400, which is what the Committee voted out in August, exactly.

MR. JONES: What we all voted against 40 minutes ago.

MR. O'QUINN: And I haven't had a chance -- I have watched -- the discussion caused me to read what is on Page 385 through 391. You referenced 391.

MR. EDGAR: Can't hear you, John.

MR. O'QUINN: Good point. Let me ask the question correctly. Under the rules that we are now voting to adopt, when do you have to request in order to preserve your right?

CHAIRMAN SOULES: You never have to request

MR. O'QUINN: Never have to request.

CHAIRMAN SOULES: That is right.

MR. EDGAR: Nobody does.

CHAIRMAN SOULES: That is past motion.

MR. O'QUINN: All you have to do is object.

CHAIRMAN SOULES: That is right.

MR. O'QUINN: No matter what it is and no matter whose burden it was.

CHAIRMAN SOULES: That is right.

MR. O'QUINN: I would like to offer an amendment. My amendment would be that provided that if the judge requests a party to submit an issue or an instruction or a definition in substantially correct form to cure his objection, that the party shall do so.

CHAIRMAN SOULES: Okay, that is the A part of what I passed around a minute ago.

MR. O'QUINN: That has already been voted on?

CHAIRMAN SOULES: No, it hasn't been voted on. Okay, there is an amendment. Is that an acceptable amendment? If it is not, we will vote on it.

MR. BEARD: That gets us back in the same place, we have to submit our objection if it is not precise enough. The judge satisfies all your objections by saying submit it in substantially correct form.

MR. O'QUINN: Pat, the reason I propose that is because I think that solves the complaint of judges. If they want to know, they have got some mechanism whereby when

it is eleven o'clock at night and somebody is making an hour's worth of objections, they can say, on that one, I want you to write it out so I can look at it and see exactly what it is you want in the charge. Apparently, that is a concern of the trial judges. As a lawyer, that doesn't cause me any problems. If the judge wants me to do that, wants to make me do that, I am happy to do it.

MR. DAVIS: It does concern some lawyers, as the judge may require you to draft all of the issues.

CHAIRMAN SOULES: That is a potential abuse.

MR. DAVIS: That is the other side of the coin.

MR. O'QUINN: If he wants me to draw the whole charge, I will be happy to.

MR. BRANSON: Is that the best thing that could happen to you, Tom.

MR. O'QUINN: If the judge tells me, John, you draw the whole charge, plaintiff and defense, that is a plus for me. I will be happy to do it.

MR. SPARKS (SAN ANGELO): Except to this point. When you start to appeal, you have got a different burden than the person that just gets to object to preserve everything. You have got to have written it perfectly or you have lost your right to comply.

CHAIRMAN SOULES: Not under these rules.

MR. SPARKS (SAN ANGELO): Under the proposed rule of A, if the judge tells you to submit it in substantially correct form and you do not, then an objection simply takes care of all of it?

CHAIRMAN SOULES: On a particular question, the answer to that is no.

MR. O'QUINN: Why is Sam not right that if a judge makes me draw the defendant's issue instead of just object to the way it is worded or object to the fact it is not in there and I don't do it in substantially correct form, then I have assumed a higher burden. I have now got a higher burden than if I merely objected to it. What is your solution to his argument? For me, John, you are making a big appellate problem for yourself, John, by offering that amendment.

MR. SPARKS (SAN ANGELO): It is the placing of the burden that I am complaining about. I think a trial court under the proposed rule can put a different burden on one party as opposed to the other.

CHAIRMAN SOULES: Okay, if we are talking about a particular objection, not just the judge saying do the whole charge. He has picked up on a particular objection, which is the way that is written, then --

MR. O'QUINN: I don't like the way that they submitted their defense on negligence, contributory

negligence, for example. He says, well, John, you don't like it, you write it out the way you think it ought to be written out.

CHAIRMAN SOULES: First of all, you have waived the complaint because you said you didn't like it.

MR. O'QUINN: I said I don't like it for these specific, definite reasons, et cetera.

CHAIRMAN SOULES: Then and the judge says, okay, write out the cure, and then you would have to write out the cure, or you would waive your objection.

MR. O'QUINN: And Sam says that is going to make it harder for me to win on appeal than if I just made a real good specific objection.

MR. BEARD: Luke, I don't accept the amendment. Let's just get this issue voted on.

CHAIRMAN SOULES: Are we ready to vote on that? Okay, how many are in favor of exception A which would require to preserve appellate error in a charge complaint that you request in substantially correct form anything that a judge requires you to submit in that form?

MR. BEARD: That is not my motion. My motion is to adopt --

CHAIRMAN SOULES: I have got to vote on the amendment first.

MR. BEARD: You are right.

CHAIRMAN SOULES: How many are in favor of making that exception that John proposes? One, two, three -- let me count them. One, two, three, four, five, six, seven. How many oppose it? One, two, three, four, five, six, seven, eight, nine oppose it. So that is defeated.

Now, does anyone want to propose the adoption of B as an amendment?

JUSTICE PEEPLES: Luke, I will be honest, I am against Pat's motion, but -- and if we vote it down, I think we ought to, you know, maybe go with your 5(a) and (b). I mean, that is half a loaf.

MR. BRANSON: We get to the underlying motion if we are --

MR. EDGAR: Pat has a motion on the floor and you are asking us to vote on something that is not on the floor.

CHAIRMAN SOULES: I stand corrected. All right, how many are in favor of Pat's --

MR. O'QUINN: Point of information. Under the rules we are fixing to vote on, if my objection is that a defense was not submitted in any way, some pled defense didn't get itself in the charge, do I have to object to that?

MR. McCONNICO: Sure.

MR. O'QUINN: I got to read the defendant's pleading and make sure which ones got in the charges.

CHAIRMAN SOULES: No, no, because you are not going to complain of that omission on appeal anyway. You are happy that it was omitted.

MR. O'QUINN: That seems to be what your R was about.

CHAIRMAN SOULES: No, what it is is you are the plaintiff and you have got a pled ground and the judge -- and you don't give the judge any question about it and the judge then says --

MR. O'QUINN: I can't say -- okay.

CHAIRMAN SOULES: All you have got to do is object.

MR. O'QUINN: You didn't submit my theory under products liability.

CHAIRMAN SOULES: I don't know how specific you have got to get, but the objection alone will take care of it.

MR. O'QUINN: Okay, and I got an appeal.

CHAIRMAN SOULES: And you got an appeal on that point.

MR. DORSANEO: Maybe your objection would need to be more detailed.

MR. O'QUINN: More detailed, assuming it was a good objection.

CHAIRMAN SOULES: But it doesn't have to be in

writing.

MR. EDGAR: By the same token, the defendant could say, Your Honor, I object on the grounds you didn't submit my theory of statute of limitations in sufficient detail, and that preserves error.

MR. BRANSON: But you don't have to express statute of limitations.

MR. O'QUINN: Under these rules, the rules we have always worked under, if the party relying on that ground of recovery or that defense is going to appeal, he has still got to submit something.

CHAIRMAN SOULES: Under these rules, a written request is not necessary to preserve any error whatsoever. An objection is all it takes in any content.

MR. O'QUINN: I got you.

CHAIRMAN SOULES: That is just to make it perfectly plain.

How many -- those in favor of Pat's motion, which is to reaffirm and that we recommend to the court our August work product? Those in favor show by hands. One, two, three, four. Those opposed? One, two, three, four, five, six, seven. That is the majority. Now, what are we going to do? What are we going to do? Just leave the charge rules the way they are?

MR. MORRIS: Why don't we leave it and study

it for another year? We have excellent minds all around the room in terrible disagreement. I know you feel frustrated.

CHAIRMAN SOULES: I don't feel frustrated.

MR. MORRIS: I think the whole Committee probably does. I think we need to study it a little more is what I am seeing. People on all sides of the docket and all kinds of people who are capable of doing -- thinking and have a lot of experience and there is so much diagreement, surely, we can, as a Supreme Court Advisory Committee, come together on this. But I think it needs more work.

MR. DORSANEO: Be back to the same place.

CHAIRMAN SOULES: We can't get off this thing here.

MR. DORSANEO: We understand what the issue is.

CHAIRMAN SOULES: Let me try to get a consensus now.

MR. EDGAR: May I make a motion?

CHAIRMAN SOULES: Yes, sir.

MR. EDGAR: I move that we -- I am concerned about the wording, but I move that we adopt the spirit of your proposal that you passed out to us which includes both 5(a) and 5(b).

CHAIRMAN SOULES: All right, how many would approve the rules, the August work product, if those two

changes were made?

MR. COLLINS: Point of inquiry. This is not an official vote, this is just a pole?

CHAIRMAN SOULES: I am trying to see if we can advance the ball any further or if the game is over. If it is over, it is over, but I don't want to leave it without being certain that that is it.

If those two changes were made, maybe not exactly in those words, but in substance.

MR. COLLINS: These changes right here?

CHAIRMAN SOULES: Yes. Where the judge could require you to submit, one, and two, if it is an entirely omitted ground of recovery or defense.

JUSTICE RIVERA: Have to change to 271(1).

CHAIRMAN SOULES: Yes, the two -- and that would be done anyway.

MR. REASONER: Luke, I wonder if I could ask Judge Peeples a question. Judge, I guess 5(b) bothers me because it seems you get into the metaphysics of trying to figure out what an entire ground of recovery or defense is and the whole business of necessarily referrable. And wouldn't your concerns about having sufficient leverage over the lawyers to force them to help you be entirely satisfied by 5(a)?

MR. DORSANEO: You are just left with your

timing problem.

MR. REASONER: You can avoid that, just ask for them at the outset of the trial.

JUSTICE PEEPLES: 5(a), okay, the one Luke submitted?

CHAIRMAN SOULES: Right.

MR. REASONER: I am sorry, yes.

JUSTICE PEEPLES: Well, I suppose so, but if a judge has the authority to do that in every case, that is what the rules do right now. I just don't see how that advances the ball very much at all.

MR. REASONER: The problem with 5(b) is that you can -- I can sit there and object, and then somebody is going to argue and wait a minute, you waived it because there was a complete omission here of this ground of recovery or defense, and nobody tells me that until I get in the court of appeals.

JUSTICE PEEPLES: I just know that as a trial judge it was a great comfort to me knowing that I had winnowed the case down to what I had in the charge, and if they didn't give it to me in writing and if it was something that was pleaded, it is waived if it was an independent ground. And I do not see the problem with telling what is an independent ground of recovery and defense as opposed to an element or fragment of something else. I just don't.

MR. REASONER: Perhaps I was warped by having Gus Hodges as a father-in-law, but I never understood necessarily referrable. I always thought you played it round or flat, if there was enough money involved.

MR. JONES: He says there is another way.

MR. REASONER: You know, he has probably got the better side. Well, you know, it seems to me in federal court, you never have a problem because a lawyer who wants something -- I mean, they are going to submit whatever the judge wants them to submit. I am frankly surprised that that doesn't happen in state court. I mean, it certainly does. You know, it wouldn't occur to me not to give a judge whatever he wanted in writing.

JUSTICE PEEPLES: You are not handling volume litigation like a lot of lawyers are.

MR. REASONER: I understand your point, although much of your concerns, I would think, are now alleviated by pattern charges, so that a lot of what we are arguing about here is all well-defined, I would think.

CHAIRMAN SOULES: If we --

MR. O'QUINN: Ask a question to get information.

CHAIRMAN SOULES: Maybe it would still be imperfect, but how many would find this revision acceptable if we made those two changes?

MR. DAVIS: As they are here without any additional --

CHAIRMAN SOULES: Well, the words may not be perfect, but in substance.

MR. JONES: You have to have time limit in here, Mr. Chairman.

MR. DAVIS: Example, any time limit on when the judge can require you to make the written charge, that would be --

CHAIRMAN SOULES: There is no time limit on it, but there is no appellate consequence to not doing it as long as you get it done by the charge conference.

MR. DAVIS: You are saying the judge can tell you to do it a week before the trial and you say, no, I ain't going to do it, and you don't have to worry on appeal because you didn't do it unitl --

CHAIRMAN SOULES: Franklin, I underlined before compliance with 271(1) before the court charges the jury.

MR. EDGAR: That pertains to Subparagraph B and not to A, though, so you need to have a time limit in A, as, well, don't you?

CHAIRMAN SOULES: Okay, it would be to both.

MR. DAVIS: Then you have a time limit on A, all right.

CHAIRMAN SOULES: I understand that, and I intended that.

All right, how many would be -- would find these rules acceptable with those two changes?

MR. SPARKS (SAN ANGELO): If you combined it with something like Buddy Low's, Luke, that said the party depending upon on appeal or something.

CHAIRMAN SOULES: That is a completely new approach than this. So that would mean --

MR. LOW: It would not be, Luke, if you put up here that the trial court could order. I mean, there is a big segment at a complaint, a trial judge shouldn't be able to make me draw substantially correct what the defendant has, and if I don't, then I am in error whereas an objection ordinarily is sufficient.

CHAIRMAN SOULES: How do we fix that? Maybe that is a --

MR. LOW: But the trial courts could order a party with regard to something that is proper, which he is properly a part of his claim, cause of action, or defense, is properly a part of it. You can't always tell, negligence may be both of them, but a good lawyer is going to have prepared something if everything that is properly a part of his case, if he feels it is properly a part. So if it is properly a part of your case, the judge ought to say, okay, you draw it.

Say the judge submitted something different than what you wanted, but if it is the other person's burden or something that is properly a part of their case, lawyers don't want to be having to draw something in substantially correct form.

Now, I don't have that language with me. I prepared and did some work on the rules. I think I sent a copy to you, didn't I, Justice Hecht, a year ago where it is properly a part of your claim, defense, or cause of action, I think was the term I used. Now, and if you have any question whether it is, then that is --

MR. DORSANEO: Mr. Chairman, I think that could be drafted and that makes sense as long as the sequence involves charge conference, objections, the judge says I would like to see that in writing, it is properly part of your case, submit it in writing to protect the objection but not way before -- a week before the trial -- but as part of just that sequence happening, just like that. That would let you, in effect, do what you can't do now is combine objections and requests so you don't get into the problem of you used the wrong gun.

MR. LOW: Two points, time limit and not making somebody draw something in correct form that is not even their burden of proof.

MR. SPIVEY: Mr. Chairman, could we get a vote

on -- a show on your request?

CHAIRMAN SOULES: Okay, what --

MR. DAVIS: How about as restated?

CHAIRMAN SOULES: With this most recent discussion, I am having a hard time really getting a grasp on it enough to articulate what it really is that we are voting on. John O'Quinn.

MR. O'QUINN: Are you proposing, Luke, that we add something to our existing -- apparently, we voted down the massive redo of the existing rules, didn't we, nine to seven? That is what it seemed like we just did. Where we are sitting right now, it seems to me we have got our existing rules with no changes. That seems to be what the vote was.

CHAIRMAN SOULES: That is a really not what we voted, because almost unanimously the reorganization of these rules is supported in the public and the judges and the lawyers and this Committee and by the court. We really voted down the -- the problem about how to preserve error is the only --

JUSTICE RIVERA: Voted down the change that we proposed last year.

CHAIRMAN SOULES: But the reason that it has been voted down is because of the preservation of error aspect of it.

MR. O'QUINN: Not because of the other thing.

CHAIRMAN SOULES: Everything else people support widely. As a matter of fact, there is no opposition to it.

MR. O'QUINN: Do you want to see what part we can save, the nonobjection parts? Identify that and let's say that is safe?

MR. EDGAR: It really kind of all ties together. You really need to solve the preservation of error problem in order for the way in which the rules are imposed to be reorganized fit together, John.

CHAIRMAN SOULES: Let me see if I can --

MR. O'QUINN: We are mandated to stop.

CHAIRMAN SOULES: Does anyone want to propose that we amend that and stay another 30 minutes or something?

MR. SPIVEY: We are going to meet again next week anyhow.

CHAIRMAN SOULES: We are? I don't know that.

MR. O'QUINN: Let's discuss that then.

CHAIRMAN SOULES: Okay, before we do that, I will take a poll. Don't vote if you feel like I am not giving you enough time to think about this, but if we took A and limited the court's ability to demand or require a request to somehow --

MR. LOW: Reasonable time.

CHAIRMAN SOULES: -- to the party with the burden, and I don't know how in the world to do that, but assume there is a way to do that.

MR. O'QUINN: Use existing rule, which is an issue, instruction, definition on which you rely, you have to tender in substantially correct form.

CHAIRMAN SOULES: All right, if we do that, let's see, on which -- trial court asks the parties to tender a question.

MR. O'QUINN: Ask the objecting party to tender requests on issue, instruction, or definition, that the objecting party relies, on which the objecting party relies.

CHAIRMAN SOULES: Okay, if we get that language into A and then put A and B in as exceptions, does the Committee favor the changes?

MR. O'QUINN: All of them, 385 to 400?

CHAIRMAN SOULES: The whole thing.

MR. O'QUINN: Including it the way you preserve complaints by objection only?

CHAIRMAN SOULES: Except with these two exceptions. Does the Committee then favor that?

Those in favor show by hand. Six, seven, eight, nine, 10, 11, 12, 13. Did you have your hand up, Broadus? I couldn't see.

MR. SPIVEY: Yes.

CHAIRMAN SOULES: Okay, 14. Those opposed? Well, it is unopposed.

You see how close this is to getting done and I don't think the game is over and --

MR. DAVIS: All you have got to do is put in words what we have said. There is your problem.

MR. EDGAR: There is one other thing that will need to be done.

CHAIRMAN SOULES: Let me be very clear. We are not going to address again whether -- the different ways of preserving omissions and commissions and all that sort of thing. We are going to preserve everything by objection, except a total omission of a ground of recovery -- or let's take a consensus on that.

MR. O'QUINN: Don't do it again. You got it.

CHAIRMAN SOULES: And where the judge asks somebody relying on a question, instruction, or definition, to give it in substantially correct form. We do that and we are going to look at those two things, the language, and we are going to get those done with language, and we are not going to debate about whether it should be done. We are just going to get it done. Is that what we are going to do?

If that is the case, I can get this done through our next meeting. We can't revisit this whole problem again.

MR. EDGAR: There is one other thing. We will now have to include, though, that you omitted, and that is a section on requests.

MR. O'QUINN: What do you mean?

MR. EDGAR: When we eliminated having to make a request, there is a rule that deals with requests.

CHAIRMAN SOULES: All right, I will look back at that.

MR. EDGAR: We need to go back and pick that up. It is a housekeeping thing, but we need to have it in there.

CHAIRMAN SOULES: Would you find it for me so I can look at?

Now, then, while Hadley is looking for that language, when do we meet again?

MR. SPIVEY: Can we meet Friday? I move we meet Friday.

MR. O'QUINN: Right down Rule 274.

MR. EDGAR: That is what it is.

CHAIRMAN SOULES: Is it a court holiday next Friday?

JUSTICE DOGGETT: Yes, it is a court holiday Friday.

CHAIRMAN SOULES: The district court?

JUSTICE DOGGETT: No, for our court. I don't

think it is a court holiday anywhere else.

CHAIRMAN SOULES: I know a judge is trying to set me for a hearing that day, but I guess everybody has got that problem.

MR. EDGAR: Luke, 276.

CHAIRMAN SOULES: Okay, we will meet at eight o'clock, Friday, the 16th, and we will meet until we finish.

MR. O'QUINN: Including Saturday?

CHAIRMAN SOULES: No.

MR. EDGAR: We may not be able to use the state bar headquarters. We may have to -- will you advise us by some method where we will be meeting?

MR. BRANSON: I know it may upset you, but I can't meet on Friday. Don't change the meeting. I can be here earlier in the week, but not Friday.

CHAIRMAN SOULES: All right, is the consensus, then, we are going to meet Friday. We are going to work a long day until we get done with the agenda that we had in '89, plus all the new work. It is going to be a long, long meeting.

Do you want to meet Friday and Saturday?

MR. DAVIS: Hopefully, we won't need to meet on Saturday.

CHAIRMAN SOULES: What is the commitment for Saturday, till noon?

MR. SPARKS (SAN ANGELO): At least as much time as we put in this time.

MR. SPIVEY: You can't get people to work past noon on Saturday.

CHAIRMAN SOULES: Okay, we will meet Friday the 16th and Saturday until noon.

MS. CARLSON: What time frame?

CHAIRMAN SOULES: Friday at 8:00 a.m. Is that all right, 8:00 a.m.? That means everybody has to come in the night before, but at least we can get a full day in.

Okay, eight o'clock Friday morning. We will work a long day and if we can, we will get done.

We stand adjourned.

(At this time the hearing recessed 12:15 p.m., to reconvene at 8:00 a.m. on Friday, February 16, 1990.)

THE STATE OF TEXAS)

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COUNTY OF TRAVIS)

I, LESLIE DUTSCHKE, CERTIFIED SHORTHAND REPORTER in Travis County for the State of Texas, do hereby certify that the foregoing 509 pages constitute a true and correct transcription, to the best of my ability, of the testimony introduced and the proceedings had upon the hearing of the TEXAS SUPREME COURT ADVISORY COMMITTEE, which hearing was held at the Texas Law Center, 1414 Colorado, Austin, Travis County, Texas, on February 9th and 10th, 1990.

WITNESS my hand and signature of office this, the 20th day of February, 1990.

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