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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 19, 1995

(MORNING SESSION)

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Taken before D'Lois Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 19th day of May, A.D., 1995, between the hours of 9:00 o'clock a.m. and 12:35 p.m. at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

MAY 19, 1995

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Gilbert I. Low
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

David J. Beck
Anne L. Gardner
Hon. Clarence Guittard
Franklin Jones, Jr.
Thomas S. Leatherbury
John H. Marks, Jr.
Anne McNamara
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
Carl Hamilton
David B. Jackson
Hon. Doris Lange
Hon. Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
Hon. William J. Cornelius
W. Kenneth Law
Thomas C. Riney
Hon. Paul Heath Till

Also present:

Lee Parsley
Holly Duderstadt
Trey Peacock (w/ Susman)

MAY 19, 1995
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CHAIRMAN SOULES: Good morning everybody. I appreciate everybody being here. We are circulating a sign-up for the attendance. I do appreciate everybody being here today. I want to welcome Carl Hamilton who's the new chair of the State Bar Rules Committee. Carl has been a very active participant here and helped us a lot over the past year or so, but he's now officially an ex officio member of this committee, and Carl, we welcome you.

MR. HAMILTON: Thank you.

CHAIRMAN SOULES: As far as our agenda for the day is concerned, we want to get the charge report finally approved and then we want to go to -- get Joe to tell us, Latting, about the bill that apparently the governor signed yesterday relative to sanctions, and with that in place Joe will be able to give us a comprehensive report next time with recommendations from the sanctions subcommittee. Then we will probably hear from Alex Acosta. Is Alex here yet? He usually gets here about 9:30 because of the way the travel works from El Paso. Then hopefully by

then Steve will be here, and we will pursue discovery for the balance of the day and as long as it takes to try to get that wrapped up. Then we will go with the main agenda rules starting with David Beck if he happens to be here. Otherwise somebody from his committee should be ready to report on that.

Okay. First thing then is the charge rules. This is a red-lined version of what the committee voted on last time, what the committee as a whole had passed. The text that we voted on had grammatical errors in it which Richard Orsinger and I tried to read carefully and catch all of those. I hope we have, and we did not get a red-lined version from the committee. So that had to be done because it should go to the Court in red-line. This is -- and Richard can say whether or not he agrees with this. This is what the committee approved last time with grammatical errors such as I think one "or" was supposed to be an "of," o-f instead of o-r, and that sort of thing and converted to red-line. Do you agree with that, Richard?

MR. ORSINGER: I agree with

that.

CHAIRMAN SOULES: Okay. Okay. Is there any opposition to forwarding this report to the Supreme Court of Texas?

HONORABLE DAVID PEEPLES: Luke, I have got two or three suggestions. Okay. On page 21 I thought that down at the very bottom sub (b) I thought that our subcommittee changed "upon" to "by," and this has it the other way. Richard, do you know?

MR. ORSINGER: No.

HONORABLE DAVID PEEPLES: The present rule says "upon." It just sounds weird to me, but if nobody remembers that, that's fine. Now, on page 16 I think there is a real bad sentence. The one that says, "The judge shall give the jury the following oral written instructions after accepting the verdict and then release them." I would change to say, "After accepting the verdict the judge shall give the jury the following instructions and then release them." If nobody else sees it that way, that's fine with me.

MR. ORSINGER: I would second

that change.

HONORABLE DAVID PEEPLES: It looks awkward the other way.

CHAIRMAN SOULES: Where, David?

HONORABLE DAVID PEEPLES: Page 16.

CHAIRMAN SOULES: "After accepting the verdict," and then --

HONORABLE DAVID PEEPLES: "The judge shall give the jury the following oral instructions and release them."

CHAIRMAN SOULES: Any opposition to that?

No opposition. It will be done.

HONORABLE DAVID PEEPLES: And the next thing on pages 2 and 18. I wasn't here, but I guess we voted on this. It's just -- you know, they are taking out "so help you God" on the oath that goes to the jury panel and to the jury of 12, which has been the oath for centuries. They do it that way in Federal Court. Legally there is no requirement that we have got to take it out. It's not unconstitutional. 95 percent of the people in this country say they believe in

God, and for us to take it out because five or ten percent don't like it, I just disagree with it. I can't believe that Supreme Court justices who run for election are going to take that out. You know, that's headline stuff, and so I just think we ought to reconsider that one.

CHAIRMAN SOULES: Okay. Anyone want to change their vote on that?

PROFESSOR DORSANEO: I voted against it, I believe, and I would vote against leaving it out again.

CHAIRMAN SOULES: Well, that's not a change. Maybe you can't remember whether you were in the majority or the minority at the time, but should we vote on that again? Steve Yelenosky.

MR. YELENOSKY: I don't want to change my vote, which was to take it out. I think we can recommend that to the Supreme Court. If they choose not to take it out, obviously that's their choice, but they ought to know what we recommend.

HONORABLE DAVID PEEPLES: What's the reason for it, Steve?

MR. YELENOSKY: Well, I just think some people felt that there was no need, for one thing, to swear someone in that manner, and some people object to it. If there is no need and people object to it, why have it? I mean, I know the lawsuits have upheld it to some extent. I mean, I think some people would still challenge it, but I just -- I think it's objectionable to some people.

That's not -- you know, 90 percent of the people may believe in God, but some people take that as who may not -- who take our society as primarily Christian who are not Christian may object to it because they see it as a reference to a Christian God or something like that, but if it's not necessary and people object to it, why have it in?

HONORABLE DAVID PEEPLES: In all my years I think once, maybe twice, I have had somebody say, "Judge, I'd rather affirm than swear." We have taken care of that. This is not the end of the world for me. I just thought we ought to --

CHAIRMAN SOULES: Anybody want

to change their vote?

HONORABLE SCOTT BRISTER: I wasn't here. I think it seems like we voted early on one meeting, but I also have never had any problem with it. I do think it does make a difference sometimes to have it in there, and I would vote to leave it in.

HONORABLE DAVID PEEPLES: Let's just vote again, Luke. Can we do that? Instead of talking about changing votes, let's just vote.

CHAIRMAN SOULES: Okay. Those in favor of leaving in "so help" -- oh, wait a minute. Since we have already voted I guess we will do it with a reference. On page, what, 2 and 18?

HONORABLE DAVID PEEPLES: It's 2 and 18.

CHAIRMAN SOULES: On page 2 and 18, the words "so help you God" have been stricken from the oaths. Show your hands if you think it should be stricken from the oaths.

MR. JACKS: Should be stricken?

CHAIRMAN SOULES: Stricken,

yeah, the way it shows here on 2 and 18 right now.

Those opposed? Okay. By 14 to 9 it stays in.

MR. YELENOSKY: Luke?

CHAIRMAN SOULES: Opposed votes carry. That's why I am clarifying by stating on the record by a vote of 14 to 9 "so help you God" will stay in the oaths on pages 2 and 18.

MR. YELENOSKY: Luke, can I ask a question on this?

CHAIRMAN SOULES: Yes, sir.

MR. YELENOSKY: I hate to have this argument over this particular vote because I understand people feel strongly about it, but just as a point of order if we are going to vote on everything at the last minute and we can change what we voted on before, then the vote will depend on who happens to be at the last meeting, and I just -- I don't believe that that's either fair or appropriate because if you really have a strong feeling about any particular vote, just wait until the end and vote on it then.

Why bother with the discussion? We didn't have any discussion on this today. We had it last time and voted then. So a lot of people who may not be here today who were privy to that discussion aren't getting to have their votes count. So that's just -- you know, I don't want to have that argument really over this vote, but I think we ought to know what the position of the chair is on that.

CHAIRMAN SOULES: The position of the chair is that I agree with you, but it doesn't work that way, and there are some legitimate reasons why it doesn't work that way. There is at least one legitimate reason why it doesn't work that way, and that is that our goal is not to build a consensus of a narrow majority and legislate. It's really to try to advise the Supreme Court what a cross section of the state of Texas lawyers and public, other members of this committee, feel is the right thing to do in the rules, and so when we get to here is the final draft and it's going to the Supreme Court with our recommendation and someone has, you know, like

this has been in everybody's hands for a few days, a revelation that we have got a problem then we really need to respond to that and fix it.

Usually it's in that context that these things come up. It's not ordinarily trying to go back and rehash a close vote, but sometimes it's that, too, because when it was close then everybody had -- you know, people have had time to think about it again. So the purpose of this committee and the function of the committee doesn't lend itself well to following Congressional rules and getting things done step by step. It does slow down the committee. It burdens our ultimately getting something to the Supreme Court, and if there is very much of it, we are going to have a real problem meeting the 1995 year-end deadline. So I think it has to be really an issue of conscience or an issue of error before we try to revisit these things. Rusty.

MR. MCMAINS: What's the total number of people on the committee?

CHAIRMAN SOULES: Oh, I don't know. Fortyish. We can count them.

MR. MCMAINS: Okay. And I am not necessarily sponsoring this right now, but it seems to me that if you have gone through the process and get to the final stage that perhaps we should have some basic requirement; first of all, in order to change something that's gotten to this stage the burden should be on the person trying to change it. In other words, you asked the question of who -- you kind of put the burden the other way when the question was framed, I think, and in reality because of the voting size I don't think it made a difference, but the other thing that we might consider internally as a part of the committee is whether or not we want to require a majority of the committee, of the total committee, to be polled to change something once it gets to the stage of final report.

CHAIRMAN SOULES: There are 36 members and 10 ex officio members.

MR. MCMAINS: Okay. I mean of the official members then that needed to vote.

MR. YELENOSKY: One point on that. As I remember, the main proponent of

this is not here today, and that was Judge McCown.

MR. MCMAINS: That's right.

MR. YELENOSKY: At least he was the first one to speak on it, and I was joking about seconding the vote like that, but so that was my recollection. So, I mean, that just gives you an example of what can happen. He's not here.

CHAIRMAN SOULES: Well, that's right, and that's always a problem that some -- well, you know, whenever we were going through all of the process of dealing with the appellate rules if this committee worked on or can't function without a quorum, I'm not sure we would have had meetings for several days, and that is a travesty, and it is an abdication of the responsibility that the court has put on the members of this committee, but people sometimes come when they are interested and don't come when they are not interested. And so that's also always been a factor here. So Alex Albright.

PROFESSOR ALBRIGHT: Is there a procedure for a minority report, or should

just interested members when the majority report is submitted maybe write a letter to the court submitting a minority view? What is the procedure for that?

CHAIRMAN SOULES: There hasn't been any procedure. I know Judge Guittard wrote the court after the appellate rules were sent forward giving his views on what he thought were issues he thought ought to be raised, most of which had been raised and were a matter of record already in this, in the minutes of this committee or in the transcript of our discussions.

PROFESSOR ALBRIGHT: Is the Supreme Court going to read the transcripts? Or maybe Lee could help us --

CHAIRMAN SOULES: The answer is, yes, they will read the transcript of this committee where they have concerns about whether they should or should not do something we recommended. At least historically they will go and see what the debate of this committee was so they can get an understanding of the background for the recommendation.

Now, they won't read all the transcripts

because some things are fairly obvious and not controversial when they get to that level, but where things are controversial they will look at it.

PROFESSOR ALBRIGHT: Does Lee have a suggestion as to what might be -- because I would assume that there is situations that have been fairly controversial that maybe some people feel strongly about that might be pointed out to the court.

CHAIRMAN SOULES: The court is a public court. They are ready to receive your letters, if that's what you want to do.

Buddy, Buddy Low.

MR. LOW: I have only been on this committee since '76, but since that time any time when we vote on things as we have voted before, and it works at that time, but when something comes up for final approval it's always been subject to somebody saying, "I don't believe in this" because that's what the final vote is for. So technically if you want to try to destroy that, which the committee has not formed that way, you could do that, but the purpose is for something like

this, and those who feel strongly about it when they see in that report it's going to come up, they better be there because it can come up, and it's worked that way since '76.

CHAIRMAN SOULES: Okay. With those two changes, those will be changes on page 2 and --

MR. HUNT: Luke. Luke, I have a few other changes --

CHAIRMAN SOULES: Oh, I'm sorry. Don, I did not see your hand. Don Hunt.

MR. HUNT: -- that are more or less weighty on page 21 in 1(b).

CHAIRMAN SOULES: Page 21?

MR. HUNT: 21, 1(b). "Any answers." Shouldn't that be "any answer" in two places, take the "s" off "answers"?

MR. MCMAINS: Yeah.

CHAIRMAN SOULES: I'm sorry, Don.

MR. HUNT: Page 21, 1(b).

CHAIRMAN SOULES: One.

MR. HUNT: Third line.

CHAIRMAN SOULES: Where it says

"Comment on the evidence"?

MR. HUNT: "Any answer." Yes, "Comment on the evidence." It should be "any answer" instead of "answers."

CHAIRMAN SOULES: Okay. Okay. And down in the -- that being the third and also the --

MR. HUNT: Third from the bottom.

CHAIRMAN SOULES: Seventh line?

MR. HUNT: Yeah.

MR. MCMAINS: Yeah. "May use any." There is another up above you. I mean another problem, typo.

CHAIRMAN SOULES: Okay. And then Holly tells me that she has discovered that on page 21 that "by" is --

MR. MCMAINS: Yeah.

CHAIRMAN SOULES: -- supposed to be the correct word, and "upon" is supposed to be stricken, and that was --

PROFESSOR DORSANEO: Where is that?

CHAIRMAN SOULES: "Case by broad-form questions," and so this "upon,"

that was never to be added.

HONORABLE DAVID PEEPLES: You are changing "upon" to "by."

CHAIRMAN SOULES: Well, I am just trying to to get the red-lining done now.

No. It's not red-lined out. It doesn't exist in the present rules, does it?

HONORABLE DAVID PEEPLES: The present rule says, "upon broad-form questions." What the committee meant to do was change "upon" to "by."

MR. MCMAINS: And we didn't accomplish it.

HONORABLE DAVID PEEPLES: And it did not come out that way.

CHAIRMAN SOULES: So we will strike through "upon" and that will show on the draft and add "by" and underscore "by"; is that right?

MS. DUDERSTADT: Right.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: Luke. Luke.

CHAIRMAN SOULES: And these, apparently "answers," plural, is the way the rule is right now so that will be --

MR. HUNT: But it was "there," we changed "there" to "any." That's the reason why.

MR. MCMAINS: Right.

CHAIRMAN SOULES: Okay. Rusty.

MR. MCMAINS: Yeah. At the top part of the page on page 21 you have got two by's right now.

HONORABLE DAVID PEEPLES: Lines three and four.

MR. MCMAINS: Lines three and four. You have got "raised by" and then you have the underlined "by the party's pleading." So obviously one of the "by" comes out.

CHAIRMAN SOULES: So this "by" just comes out. Okay.

MR. MCMAINS: Now, the other question I have about that is -- and I guess we did that, but are we saying the party's -- do we mean by that the party's written pleading? In other words, when you say "by the party's pleading" do we -- if you eliminate "written," and I just don't remember whether we had any discussion about this is why I am asking. When what we have done is

taken away the written pleading part, it says "affirmative written pleading" is the part we struck.

CHAIRMAN SOULES: Okay. So --

MR. MCMAINS: But the only question I had is does the elimination of the term "written," is it going to give rise to the notion that if it's tried by consent that you don't actually have to do the amendment?

CHAIRMAN SOULES: I don't remember any discussion that we intended to vary the written pleading. I just think the committee --

MR. MCMAINS: I'm just curious does anybody think that when you take "written" out that somebody is going to make that interpretation?

MR. HUNT: Pleading is defined elsewhere.

CHAIRMAN SOULES: Well, it doesn't hurt to put "written pleading" in if that's what we mean. Do we mean written pleading? Those who think that's what we mean hold your hands up. Eight.

Do we mean something besides "written

pleading"? Those who think so hold your hands up. Okay. We will insert the word "written."

Okay. So now I am making a list on my copy of where Holly is to pick up changes. Page 2, page 16, page 18, page 21. Okay. And that's it. Okay. This is now ready for final passage.

PROFESSOR ALBRIGHT: Luke, I have one more.

CHAIRMAN SOULES: I'm sorry, Alex. Go ahead.

PROFESSOR ALBRIGHT: On page 22, subdivision (d). The last sentence of subdivision (d), "A proper disjunctive question is not an impermissible inferential rebuttal submission." I think that is kind of nonsensical now. The reason that's in there is because I made a motion to get rid of inferential rebuttals altogether, and then this was a drafting done at the committee stage. What I would suggest is if we would say, "A proper disjunctive question that submits the defendant's theory of the case as an alternative to the plaintiff's theory is not an impermissible inferential rebuttal

submission."

CHAIRMAN SOULES: Discussion?

PROFESSOR CARLSON: Would you repeat that?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I wasn't going to say anything about this paragraph (d), but briefly I will say that my recommendation would be to discard the entire paragraph because it is not helpful. In lieu of that I think the professor's suggestion is a very sound suggestion because it makes at least some sense out of this nonsense.

PROFESSOR ALBRIGHT: Would you like me to repeat?

CHAIRMAN SOULES: Anyone else? Repeat it if you will so everybody can hear it.

PROFESSOR ALBRIGHT: Insert after the word "question"; "that submits the defendant's theory of the case as an alternative to the plaintiff's theory."

HONORABLE DAVID PEEPLES: Could you say again, Alex, why that's needed?

PROFESSOR ALBRIGHT: Well, right now if you say, "a proper disjunctive question is not an impermissible inferential rebuttal submission," well, inferential rebuttal submissions are proper only -- I mean, inferential rebuttal submissions are not proper; therefore, if you submit a defendant's theory as part of the disjunctive question, then it is improper under (e). So I don't see -- I don't think that sentence makes clear that you want to allow defendants' theories of the case to be submitted disjunctively. What you're saying is that an improper question is otherwise proper, which I don't think makes any sense unless you specify what it is that you want to allow.

PROFESSOR DORSANEO: What I understand you to mean is that this sentence will cover cases like the one that involves a claim by the plaintiff to recovery on some basis, and the defendant defends that, no, you weren't supposed to get that under our deal. You were supposed to get a commission. So the question would be do you find that the recovery should be, you know, A rather than B?

PROFESSOR ALBRIGHT: Right.

PROFESSOR DORSANEO: And that's a nice little package question.

PROFESSOR ALBRIGHT: Right. As Justice Guittard mentioned, there are lots of cases, and I know old workers' comp. cases -- I don't know anything about new workers' comp. -- where it said, "was the injury permanent or temporary," where the defendant defends by saying it was only temporary. So you have only two possible theories, one supported by the plaintiff, one by the defendant, and you want to submit them disjunctively instead of only submitting the plaintiff's theory.

In contract cases you have the contract means X, which is the plaintiff's theory, or Y, which is the defendant's theory, and you submit one or the other.

PROFESSOR DORSANEO: But this sentence would not then authorize a Stovall McElroy submission of --

MR. MCMAINS: Plaintiff, defendant, neither.

PROFESSOR DORSANEO: Plaintiff,

defendant, both, neither. It wouldn't authorize that, and I think that the professor's suggestion makes that -- clears up that issue. The issue being does this sentence override Lemos vs. Montez, and the answer being "no," especially with the added language.

MR. MCMAINS: Would you read that again, the language?

CHAIRMAN SOULES: Well, we spent -- this is not a new issue, although, and I think it's important we bring it up, but just so that any of you weren't here we spent probably a couple of hours anyway on this issue and how to resolve it before. Some of that's going to have to come back in order for us to get this altogether on the table. What if a plaintiff clearly has the right to recovery, to recover, under one of two alternatives as a matter of law? Then this language would preclude the court's submitting that.

PROFESSOR ALBRIGHT: No, it doesn't. Because that would not be an inferential rebuttal because if the plaintiff

has two theories and they are submitted alternatively, that's not an inferential rebuttal. That's a proper theory. It's only when you are submitting the defendant's theory in a question that it becomes an inferential rebuttal question that is not proper under (e).

CHAIRMAN SOULES: Good. Good point. I think that's probably right. So okay. How about changing "plaintiff and defendant" to "party and another party" since we may be in multiparty litigation?

PROFESSOR ALBRIGHT: No. You need to -- it needs to say defendant's theory because it's only the defendant's theory that is an impermissible inferential rebuttal.

CHAIRMAN SOULES: What if it's a cross-defendant's theory?

PROFESSOR ALBRIGHT: Then that's a defendant, correct?

CHAIRMAN SOULES: What if it's a plaintiff's theory against the counter-plaintiff?

PROFESSOR ALBRIGHT: Then that's the plaintiff being a defendant.

CHAIRMAN SOULES: Why not just say a party against -- a party and another party?

PROFESSOR CARLSON: How about "a defense theory"?

PROFESSOR ALBRIGHT: "A defense theory."

CHAIRMAN SOULES: That's who gets to the courthouse first. I mean, what's the problem with saying that submits one party's theory on the case as an alternative to another party's theory of a case?

PROFESSOR ALBRIGHT: I'm not sure. I haven't thought.

MR. MCMAINS: Well, it shouldn't be "another" it should be "opposing" if you were going to try to convert it to party.

PROFESSOR ALBRIGHT: I think I like defense theory because what it is, it's not an affirmative claim for relief. It is a defensive theory that inferentially rebutts the claimant's theory, and that is the definition of an inferential rebuttal. So I think a defensive theory would --

PROFESSOR CARLSON: And how about saying "claimant" instead of "plaintiff"?

PROFESSOR ALBRIGHT: Right. I think "a defensive theory" and "claimant" so it would read, "A proper disjunctive question that submits the -- a defensive theory of the case," or you can leave out "of the case."

"A defensive theory as an alternative to the claimant's theory is not an impermissible inferential rebuttal submission."

HON. ANN TYRELL COCHRAN: I think we have got some problems -- I mean, I am about to say let's just not have that and agree that the best solution maybe is to not have that paragraph, but then you have gotten into unless it's tied into what the definition of a proper disjunctive submission is and you have that sentence floating out there without being limited to only those things where one of the alternatives has to necessarily exist, that it truly is a proper disjunctive submission. Otherwise, the language that we are talking about here is going to breathe new life into inferential rebuttal.

PROFESSOR ALBRIGHT: Well, except what it does, it does say "a proper disjunctive question." So all I am trying to do is clear up the language for what was voted on months ago. It was voted on months ago that we wanted to allow disjunctive questions that submitted the defendant's theory in a proper situation where you --

HON. ANN TYRELL COCHRAN: In a proper situation.

PROFESSOR ALBRIGHT: Which is defined here in the rule. That's the first sentence of (d). So all I am trying to do is just clarify the second sentence because I think as it exists it's just a drafting problem from drafting in the large group, which I think happens a lot, is that it just needs to be clarified as to what we mean. I think the sentence as it is, it's impossible to understand what we meant.

CHAIRMAN SOULES: Anything else on this? How many feel that -- Alex has proposed that we add after the word "question" -- this is on page 22, under paragraph (d), "disjunctive submission,"

fourth line after the word "question" at the end of the fourth line the following language: "that submits a defensive theory as an alternative to a claimant's theory of the case."

PROFESSOR ALBRIGHT: Leave out "of the case."

CHAIRMAN SOULES: Theory. Okay. So then the sentence would read, "A proper disjunctive question that submits a defensive theory as an alternative to a claimant's theory is not an impermissible inferential rebuttal submission."

Carl.

MR. HAMILTON: Can I say one thing? It looks to me like that sentence contradicts what's in (e), and if you are going to put it in there, it ought to go in (e), say, "An inferential rebuttal shall not be submitted except that a proper disjunctive question is not" and so forth. Otherwise you are saying in (d) you can have an inferential rebuttal issue, and in (e) you are saying you can't have one.

CHAIRMAN SOULES: Well, before

we get to that issue let's get the sentence written or left alone or deleted or whatever we are going to do with it. And this is -- that submits a defensive theory. Okay. Those in favor, the sentence would then read, "A proper disjunctive question that submits a defensive theory as an alternative to a claimant's theory is not an impermissible inferential rebuttal submission." Those in favor show by hands.

MR. YELENOSKY: What is the word "proper" at there?

PROFESSOR ALBRIGHT: It goes to the previous.

CHAIRMAN SOULES: 12. Those opposed?

12 in favor, 3 opposed. The motion carries. So that language will be added, page 22. Anything else on the charge rules?

MR. LATTING: What about Carl's question?

CHAIRMAN SOULES: Well, we have got disjunctive submission in (d) and inferential rebuttal in (e). This deals with both disjunctive submission and inferential

rebuttal. Where should it go?

MR. YELENOSKY: Put them together.

MR. HUNT: Leave it where it is.

CHAIRMAN SOULES: Those in favor of leaving it -- well, this ought to be a division of the house. In favor of leaving it where it is hold your hands, show your hands. Ten.

Those who want to move it into (e) show by hands. One, two. Stays where it is.

PROFESSOR DORSANEO: It must be understood that (e) does not trump the last sentence of (d.)

MR. YELENOSKY: Yeah. That's the problem.

PROFESSOR DORSANEO: That (e) is to be read as "Except as provided in paragraph (d) inferential rebuttal shall not be submitted." Otherwise, it is completely ridiculous.

HON. ANN TYRELL COCHRAN: Isn't that -- I mean, you have rules about how you have to interpret rules, and one of them is

that if you can read them so that they are consistent with each other, you do that, and I think you have just got to accept that that is the way that rules have to be construed, and because otherwise you have to go back and rewrite everything saying, well, except for what's over here, here, and here and here. I mean, do we really need to worry about that?

PROFESSOR DORSANEO: No. I don't mean to add that language. I am just saying the same thing you just said.

HON. ANN TYRELL COCHRAN: Uh-huh. Okay. Good.

CHAIRMAN SOULES: Okay. Anything else on the charge rules? Don Hunt.

MR. HUNT: Page 24 and 25, paragraph (1) and (2). And this is more for my education and clarification and to be sure I understand what we are doing, but as I understand (1) it says that if the question, definition, instruction, are about a matter I am required to plead then I have to submit or request.

MR. MCMAINS: Request something.

MR. HUNT: Yes. Request something. But (2) says that if it is omitted or given, I have got to object.

MR. MCMAINS: Correct.

MR. HUNT: So when it's my issue I have got to do both.

CHAIRMAN SOULES: Yes, sir.

MR. HUNT: And that's what we intend to do? And everybody understands that?

HON. ANN TYRELL COCHRAN: Yes.

MR. HUNT: Okay. That's what it says.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: On page 32 --

CHAIRMAN SOULES: Which raises a serious question, are we really fixing anything? But if that's where the committee stands, I mean, is that what we intend to do? That's where the committee stands on its vote.

MR. HUNT: Yeah.

CHAIRMAN SOULES: And the reason for that is we can't get these rules through if we go to a straight objection to preserve error on everything because the trial bench just won't let it go through. They have

the strength to oppose it. We got -- the Supreme Court actually adopted rules that objections preserved everything, but before they became effective the trial bench brought enough influence to bear, and I am not saying it wasn't justified, but anyway they got scrubbed.

So this is what the committee -- the best the committee could come up with to meet all of the political influence and the intention that there is about the practice the desire to have lawyers -- to compel lawyers to help the court draft the charge because they don't have any help like federal judges do. I mean, there are reasons for that. So this is where we are. Ann Cochran.

HON. ANN TYRELL COCHRAN: To the defense of my former colleagues on the trial bench and as I think everyone on our task force who attended meetings in this very room with, you know, selected trial judges who were asked to consult with us, there are very legitimate reasons underlying with judges' fundamental disagreement with an object only system, and I really have to very respectfully

disagree with the chair's characterization of at least the task force report and I think where this committee has been so far as being, you know, merely a political compromise.

I think there were some very sensitive issues that I know our task force spent many a day with really trying to understand the tensions that were there but are much more than political and some things that really have to do with some basic concepts of how our justice system should work. I think this is a very good compromise, but it's one that's not a political cave-in. It is a compromise of two very well-founded but intention concerns that the Bench and the Bar have.

CHAIRMAN SOULES: Anyone else? Sarah Duncan.

HONORABLE SARAH DUNCAN: I would just like to say that the committee may not politically be able to get more than this through, but it's contrary to what the law has been since Morris vs. Holden, and I would still vote against it, just to put it on the record.

CHAIRMAN SOULES: Okay. Anyone

else?

Okay. Is there anyone who feels that the changes that we have made today are of such a nature that you want to see another clean draft and vote on it after you have a clean draft before this goes to the Supreme Court? Does anyone feel that way? Because that's really the way we work except for maybe just ticking and tacking on a few small issues or easily identifiable issues maybe.

Okay. Then what you are going to vote on now then is for the staff, i.e., Holly, to make these changes and forward this to the Supreme Court as a recommendation of the Supreme Court Advisory Committee. Those in favor show by hands. 20. I count 20. Those opposed? Okay. The recommendation of these rules --

HONORABLE SARAH DUNCAN: I'm sorry. Can I vote against that? I didn't understand we were voting for the whole report.

CHAIRMAN SOULES: Okay. One opposed. So the vote of the committee is 20 to 1 to recommend these rules for promulgation

by the Supreme Court of Texas, and the chair will forward them to the court with that recommendation.

MR. LOW: Luke, I got recognized and then disrecognized.

CHAIRMAN SOULES: Buddy.

MR. LOW: On page 32.

CHAIRMAN SOULES: I'm sorry. Where are you?

MR. LOW: Well, 32. It's not a major thing.

CHAIRMAN SOULES: I apologize to you, Buddy.

MR. LOW: It's a grammatical situation, I think, or bad language by saying, line four we say "of which that are." I mean, I never heard an object of a preposition followed by something other than an action word.

CHAIRMAN SOULES: Please help me find the place where you are talking about.

MR. LOW: Line four, page 32. Before I am again disrecognized.

HONORABLE SCOTT BRISTER: It should be "that" and drop "of which."

MR. LOW: No, no. It has to be "of which," but you drop "that" because "of which" refers back, but just "of which that are"?

HONORABLE SCOTT BRISTER: I know I sense some grammatical --

CHAIRMAN SOULES: All right. Let's -- Judge Brister.

HONORABLE SCOTT BRISTER: Because Judge Cochran trained me to always use "that" rather than "which" I know I sense some grammatical changes that would have changed "which" in the second line of No. (1) to that and would propose that both of them say "that."

MR. LOW: I don't know. It doesn't change to me. It's just --

CHAIRMAN SOULES: Judge Brister, did you send that to the chair or to the subcommittee?

HONORABLE SCOTT BRISTER: To the subcommittee chair.

CHAIRMAN SOULES: I did not see that.

HONORABLE SCOTT BRISTER: Yeah.

Most of them have been incorporated. That one didn't.

CHAIRMAN SOULES: Well, let's get that fixed. Who has a suggestion on how to fix it? Sarah Duncan.

HONORABLE SARAH DUNCAN: I think the sentence should read, "Any independent ground of recovery or defense that is not conclusively established under the evidence and all elements of which are not referable to any other ground" -- and proceed with the rest of the sentence.

HONORABLE SCOTT BRISTER: That's fine.

MR. LOW: That will work.

CHAIRMAN SOULES: Okay. We are going to change in line two "which" to "that" and in line four we will strike the word "that." So and those are both -- they kind of fix themselves red-linewise. So we will make that note on the front here, page 32. Okay.

Do we need to vote again? Anyone want to change your votes if we make those changes on 32? Same vote. Okay. By a vote of 20 to 1 this will go to the Supreme Court on changes

on pages 2, 16, 18, 21, 22, and 32.

Joe, tell us what the legislature did on sanctions.

MR. LATTING: Well, the legislature did some huge things on sanctions, and everybody that is interested in sanctions needs to be aware of it. I think that Lee is getting a copy of the bill that was signed yesterday by the governor, Senate Bill 31. Well, Senate Bill 31 was horrible, and we were having a sanctions committee meeting where we were sitting down two and a half weeks ago, three weeks ago, to prepare our report, and Chuck Herring came in and said, "Before we go any farther look what the Senate did today," and we couldn't believe what they had done. It's been helped somewhat by the House. In fact, it's been helped a lot by the House amendments that were signed yesterday, but we are just starting from a new place for sanctions. All of our work heretofore is pretty much out the window.

CHAIRMAN SOULES: Does that include discovery sanctions?

MR. LATTING: Well, that's a

good question. I'm going to tell you right -- maybe or maybe not, depending on -- we need to study this bill and see the answer to that because what the legislature did was, as Chuck Herring said, pass a mongrelized version of the Federal Rule 11, and it -- the rule does not apply, Federal Rule 11 does not apply to discovery. It applies to the filing of lawsuits. Also, another thing we are going to have to deal with in our drafting of the new sanction rule is that there is a provision in this bill as signed which limits the court's rule-making power. So we are going to have to draft everything around the outside of this bill. And --

MR. HERRING: That provision happens to be unconstitutional, but we can set that aside for a moment.

MR. LATTING: Well, okay.

CHAIRMAN SOULES: Don't everybody talk at once. If you have something to say, put your hands up.

MR. LATTING: I can tell you a few things about it courtesy of Lee, who has

laid down this Senate Bill 31 next to Rule 11 and given where they are similar and where they are different. Just for example, Senate Bill 31 only applies to pleadings or motions, and so we have got these big blank spaces. Well, what do you do about things or activities on the part of lawyers or litigants or clients who are not -- that aren't pleadings or motions?

MR. HERRING: What you do is you put all of your lies --

CHAIRMAN SOULES: Chuck Herring. Go ahead.

MR. HERRING: If you are going to lie, lie in your brief and then you are not covered by it.

MR. LATTING: There is -- we are told in this bill that the allegations and factual contentions must have evidentiary support, which is going to give me some difficulty filing pleadings, and I don't need to spend a lot of time telling you what all is in this bill. We are going to have a copy of it available for you, but the sanctions subcommittee is going to have to meet at least

twice to write a new sanctions bill, and Luke has threatened me that I am losing my job if we don't come up here with a report. Of course, every time we get ready to write one something happens.

I think for all of your entertainment you ought to look at what the Senate did before they amended it. It's just crazy. It said that litigants included lawyers and parties and that if anyone brought a suit for purposes of vexation that the trial court shall award costs including attorneys' fees and everything else you can think of, and then it provided for mandatory appeal rights if he didn't and said that the courts would hear them, the appeals, that is, and so it was just -- we were just stunned, and I was going to -- I was never going to South Texas. I was never going to go south of San Antonio for any purpose ever again. I wasn't even going to drive there.

MR. MCMAINS: You would be sanctioned for that.

MR. LATTING: It was amazing. I mean, it was just astonishing, but the House

got them to amend it as it now stands, and so we are going to have to write around this and recommend something to the Supreme Court, and I heartily invite your input to the members of the sanction committee because I am not exactly sure how we are going to do this. We are going to do the best we can. I think that what my intention is, just to be out in front about it, I am going to be trying to write a rule, a TransAmerican rule as best I can that fits this, that fits this bill.

I think that the legislature has made it very clear that this notion that you have to go get an order to violate before something can be sanctionable is dead as a doornail, I think, but maybe I am wrong about that. So we are going to be -- we are going to be busy people trying to come up with a sanctions rule, and we will do our best, but we need some help, and please talk to those of us on the committee or come to the meetings or write me, and preferably write me and tell me your views. That's all I have got to say about it.

CHAIRMAN SOULES: I will get some hands in just a minute. Top priority is

individuals.

We have got to deal with that because the first sentence only deals with individuals, or we can just put "his or her," and inferentially if it's not a his or a her then what? We still have, I guess, the same issue because we haven't said how nonindividual Homo sapiens can appear. So do we want to address this somehow to clarify that? Judge Brister.

HONORABLE SCOTT BRISTER: I wouldn't put "any individual party" because partnerships can appear personally, et cetera. So you need more than that and less than that. I would just leave it exactly like it is and say "either personally or through an attorney" because, as Judge Cochran says, a corporation doesn't appear personally. It cannot appear personally. So when the president shows up, that is not a personal appearance of the corporation.

CHAIRMAN SOULES: Okay. So are you looking at --

HONORABLE SCOTT BRISTER: Just leave it exactly as it is except drop "on his own behalf" and put "personally" in its place.

CHAIRMAN SOULES: You are proposing that we delete -- okay. We are starting with the committee's recommendation, right?

HONORABLE SCOTT BRISTER: Correct.

CHAIRMAN SOULES: Okay. And from that recommendation you would delete "on his own behalf" and insert --

HONORABLE SCOTT BRISTER: "Personally."

CHAIRMAN SOULES: "Personally." All right. Got that. Any discussion on that? Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think the reason a partnership can appear is because the individual can appear even though it's a claim against the partnership. So I don't disagree with what Judge Brister said. I just disagree with the spin that he put on it.

CHAIRMAN SOULES: All right. Now, those in favor of -- is there a second to Judge Brister's proposal?

MR. HUNT: I second.

CHAIRMAN SOULES: Seconded. Those in favor show by hands. Those opposed?

The vote is 12 to 2 to adopt Judge Brister's proposal and put "personally" in the place of "on his own behalf."

Any other discussion on paragraph (a) as proposed by the committee? Yes. Elaine Carlson. Excuse me.

PROFESSOR CARLSON: Would it be clarifying to add the words "of record" in the beginning of the second sentence?

"When a party is represented by an attorney of record" as opposed to someone just on retainer.

CHAIRMAN SOULES: Any opposition to adding the words "of record" after "attorney" in the first line of the new language?

HONORABLE SARAH DUNCAN: Actually, I do have a question.

CHAIRMAN SOULES: Okay. Judge Duncan.

HONORABLE SARAH DUNCAN: Is it really inefficient to provide notice to that party's attorney, or does notice have to be to

that party's attorney in charge?

MR. YELENOSKY: Well --

PROFESSOR CARLSON: I think you read the sentences together.

MR. YELENOSKY: Yeah.

HONORABLE SARAH DUNCAN: Never mind.

CHAIRMAN SOULES: Well, if we say "if a party is represented by an attorney of record" then we have got an attorney in charge, and we could put that after the attorney at the end.

MR. YELENOSKY: Tell me again what that --

CHAIRMAN SOULES: All right. "When a party is represented by an attorney of record, any reference in these rules to notice to a party shall be read to require instead notice to that party's attorney in charge."

MR. YELENOSKY: Well, I mean the reason --

CHAIRMAN SOULES: You can't serve --

MR. YELENOSKY: Right.

CHAIRMAN SOULES: -- a citation

on a lawyer and get personal jurisdiction over the party when you know the party is represented by a lawyer. You still have to serve the party. It's not until you have got a lawyer of record that this all kicks in.

MR. YELENOSKY: The last part of it, though, you said "to that party's attorney in charge." The next sentence basically says unless you have more than one attorney you don't even use the language "attorney in charge."

CHAIRMAN SOULES: Well, that's fine.

MR. YELENOSKY: So why do you need to add it in?

CHAIRMAN SOULES: You don't need it. I agree. So if we add "of record" in the first line of that after "attorney," that would take care of your concern; is that right, Elaine?

PROFESSOR CARLSON: Uh-huh. Yes.

CHAIRMAN SOULES: Any objection to that? No objection to that change being made. Buddy Low.

MR. LOW: Let me ask a question. Are we getting away from by saying this notice to the attorney in charge -- in a lot of these lawsuits, you know, I have got, the plaintiff has four or five lawyers. They all have some interest in it, although, one of them is in charge; or four or five defendants represented and you give notice of everything to all the attorneys. Are we inviting people to say, "Okay. I just give notice to that one, and then he's got to give notice to all the others." I mean, as a matter of courtesy if we just give notice is any of this restricting it?

CHAIRMAN SOULES: Buddy, the policy of the rules right now is that you only have to give one party notice one time to his attorney in charge. The parties can agree to accommodations where there are multiple lawyers, but that's the policy that this is directed towards, and it's now the policy of the rules.

MR. LOW: That's what I was afraid of. So I won't say anymore.

CHAIRMAN SOULES: Okay.

Anything else on paragraph (a) on page 6? We have made two changes. We have substituted "personally" for "on his own behalf," and we have added "of record" after the word "attorney."

Being no further discussion, those in favor of paragraph (a) as now modified show by hands. 11. Those opposed? Okay. That carries by a vote of 11 to 1.

Now, then going on to number -- excuse me.

HONORABLE DAVID PEEPLES: Luke, did we not put the words "in charge" after that "attorney" in that sentence the way you suggested it?

CHAIRMAN SOULES: Well, the second sentence my attention was called to by Steve --

HONORABLE DAVID PEEPLES: So it wasn't necessary?

CHAIRMAN SOULES: It wasn't necessary because the next sentence takes care of that.

HONORABLE DAVID PEEPLES: Okay. That's fine.

CHAIRMAN SOULES: Would you check that and satisfy yourself that it does? If not, we need to go revisit it.

HONORABLE SARAH DUNCAN: Can I ask one question?

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Why the last sentence of (a), "All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge," is that being replaced by "the notice shall be made to the attorney in charge," and that includes both the court and counsel; is that right?

MR. ACOSTA: I think that was the intention. I hope it does that.

HONORABLE SARAH DUNCAN: Okay. Thank you.

CHAIRMAN SOULES: Okay. Then we get to motion to show authority, and you're saying that you have rewritten this, but the only substantive change is that the court is not compelled to strike the pleadings but may strike the pleadings; is that right?

MR. ACOSTA: Yes, sir. That's correct.

CHAIRMAN SOULES: Okay.

MR. BABCOCK: Luke?

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: May I ask why the timing sentence was stricken, that it had to be heard and determined before announcement of ready for trial?

CHAIRMAN SOULES: Can you answer that, Alex?

MR. ACOSTA: Steve, do you remember what the discussion was?

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Let me think real quick. Well, I think in changing -- maybe in changing -- I don't know. Maybe in changing the "shall" to "may" that that brought on that. I think that was something that Alex had suggested, Alex Albright, and I'm not sure.

MR. BABCOCK: The reason I think it was in there before was to give some sense that this shouldn't be used as a trial

tactic on the eve of trial to file one of these motions and ball up the whole trial.

CHAIRMAN SOULES: Why should that be deleted? I think that is the reason for it. You can't go get a trial and ask for that and say, "These guys don't have any authority." All you have got to do is --

MR. YELENOSKY: Well, I guess the notion was that there could be circumstances in which that would come up, and that ought to be left up to the judge and that the judge wouldn't allow it to go forward if they were sitting on top of information that the person lacked authority. I don't know.

MR. BABCOCK: I suppose it could come up during trial that an attorney didn't have authority; although, it would be an odd situation when you have got the client sitting right there with his lawyer.

MR. LATTING: "I thought he was with you," he says.

MR. BABCOCK: Yeah.

CHAIRMAN SOULES: I know that we have talked in the context of discovery and so many things, so many areas, that challenges

of a lot of different kinds should have to be made before you get to the eve of trial so that they are not -- so that they are not used as dilatory tactics to duck a jury setting whenever you have got a panel ready to go to try a case.

MR. YELENOSKY: I mean, there may be a dispute as to whether somebody has been fired on the case, as Chuck suggested, or there are occasions when it would be appropriate. If you are going to leave it in, do you have to write an exception now?

CHAIRMAN SOULES: Okay. Any other discussion on this? Richard Orsinger.

MR. ORSINGER: Could this problem also occur if there was a question of the competency of the client, whether as a result of a mental defect or perhaps someone appearing through next friend for a child?

I mean, we wouldn't want complaints like this to appear when we show up to pick a jury, and so I would think that we would want to force these kind of confrontations to occur long enough in advance that we can keep a trial date if we have it.

CHAIRMAN SOULES: Okay. Any other discussion on that? Chip, are you proposing this be put back in?

MR. BABCOCK: Yeah. I think I am. My original question was to see if there had been any deliberate discussion about it, if there was any problem that had arisen, but if you look at the way it's written, it says, "The motion may be heard and determined at any time before the parties have announced ready for trial." That does not necessarily preclude later consideration, but I think it does give a sense that the court doesn't want this motion being used to gum up a trial after people have announced ready, and so my motion is to put it back in.

MR. YELENOSKY: I just want to ask about your interpretation. Your interpretation is then that that doesn't mean it may not be heard after announcement of ready for trial, which is what I thought was important for it to say from the discussion. So if your interpretation is correct then it's not serving the function that others are saying is necessary for it to serve, which is

to prevent a late motion. So now I'm confused.

CHAIRMAN SOULES: I disagree with Chip's construction of it, but that's up to another fight another day unless we want to clarify it.

MR. YELENOSKY: Right.

CHAIRMAN SOULES: Okay. Anything else on this? Is the committee willing to accept Chip's proposed amendment that this be added back in?

MR. ACOSTA: Yes, sir.

CHAIRMAN SOULES: Okay. If that's added as the last sentence to what's been proposed by the committee, now let's have any further discussion on this. Richard Orsinger.

MR. ORSINGER: The currently last sentence before the most recent addition troubles me because of its readability, and I would propose -- it's the sentence that says, "If the party or no person who is authorized to represent the party appears."

I would rather say something like "if neither the party nor any person who is

authorized to represent the party."

MR. LATTING: Yeah.

CHAIRMAN SOULES: That's acceptable.

MR. ACOSTA: The committee will accept that change.

CHAIRMAN SOULES: "Neither the party nor any person."

MR. ACOSTA: If it's intended as constructive criticism.

CHAIRMAN SOULES: So intended, right?

MR. ORSINGER: Right.

CHAIRMAN SOULES: Okay. Anything else on (b)? Elaine Carlson.

PROFESSOR CARLSON: I guess to be consistent with what we did in (a) we ought to take "his" out of the third sentence. I'm not sure you need any gender reference either way. Just "and show authority to act."

CHAIRMAN SOULES: Okay. Any opposition to that? No. Okay.

All right. Now we are ready to vote on (b).

HON. ANN TYRELL COCHRAN: Luke?

CHAIRMAN SOULES: I'm sorry. Judge Cochran.

HON. ANN TYRELL COCHRAN: I'm sorry. Could I discuss one thing? If you are going -- the notice that's required in (b) only has to be given to the challenged attorney, and yet you say that if the party who really may not have ever given this lawyer authority doesn't show up at the hearing, shouldn't we require notice to the party if we are saying that the lawyer who is getting notice might not have any authority to act for them, might not even be in contact with them because you are going to say you are going to dismiss the case?

CHAIRMAN SOULES: Well, you may. Rhetorical question, what if you can't find the party?

HON. ANN TYRELL COCHRAN: Well, no. I'm just saying -- I just wanted to raise that we are not requiring notice to the party.

CHAIRMAN SOULES: Okay. That's right. Comment on Judge Cochran's concern here? Anyone else? Buddy Low.

MR. LOW: I just don't think

you ought to be in touch with a party until you know --

CHAIRMAN SOULES: I can't hear you, Buddy.

MR. LOW: I don't think you ought to be in touch with the opposing party until you know that that lawyer is not representing him because otherwise they will -- I mean, you will be getting -- people will be writing, "Well, I don't think you represent him. So I am going to write him this or give him this kind of notes." I just don't believe you get in touch with the parties.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think the problem may be that the last sentence really doesn't go along with the rest of the rule. The rest of the rule is just a matter of determining whether the attorney has authority or not, and when you go -- the last sentence all of the sudden jumps to striking the pleadings, and maybe the last sentence simply shouldn't be there.

MR. YELENOSKY: Well, the last

sentence is the only thing we thought we were changing substantively by changing "shall" to "may," and by the way, I think I missed the last discussion there about changing the language. That should read, "If no party or no person who is authorized to represent the party appears." Is that what we got corrected?

MR. ORSINGER: It says, "If neither the party nor any person."

MR. YELENOSKY: Okay.

CHAIRMAN SOULES: Actually this has got another problem, this last sentence. I mean, if the court is going to act then striking the pleadings doesn't dispose of the cause of action. Shouldn't it be dismissed for want of prosecution if nobody shows up? The lawyer doesn't show up, and the party doesn't show up. Nobody shows up on a motion to show authority.

MR. PERRY: It looks to me like if nobody shows up on a motion to show authority the result should be that you refuse to let the attorney appear and represent the party.

CHAIRMAN SOULES: Well, the lawyer doesn't even show up.

MR. PERRY: Well, that's fine. But if the lawyer -- the outcome would be that the lawyer whose authority is being questioned is found not to have authority. I think making a further leap that you are going to strike the pleadings gets you into a whole different area.

MR. LATTING: Yeah. I do, too.

CHAIRMAN SOULES: How does the court ever get rid of the case?

HONORABLE SCOTT BRISTER: Yeah. What do you do then?

CHAIRMAN SOULES: I mean, the lawyer doesn't have authority, and the party hasn't showed up. Nobody has showed up.

MR. PERRY: Somebody can file a motion to dismiss the case for want of prosecution, or there are a lot of different things that can happen, I think, but what the outcome of this proceeding would be that you have determined that a particular attorney does not have authority. At that point, for example, you know that notice has to go to the

party and not to that attorney.

MR. LATTING: That's right. That's right. You're right.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I worry a little bit about David's suggestion for this reason: The majority of the cases that are filed under this are generally the cause of action has been brought without a party's approval, or at least those are the ones I see. So if that's the case and that position is sustained by the defendant then you have a lawsuit pending for a party who never intended to file it, and there has to be, I think, in the rule somewhere an idea of how we get rid of them.

I worry about dismissal for want of prosecution, Luke, because we have to jump through a lot of hurdles on that, at least by common law, and there are some difficulties there. Now, I think David has got a good point, but I think we have got to figure out a way that we can get rid of that cause of action or at least give the trial judge some authority to act on that if that's the

decision.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I agree with David Perry on this. I have never looked at this rule as a mechanism for striking a pleading. It's merely to find out who is authorized to be prosecuting the suit. Also, with regard to Judge Cochran's comment that maybe the party should be given notice, I think that winds up in a problem as well because then that presumes that the attorney that hasn't answered does not have authority.

If the party -- if the attorney represents the party then the attorney is going to notify the party, and the party is going to provide the evidence they need to support a response to the motion. If the attorney doesn't represent the party, the party isn't going to be there, isn't going to give that type of evidence, and the motion will prevail, but I don't think that any result should be striking the pleadings.

I just think it should be the determination of whether the attorney that's filed the response or filed the pleadings has

the authority to do so because you are not going to have the party there, and you are striking the pleading. It's a death penalty situation, and then I do believe you have a due process problem with the whole affair.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: But you may have a situation where you would want to strike the pleading, wouldn't you, if you just had an original petition filed, and you have a motion to show authority, and the attorney comes in, and the attorney who signed the petition has shown he has no authority, then he had no authority when he filed the petition. Shouldn't that pleading be struck?

MR. GOLD: Then I have a problem with that the party doesn't --

MR. YELENOSKY: But the attorney -- I mean, the party never signed the pleading. The attorney signed the pleading.

CHAIRMAN SOULES: Just a minute. Okay. Richard Orsinger, and then I will keep going around the table.

MR. ORSINGER: It seems to me

that we really ought to provide for notice to the party whose attorney is being stricken because the idea that you can serve a party through their lawyer presumes that they are their lawyer, and if we are going to strike them as not being their lawyer then our notice through their lawyer is no good.

It seems to me that if we are going to strike an attorney or a pleading, we have to by necessity be sure that the party has notice of that because of the possibility the court may find that the lawyer is not the representative of the client, and then there has been no due process.

CHAIRMAN SOULES: But isn't this mechanism that you say, "Lawyer, you have got to show authority," and then the lawyer either goes to his client if he has a client and gets proof; or if he doesn't have a client, he can't do it. Doesn't that notice to the party happen that way in the mechanism of the workings of this rule? Judge Brister.

HONORABLE SCOTT BRISTER: The problem I have is if you don't dismiss the case, strike the pleadings, do something, the

few times I have seen this, it tends to be with unsophisticated plaintiffs or poor folks in frequently a family kind of dispute or family property or something like that, and some lawyer has gotten in there and decided he's going to collect his fee by enforcing somebody's rights in there.

We strike that attorney, and now this unsophisticated person, we are going to serve a notice on them that they are not going to understand or require them to hire an attorney to come in and prosecute this suit that they didn't know -- I mean, this doesn't happen to Exxon or somebody like that who has attorneys, that can send somebody down to take over the suit.

This happens to people who have no idea what's going on and simply leaving them -- leaving me with them having a suit in my court and not knowing who to serve, I mean, these are people who frequently don't have phones and certainly don't have faxes and certainly don't have attorneys or any way to get an attorney. I have got a case that I cannot get rid of without due process problems and I

can't keep because I can't do anything with them, and I would rather strike the pleadings without prejudice.

CHAIRMAN SOULES: You still haven't gotten rid of the case.

HONORABLE SCOTT BRISTER: Well, if I strike the pleadings then something will follow soon thereafter.

CHAIRMAN SOULES: Without notice?

HONORABLE SCOTT BRISTER: Yeah. Without prejudice, too.

MR. LATTING: Well, just -- Luke?

CHAIRMAN SOULES: Okay. Joe Latting.

MR. LATTING: Just because an attorney does not have authority to represent a party does not mean necessarily that that party does not want to be in court, and that's the problem here. You can't assume that just because Attorney A doesn't have authority that, therefore, the party has no business in court and his pleadings ought to be struck. We just can't make that leap. I mean, it may

happen in 90 percent of the cases, but it's one we can't do, I don't think.

HONORABLE SCOTT BRISTER: If he had no authority to file the pleadings, the pleadings shouldn't be struck? He had no authority to file the pleadings, and he shouldn't be struck?

MR. LATTING: Well, maybe. But you don't know that just because he has no authority he had no authority to file the pleading. He may have had authority when he filed the pleading and no longer has authority. It may be a squabble among lawyers. Firms break up, and the client may be sitting over here thinking he is represented. So it seems to me we have to separate these things.

CHAIRMAN SOULES: Separate what things how?

MR. LATTING: These things being the difference between whether a particular lawyer has authority, and we have to get that out of the way. That's an inquiry unto itself, and then if we decide he doesn't then we look at the situation and see what we

have to do. Maybe there is another lawyer there. 90 percent of the time there is not. We are just going to have to deal with that. We have an unrepresented party appearing pro se, and we can deal with that on its own terms.

CHAIRMAN SOULES: Okay. David Keltner, and then I will get to you, Rusty.

MR. KELTNER: Let's look a little bit about where we are, and I'm afraid Perry and I got you into this without giving a road to get out. Remember the rule now says if you don't appear, the pleadings shall be struck. We have changed it to "may" so to give the judge some discretion, which is to move in the direction that all of us seem to want. Now, the question is, should we give notice to that party if we are going to strike their pleadings, which seems to me to be fair, and maybe we just put a notice provision on the end of it, Luke, and that solves this problem, it seems to me.

CHAIRMAN SOULES: Well, the problem I have after that is suppose I am in the family law practice or some other

practice, and I have got -- I am experiencing people challenging my authority to represent my clients, and every time I file a lawsuit certain lawyers just automatically serve me and my clients that I don't have authority.

My client calls me up and says, "What is this?" I say, "Oh, this is just an annoyance that lawyers can indulge in when they want to. Don't worry about it." You know, I mean, I don't want -- I don't think that there should be an automatic notice to the client on one of these kinds of motions.

MR. KELTNER: I'm sorry. I was talking about notice if the judge decided to strike the pleadings, and in that event notice would have to go to the party but only in that event.

CHAIRMAN SOULES: I don't have a problem with that. I have a problem with notice of the motion. I don't know whether anybody else shares that concern, but I share it.

MR. LATTING: Well, I do. I share it.

MR. HUNT: Yeah.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Any lawyer that files a lawsuit and says that he represents the party, that lawyer is going to say that he knows how to get in touch with that party. So, I mean, and then if some reason, you know, you get -- then he should be required to advise the court. I mean, he's still an officer of the court. So he should be required to give -- and if he messes up the man's lawsuit because he does that, well, I have seen malpractice cases that are founded on weaker things than that.

I mean, that would be the only resort, but that lawyer ought to know where that person is, and that lawyer ought to be required to give the address where the court can serve that person with notice as they would if he didn't have a lawyer. So why not put something requiring that? I mean, the lawyer is still an officer of the court. He comes to your court. You have got some duty. He is a member of the State Bar. You could get some sanctions against him.

CHAIRMAN SOULES: Well,

perhaps, but suppose a month ago with the statute of limitations coming up Monday somebody comes in to see me, and I can't find them. So today I go ahead and file a petition, and they have --

MR. LOW: You have got trouble to start with there. So I can't answer that problem.

CHAIRMAN SOULES: Judge says -- and then the defendant shows a motion to show authority, and I say, "Look, I don't know if I have got authority or not, Judge, but I know I wasn't going to let a limitations run, but this is the name of the individual. This address they gave, I can't find them over there. Phone number doesn't work, but here I am. You do what you say, what you are going to do, and I will just have to put it in your hands."

MR. LOW: I didn't say that you were going to know where he is always. I am saying at one time he approached you, and you had an address for him. I mean, if he doesn't stay in touch with you, then you can't require him to do that, but you at least at one

time -- this is the last known address, and so that's where you serve them, and if the last known address doesn't serve then there are some people you just can't find.

CHAIRMAN SOULES: Well, there are a lot of ways this rule can work, to protect lawyers, to protect clients, several ways, and it's intended kind of that way. So if we can get all of those thoughts collected up, we can probably fix this so that it's going to work the way we want it to work.

MR. MEADOWS: Couldn't you put some --

CHAIRMAN SOULES: Go ahead. Robert Meadows.

MR. MEADOWS: Luke, why don't you have a default provision in here that says, "The court shall refuse to permit the attorney to appear in the case" and then "and if" something doesn't happen the case will be dismissed. If after notice to --

MR. MCMAINS: To both sides.

CHAIRMAN SOULES: Well, there is always the process of dismissal for want of prosecution.

MR. MEADOWS: Well, Judge Brister says that's an awkward, difficult process with the kind of claimant or the kind of party he's dealing with, that he needs a way to do it.

CHAIRMAN SOULES: I mean, if you follow the rules it's not very hard. I think what -- is this right, Judge Brister? You're saying that if it's just at the moment that the attorney has decided not to have authority you're concerned about right then dismissing the case for want of prosecution without going through the 165(a) process and the other processes.

HONORABLE SCOTT BRISTER: Where do I send it to? I had a notice to show authority, and nobody showed up. I mean, that's all we are talking about. We are not talking about where three attorneys showed up to represent them. Nobody showed up. Now, what do I do?

CHAIRMAN SOULES: I don't know. I didn't know there was a problem with dismissing for want of prosecution at that point, if you have got a setting and nobody

shows up, particularly if you have got notice.

HONORABLE SCOTT BRISTER: Well, I have just been told I better send notice to the party, whose address I don't have, before I think about doing that.

CHAIRMAN SOULES: Well, I disagree with that, but anyway that's neither here nor there. Rusty McMains. What I think is neither here nor there. Go ahead.

MR. MCMAINS: Well, the other problem, though, is when you say dismissed for want of prosecution you are assuming that this rule is designed only to deal with plaintiffs. It deals with anybody.

CHAIRMAN SOULES: Yeah. That's right.

MR. MCMAINS: Okay. And that's why it says "strike pleadings." What it says is if you -- when you file a pleading you are representing that you represent someone. If your authority is challenged, whatever that pleading is, then basically if nobody shows up, if the lawyer doesn't show up, the party doesn't show up, then the judge is authorized to strike that pleading, basically assuming

what that essentially does is convert a motion to show authority into prima facie proof that he didn't have authority, and it just kind of basically treats it as if it's not filed because it wasn't authorized to be filed and --

CHAIRMAN SOULES: Chuck Herring. I'm sorry, Rusty. Did I cut you off?

MR. MCMAINS: Well, all I'm saying is that, you know, all of these attempted fixes assume that you are dealing with trying to get rid of a plaintiff's claim. That's not the only place that it works.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: What if you go two-step and you say that the court may remove the lawyer proceeding with the matter or may strike pleadings; however, if the court removes the lawyer, the court before striking pleadings shall direct sufficient notice to the party directly? Something better worded than that but you do it in two steps.

MR. YELENOSKY: What if they

don't have an address?

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I guess I really don't understand the conversation because assume that there was authority to file a lawsuit. Sometime later there is a firm break or whatever causes the authority to then disolve. The attorney doesn't show up. We can't presume that attorney who thinks that he or she is no longer representing that client has sent notice to the client of this hearing. So neither one of them shows up, and all of the sudden we are going to dispose of claims or defenses, whichever, without having to go through the procedures we have to go through with any other case with a pro se litigant.

CHAIRMAN SOULES: Judge Brister?

HONORABLE SCOTT BRISTER: What is this you have authority and then you don't have authority? You have authority until I order that you don't have any authority. You are the attorney of record, and you are the

attorney of record until you are allowed by my order to withdraw, and the client can fire you, and you are still the attorney until I sign the withdrawal. I'm not sure what this you have authority and then it disappeared is. I am talking about the only time I see it is they never knew anything about this. This was some lawyer who was going to collect something for some personal purpose, and there is some client who knew nothing about it.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yeah. Just I guess it's just a philosophical point more than anything else. If an attorney files a pleading for a plaintiff, and let's just take the plaintiff's side for just a moment, and he doesn't or she doesn't have authority to file the document, does that mean that the document is a nullity, or is it just that the person who filed it isn't authorized to continue representing the person but that the petition lives on?

I guess that seems to be a bedrock issue here because as I understand Judge Brister -- and excuse me, if I have

misunderstood it -- I understand Judge Brister to be saying if the attorney doesn't have authority to file the document then the document's a nullity, and I think there is a philosophical issue about whether that's true or not.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I think the answer to that depends because you could have someone, an attorney, without authority to file a pleading, and the plaintiff doesn't even know that it's filed, comes to the plaintiff's attention later, and he ratifies it. He says, "Yeah. Good thing you filed that. I want to go ahead with that."

I think in that case it's not a nullity, but in another case it all depends on the party. The party says, "I didn't know about it. I didn't want it filed, and I don't want it to be a case." It is a nullity.

MR. GOLD: So if you were to kill the pleading because the party didn't show up, you would cut off that right to ratification.

MR. YELENOSKY: Well, that's a good question. Unless there has been an opportunity for ratification because there has been a motion to show authority, and the attorney then is supposed to come in and say, "Yeah. I didn't have authority when" -- either "I have authority" or "if you are showing I didn't have authority when I filed it, I do have authority now."

MR. GOLD: Then there's the issue.

MR. YELENOSKY: And there is the ratification.

MR. GOLD: That's what the issue is.

MR. YELENOSKY: Right. But that doesn't require -- if there has been ratification then the attorney will be able to show the authority at that time. If there hasn't been ratification then the question is was there some mix-up and the party doesn't -- and the attorney doesn't show and that maybe we do need to get notice to the party. So it would seem you would put a notice provision in the end along the lines

that Chuck suggested. The problem there is where you don't have an address, and I haven't heard a suggestion where nobody shows, no address, other than to say when you have an address, but I don't know what to do other than that.

CHAIRMAN SOULES: I don't know whether this is appropriate maybe to get a division of the house on whether this should be a one-step process or a two-step process, maybe just putting it that fundamentally. The one-step process would leave in place something like striking the pleadings. Whether it's that or something else, I don't know, which is now in the rule, would be available to the judge at the time of the hearing and motion to show authority, or should this be a two-step process that would -- where step one would end with the judge saying that that lawyer can't go forward representing that party in that case?

MR. LATTING: Can I ask a question?

CHAIRMAN SOULES: Followed by something else that has to happen before the

striking the pleadings or anything that would affect the party other than losing this lawyer that doesn't have authority anyway.

MR. LATTING: I have got a question.

CHAIRMAN SOULES: One step, two steps, and I am not trying to be specific in any way about what step two might be. How many feel that this should be just a one-step process so that the judge could get rid of the case?

MR. LATTING: Could I ask you a question?

CHAIRMAN SOULES: Or could do something beyond limiting the lawyer going forward? How many feel that it should be --

HONORABLE SCOTT BRISTER: If it's not mandatory but "may."

CHAIRMAN SOULES: Well, that the judge has the power at the hearing on the motion to show authority to, what, strike the pleadings or something of that nature?

MR. LATTING: I'd just like to ask a question. Can I --

CHAIRMAN SOULES: We are going

so many ways. We have got so many debates going here, Joe, and I can't tell whether people are basically inclined to do a one-step process or a two. If we can get a division on the house at least we can limit the debate.

MR. MCMAINS: I think he is trying to clarify the question, though.

MR. LATTING: Well, it seems to me logically it ought to be a two-step process, but I would just like to ask if anybody in this room -- now that I am thinking about it after listening to Scott, is this ever really a problem?

CHAIRMAN SOULES: Judge Brister has encountered it.

HONORABLE SCOTT BRISTER: The hardest problem, the biggest concern is the second step. It is a big problem getting notice to people you don't have an address on. You can't get attorneys ad litem to do it because they don't get paid. I don't have the funds in the county to just hire Joe to do the notice in the paper and find this person, and if we ever find them, I will try to get them to pay you. Who is going to find this person?

Me? My district clerk?

I mean, if this attorney had no authority and didn't show up, they are not going to tell me where they are. They don't probably even know. What is my second step going to be? I am perfectly happy to give everybody all kinds of notice before dismissing their cases and chances to be heard and appeals and anything else they want, but this is a person who is not even here. What am I going to -- what am I supposed to do in this second step?

CHAIRMAN SOULES: Well, I think that's a good point. If we say it's a two-step process, how do you ever get two done?

MR. LATTING: Well, that's my question. Does it ever really happen where you are able to do the two-step process?

HON. ANN TYRELL COCHRAN: Yes.

CHAIRMAN SOULES: Okay. Judge Cochran.

HON. ANN TYRELL COCHRAN: Would it help things -- I mean, because the cases that I had that really bothered me were sort of the polar opposite of Judge Brister's where

it was, you know, one party knowing that for some reason it was the, you know, old law firm who didn't do it, and they don't want to give notice to who they now know represents Corporation X. You know, the old lawyer comes in. It's clear from the hearing that takes place that this is, you know, a lawsuit the client probably wants, that it's -- you know, the current lawyer or the lawyer on the pleadings wouldn't give the president of the corporation notice of the hearing because he thought he could hold onto the case through the hearing. He lost.

Everybody knows there is somebody to give notice to. Everybody was always waving this "shall" language, you know, in my face, and they are the ones where it was just this client was begging to be given notice. Everybody knew, you know, where it was. I could look the client up in the phone book and find them, but it seems to me, Luke, maybe we would take care of the whole problem if we could write the -- and say that if from the evidence presented or whatever happens at the hearing on this that the court has sufficient

information to give the, you know, client notice, then you can't dismiss it or strike the pleadings that day.

Then you have to give them -- but if you don't, because it's really not so much that judges should be having to fair it out, you know, where this unrepresented party is to a lawsuit that she may know nothing about. It's the ones where everybody knows where the client is but have their own agendas for why they didn't want to give the client notice of it that really cry out for this problem, you know, for a second stage.

But it seems to me you could just drop the rule and say if, you know, the identity and location of the unrepresented party are known to the court and have been made known to the court then you can't dismiss it without giving them notice that you are getting ready to do so and an opportunity to ratify if they so choose the earlier actions taken by the attorney.

CHAIRMAN SOULES: David Keltner and then I will get to you, Judge Brister.

MR. KELTNER: I have shown some

language to Alex Acosta that I think may solve this problem. I think the two issues that the two judges have just talked about is a fair indication of what the problem is. In Judge Brister's situation I do think there is somebody to pay for the ad litem, and it's the lawyer who has been taken off this case, and that's what I see that happens, is that's who pays for it.

My thought process is that we might add an additional sentence, and Alex has agreed, that if the court -- whether it strike the pleadings or dismiss the lawsuit makes no difference, to me at least -- but if the court dismisses the lawsuit, sufficient prior notice of that intention must be given to the party.

In that way we -- what that notice is is a due process issue that we can't get out of in any event, and if we have to do it, we are having the lawyer pay the ad litem; or we can do it more simply, which happens not infrequently. We can do it that way.

That way it's really not, Luke, a two-step process. It could be done all at once because my experience is the judge

generally is going to call and say, "Hey, Joe, do you represent this guy? You know, where is he? You-all come -- I want your client at the hearing," and that's what generally happens. Thank God in most instances the lawyer shows up.

CHAIRMAN SOULES: Rusty. Judge Brister, you had your hand up. Did you want to respond to that before Rusty speaks?

HONORABLE SCOTT BRISTER: No. That's okay. That's all right.

MR. MCMAINS: Well, in response to Justice Cochran's comments and her scenario, this rule now, I mean, as it's currently constituted has a "shall" which is a sanction for nobody showing up. Only there is nothing in this rule that authorizes you to do anything dispositive when somebody shows up --

HONORABLE SCOTT BRISTER: That's right.

MR. MCMAINS: -- merely because of the absence of authority of the attorney. Nobody can make the argument under either the current rule with a "shall" or this rule with a "may" that you should strike the pleadings

because you have two lawyers who show up and claim to have any authority. All it says is that when the issue is presented you can direct that this lawyer be precluded. If they actually do show up and show that he doesn't have authority then you can preclude him, but it does not authorize the striking of the pleading if the lawyer shows up. It only authorizes the striking of the pleading if nobody shows up.

HON. ANN TYRELL COCHRAN: But that's not the way the proposed rule reads. It says, "If neither the party nor any person who is authorized to represent the party appears." So that does not count the lawyer who the court finds didn't have authority.

MR. MCMAINS: No. But it says, "If neither the party" -- well, that's to change. That's not what the other one said. The other one, the prior rule said if the attorney whose authority is challenged doesn't show up. See when we changed it, when we changed it back, basically the use of the word "attorney" in the old rule merely meant the attorney who was being challenged. If he

shows up, there is no basis for striking the pleading.

MR. KELTNER: No. It says no party is authorized.

CHAIRMAN SOULES: The old rule has the same thing. Justice Duncan.

HONORABLE SARAH DUNCAN: I would just like to point out that 165(a)(1) doesn't require the court to find the address or dismiss for want of prosecution. It has to appear either in the papers on file or on the docket sheet, and I don't think there is anything wrong whether it's a claim or if it's a -- if it's a claim that you have to go through the dismissal for want of prosecution procedure. If it's a defense, you file a motion for summary judgment because something ought to entitle you to whatever judgment it is that you get, and to just say without any standard at all that the court can strike the pleadings if they want to if a party who hadn't had notice doesn't appear and an attorney who isn't authorized doesn't appear is a gross miscarriage of justice that the rules are supposed to serve.

HONORABLE SCOTT BRISTER: This is Judge Brister again. I agree. The question is to who? Any other case I have got a last known address. In this case the only address in the file is by the person who had no authority to file anything and didn't even show up, so is not cooperating at all with me.

Fine. Summary judgment. Where do I send it? And if the answer is, "I don't know," the case goes into limbo, or we have to go through the much more expensive time-consuming process of notice by publication, appointment of attorney ad litem, and that is very cumbersome.

CHAIRMAN SOULES: Well, I don't know whether it would be due process, but there were a couple of cases out of the courts of appeals last year where the judge just posted the dismissal notice on the courthouse and then dismissed the cases. So they were upheld on appeal as dismissals, and I don't know whether they are any good or not. Well, how --

HONORABLE SARAH DUNCAN: The dismissal rule simply provides if a party is

not represented by an attorney with an address shown on the docket or in the papers on file, it doesn't require that you go find one.

CHAIRMAN SOULES: But it doesn't say what happens if that address is not there and that's -- how can we get this --

HON. ANN TYRELL COCHRAN: Other rules -- other rules, though, take care of that problem because there is a rule that says -- I mean, there are -- except for this situation you have got two situations where you are going to have pro se parties. One is the pro se party filed and signed her original pleading in the case, and we have rules that say if you do that, you have to put your address and telephone number underneath your name. So you have a rule that provides the court with a pro se litigant's address when the person is pro se from the inception.

Then you have the withdrawal of attorney rules that require giving an address so that rules operate to always provide the court with the address that you are referring to in 165(a). Here we have a situation where the lawyer is being taken out, and we don't have a

parallel requirement like we do in the other places in the rules to supply the address to the court. That's what's missing here.

CHAIRMAN SOULES: Okay. What we are really talking about is a total rewrite of this rule. We have got -- here is where we are in Book No. 1. (Indicating)

Out of five task forces two of them have gone to the court and three of them, at least two -- well, three of them are a long way from conclusion. We can either focus on the complaints that have been made and the suggestions that have been made, or we can try to rewrite these rules one to end, but we are not going to be done if we don't get some focus other than a rule isn't right and something ought to be done to fix it.

I am not being critical about that, and what I am going to ask is should we just vote on whether "may" is better than "shall" and get past this rule this time? It can always be made better. Somebody can write what they think it should be in the book here, and we can talk about it, but we can't start writing proposals in this committee and then answering

those proposals, or we are never going to get done.

MR. GOLD: If that was a motion, I second it.

HONORABLE DAVID PEEPLES: Here, here.

CHAIRMAN SOULES: All right. How many prefer "may" to "shall"? Okay. Those opposed? That's unanimous. With that change or now --

MR. YELENOSKY: And the correction.

CHAIRMAN SOULES: And what?

MR. YELENOSKY: The other correction that was made on the language in the last sentence. "If neither the party nor" --

CHAIRMAN SOULES: Okay. And then the moving of the timing to the last sentence to make that -- the present last sentence in the rule, to make it be the last sentence of the proposed rule as well.

MR. ORSINGER: So that's three changes total.

CHAIRMAN SOULES: All right.

Let me give it to you. Just look at the new language that's proposed at the bottom of page 6. Okay. In the third line we delete "his."

In the sixth line after the word "if" we insert "neither." Following that will be "the party nor any person," and then we would carry forward the sentence, "the motion may be heard and determined any time before the parties have announced ready for trial, but the trial should not be necessarily continued or delayed for the hearing," and that is what is now the committee's proposal.

Those in favor show by hands. 15. Those opposed? 15 to 1. Okay. That will be recommended to the Supreme Court, and anyone that wants to make an additional proposal, we can -- if you submit it in writing, we will put it on the docket. Next is (c).

MR. ACOSTA: That's the old Rule 10.

CHAIRMAN SOULES: That's the old Rule 10. Verbatim except striking "in accordance with 21(a)," and what is your reason for that?

MR. YELENOSKY: Superfluous.

MR. ACOSTA: Superfluous and just to make it read more concisely.

CHAIRMAN SOULES: Okay. Any discussion on (c) after you have had a chance to look at it? This is the old rule. Anybody need more time before we vote?

Those in favor of (c) on, what is this, page 7 show by hands. 17. Those opposed? Okay. All in favor. Everybody is in favor, or 17, all who were voting. Now, what's next, Alex?

MR. ACOSTA: Jump to Rule 9. The subcommittee's recommendation on the number of counsel heard rule is to have it deleted because the rule is superfluous, and the trial judge has discretion in how to conduct the trial, including how many attorneys may be heard on each side. The qualification for important cases in our opinion adds nothing.

CHAIRMAN SOULES: So where does this come from? Is this --

HON. ANN TYRELL COCHRAN: Every case is important.

MR. ACOSTA: Yeah. Every case is important. Judge Cochran is right about that. Every case that I handle is real important.

CHAIRMAN SOULES: Was this recommended by some person to us?

MR. YELENOSKY: I think there was. I am looking back to that.

CHAIRMAN SOULES: Well, I guess it doesn't make any difference. Those in favor of repealing Rule 9 show by hands. Any discussion about it? David Perry.

MR. PERRY: I would like to make a comment in opposition to repealing Rule 9. I think that the general benchmark of only having two counsel on each side to be heard is a good one. I think that one of the problems that afflicts the civil litigation system today is a proliferation of lawyers talking and doing things, which tends to unduly prolong and complicate litigation.

I think that it would be -- I think that taking out the reference to important cases, which I agree adds nothing, would be perfectly appropriate, but I think we should retain a

rule there that says no more than two shall be heard except upon leave of court.

CHAIRMAN SOULES: Okay. Buddy Low.

MR. LOW: I totally agree. We had a case with about ten lawyers on each side, and we couldn't even get everybody heard by noon, and somebody says, "Well, wait a minute let's go back to the rules." And they said, "Well, that's right," and that was the only saving grace we had in that case.

HONORABLE SCOTT BRISTER: Is there some way I can do that without this rule?

MR. LOW: Well, there is, but you tell a judge to do it, apparently judges are afraid to issue citations where lawyers have filed frivolous lawsuits, and you bring them up there, and you get to address and so forth, but I think it ought to be here for the court to rely on. I mean, the judge always has a right to run his court within a certain degree.

MR. LATTING: Think if Judge Ito had this rule.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I think if we take it out, having been there so long, it would create more problems than just leaving it there. It may be superfluous, but it's not hurting anything, and if we take it out, it may cause more problems.

CHAIRMAN SOULES: Will the committee accept the change that we not delete the entire rule but delete only "in important cases and" from the prior rule?

MR. YELENOSKY: "Except in important cases."

CHAIRMAN SOULES: It would then read, "Except upon special leave of court."

PROFESSOR CARLSON: Take out the "special."

MR. ORSINGER: Take out the "special."

CHAIRMAN SOULES: Okay. I don't know what "special leave" is. Can you tell us what that is?

MR. MCMAINS: As opposed to ordinary, ordinary leave of court.

MR. ACOSTA: The committee will

accept the amendment, the proposed amendment.

CHAIRMAN SOULES: Drop the words, "in important cases, and..." Delete that. Also delete the word "special." Otherwise no change in Rule 9.

Those in favor show by hands. 18. Those opposed?

MR. YELENOSKY: We had one question. I'm sorry. We had one question about "each side." Has that been a problem as opposed to "party"?

HONORABLE DAVID PEEPLES: This rule has not been a problem.

CHAIRMAN SOULES: Okay. What's next, Alex?

MR. ACOSTA: Rule 10, of course, we have was already discussed in the combined rules. Rule 11.

CHAIRMAN SOULES: Okay. The committee's recommendation to repeal Rule 10 necessarily carries with our other vote to put it in rule --

MR. ACOSTA: It's under proposed rule (c).

CHAIRMAN SOULES: 7(c)?

MR. ACOSTA: Yes, sir.

CHAIRMAN SOULES: Okay. So we will repeal Rule 10, but that language is being added as 7(c), and we have got that record on how that was done, and now you're to, what, Rule 11?

MR. ACOSTA: Rule 11, agreements to be in writing, no proposed changes by the subcommittee.

HONORABLE DAVID PEEPLES: What's that?

MR. ACOSTA: Rule 11, agreements to be in writing.

MR. YELENOSKY: No. We had a change on 11.

MR. ACOSTA: Oh, I'm sorry.

CHAIRMAN SOULES: The committee's report on page 9 indicates some modification.

MR. ACOSTA: Yes. With regard to agreements to be in writing the subcommittee recommends -- the subcommittee is aware of two problems with the current rule. No. 1, can a court enforce a written agreement that is filed after the dispute arises?

No. 2, what does "entered of record" mean? Is it sufficient that an oral agreement be recorded by the court reporter, or does it have to be transcribed or incorporated into a court order or approved by the court before it is enforceable?

The appellate opinions are somewhat inconsistent on both issues. The recommended rule makes clear that written agreements should be enforceable if the writing is filed when enforcement is sought, after the dispute arises. If this is not the rule, the court's file may be filled with incidental agreements between counsel that are never in dispute.

The recommended rule further states that oral agreements should be enforced if recorded by a court reporter in open court or in a deposition. This recommendation reflects the subcommittee's belief that the purpose of this rule is largely evidentiary. Thus, if the agreement is recorded by a court reporter, that purpose is satisfied regardless of where the recording is made, and you can note that this rule only concerns the initial requirement of a record of the agreement for

enforcement. An alleged agreement may satisfy this rule but not be enforceable for some other reason that is a matter of contract law.

The agreements covered by this rule will include settlement agreements and agreements between counsel modifying procedures set out in the rules. Because this rule allows enforceable agreements to be made in depositions, current Rule 166(c) is no longer necessary.

That's the subcommittee's recommendation, and in our various meetings this is one that we have really labored over, and those of us that practice in the trenches know that this rule is subject to various interpretation based on the advocacy of counsel. So we would put it to the entire committee for discussion.

CHAIRMAN SOULES: Okay. Discussion? Bill Dorsaneo.

PROFESSOR DORSANEO: There is a case called Padilla vs. LaFrance that deals with the issue of whether the agreement can be filed afterwards. One of the Houston courts held "no." The Supreme Court has granted a writ on that point with respect to the

interpretation of Rule 11. I like the subcommittee's recommendation because it does probably give the better answer to that question and resolves the conflict in the courts of appeals.

The context, of course, in which that arises normally would be when somebody makes an agreement that might be written that is not filed and then there is a judgment that for one reason or another is unsatisfactory. Let's say it's just an order that dismisses the case, and the agreement cannot be enforced because Rule 11 precludes its enforcement. So the client is left with an unenforceable agreement and a judgment that is final disposing of the case that provides nothing; and that is very unfortunate, I think, especially if you were the counsel who involved himself or herself in that form of representation; but the court has this issue before it, and that may, you know, indicate that we would have to do something subsequent.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: The only problem I have with the language as they have changed

is they say "writing, signed and filed at the time the party seeks enforcement," and as you know, even if you already filed it if a party with -- if it's a dispositive issue and the party withdraws his consent, you can't enter judgment on it.

PROFESSOR DORSANEO: By consent, but you could enter judgment in an enforcement proceeding enforcing the agreement.

MR. MCMAINS: Correct. Well, on a contract problem, but what I am saying is that the problem I have is that the way it's now -- I don't know whether that affects the way the courts have been interpreting the power of the court to enter a judgment or order after a party has withdrawn it's consent because you don't ordinarily have an enforcement issue until somebody refuses to abide by it.

MR. YELENOSKY: But the timing of filing shouldn't bear on that, should it?

CHAIRMAN SOULES: Okay. We are going to take about a 15-minute break. Everybody get a sandwich and bring it back.

We have got way too much to do today to take a lunch break.

(At this time there was a recess, after which the proceedings continued as reflected in the next transcript volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 19, 1995, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,012.00 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 31st day of May , 1995.

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to get a discovery sanctions rule. Whether you get a Rule 13 or some other rule done before the next meeting is going to be fine if you do, but we have got to get the sanctions rule coupled with the discovery rules, I think, before we can release either one of them to the Supreme Court, or we have got to be close to a sanction rule before we can release the discovery rules. The Supreme Court wants the discovery rules very badly to be done. So that's where we have to go to, and if that doesn't apply to discovery then we are pretty much -- you know, we have made some progress except that it has to be reviewed in light of Steve Susman's committee's work.

MR. LATTING: I want to say that the bill before this amendment did apply to the discovery. So until the House changed it the 31 applied to everything. It was --

MR. HERRING: Well, this applies to any discovery motion.

CHAIRMAN SOULES: It would apply to a motion to compel or a motion for protective order or anything like that?

MR. HERRING: This does. Yes.

CHAIRMAN SOULES: It does. Okay. Now, Bill. I will start this way, and we will go around the table clockwise. Bill Dorsaneo.

PROFESSOR DORSANEO: I am troubled by this thought that a motion is limited to something that identifies itself as a motion. Our rules define a motion as an application to the court for an order.

MR. HERRING: Right. In cases where you wouldn't file the pleading very broadly.

PROFESSOR DORSANEO: It wouldn't cover discovery requests made to other parties, but it could cover, you know, a larger number of things than some people are suggesting. I think it probably would cover briefs.

MR. HERRING: And probably responses even though it doesn't say that.

CHAIRMAN SOULES: Chuck, you are going to have to wait your turn. I am going to go around the table clockwise here and get everybody in. Bill, anything else?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Okay. Rusty.

MR. MCMAINS: Well, I was merely asking a point of information, and I don't know whether it's changed or not, but what is the effective date of this statute? How does it read?

MR. LATTING: I don't know. Let me see if I can tell.

MR. MCMAINS: Is it causes of action occurring after? Is it lawsuits filed after, and what's the date?

MR. LATTING: I don't know. Let me look.

CHAIRMAN SOULES: Joe, can you answer the question?

MR. LATTING: I can't. I am looking in the bill to see if I can find that, the answer to that. Come back to me, and I will see if I can find it.

CHAIRMAN SOULES: Okay. Robert Meadows, did you have a comment?

MR. MEADOWS: No. I'm anxious to hear from Mike Gallagher on this.

CHAIRMAN SOULES: All right. Anyone else down to Judge Brister? Okay. Who

else wants to comment on this? Mike Gallagher.

MR. GALLAGHER: Actually, this was one of the 11 points of light in the Texans for Lawsuit Reform legislative program this session, and for what it's worth the proponents of the bill wanted a remedy to exist by virtue of the mere filing of a frivolous lawsuit or a frivolous response or a frivolous pleading, and there is no rhyme or reason to either what passed the Senate or what passed the House, but I can tell you that they are persistent in one thing, and that is people who have either -- who have been sued in what they perceive as being a clearly frivolous cause of action want a remedy to exist and not to provide the party that files the offending pleading with the right of dismissal and then exculpating themselves from any kind of sanctions or responsibility.

At one time, Joe, I don't know what the House amendments did because I was out of town, but at one time there was a remedy in there for damages for harassment, and they were very strong on that, and so to the extent

that your committee is trying to do something perhaps consistent or in amplification of that rule, that was the purpose of the rule.

MR. LATTING: This rule does not provide for exculpation, by the way. This new statute, you can't cure it like you can in Rule 11. So once you file it, it's done.

MR. GALLAGHER: That was the objective, Luke. That was the sole objective --

MR. LATTING: Well, they met it.

MR. GALLAGHER: -- was if you filed a frivolous cause of action they wanted a remedy for damages against the person filing the cause of action, including the lawyer in that set of parties that would be liable. So it immediately creates a conflict between you and your client, but that fell on deaf ears.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Before didn't we adopt a rule pertaining to frivolous type litigation and when you could demand and dismiss? I can't remember what rule, and the legislature passed something inconsistent with

that, and the Supreme Court in the bottom of the rule said anything -- "any legislation contrary hereto is unconstitutional," and the legislature got a little upset about it, and it caused some friction between the Supreme Court and the legislature.

And I don't know how the court -- whether in our job, whether we should draw, keeping that in mind, whether we should draw a rule that we think is the right rule and then let the Supreme Court say okay. Here is what the legislature passed. Now, if you want to go to war with them, you know, here is the rule. If you want to be consistent with them then you need to modify our rule.

So my recommendation would be to draw the proper rule, and let the legislature's error continue to exist because they have made many of them. I mean, end of story.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: Well, I had talked to a couple of members of the court, and my impression is they don't want any gratuitous conflict with the legislature if we

can avoid it. So we ought to try to write around the statute as much as we can. It does say expressfully in the bill that notwithstanding 22.004 the Supreme Court may not amend or adopt rules that are in conflict with the statutes. That's a pretty direct message, at least what the legislature's sentiment is, albeit, however, cheerfully unconstitutional as that may be.

The bill is -- the other one, as Joe said, was absolutely incredibly disastrous. This one is merely very bad. It does apply to motions and pleadings; and as I said tongue in cheek, who knows what that doesn't include. I think Professor Dorsaneo's point is well taken. Probably the drafters intended it to be broader than that even, and it probably would apply to -- because the cases have used the term "pleading" so broadly as, you know, beyond the scope of the rules, I think. It probably does have very broad reach.

It's going to apply to discovery motions. So it's a little bit hard to just say, well, this is a Rule 13 kind of thing, and we won't deal with it. I encourage you to read it.

They adopted the subparts of section one from Rule 11 precisely, and that's where it came from, but they didn't adopt the predicate in Rule 11 which talks about presenting motions. That is not only signing them but presenting them.

MR. LATTING: You just have to sign these.

MR. HERRING: Well, except for the first subpart refers to presenting them. So it is really an inconsistent structure they adopted. They also have retained somehow or other sanctions if you don't show due diligence. Now, due diligence isn't mentioned in the first part of the rule as something you have to show, but if you don't show it, then the court may award all costs for inconvenience and harassment and out-of-pocket expenses incurred or caused by the litigation, which doesn't, again, confine it just to motions or pleadings. So it's a very inconsistent structure that they have developed, and I do, as Joe said, encourage everyone to read it and try to figure out what we can do with this. It's going to be

difficult, though.

CHAIRMAN SOULES: Richard Orsinger.

MR. LATTING: Luke, your question about -- you were asking when it's -- it doesn't say when it's effective, and I assume it will be 90 days after the end of the session it just becomes part of the Civil Practice and Remedies Code and I suppose would apply to anything filed after that date, I suppose. I wouldn't think it would be just restricted to suits filed after that date.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Regardless of the merits of the statute, on this constitutional question I will have to say that it's my view that the power of the legislature is plenary and is limited only by the contures of the Texas Constitution and that the legislature has ultimate control over the rules of evidence and the rules of procedure in our courts.

It's my understanding that that's true at the federal level, that the United States

Congress is the final arbiter of Rules of Federal Procedure, and there has been some discussion about how the legislature's statement that a rule cannot override a legislative act as unconstitutional. I don't believe that, and maybe we don't need to debate that, but I would not want us to just assume that that's unconstitutional for the legislature to restrict that.

CHAIRMAN SOULES: Well, we can't assume that it's unconstitutional because it's never been decided. I know what happened when the legislature passed a frivolous suits part of Tort Reform One. This committee recommended to the Supreme Court more or less as a protection of the Supreme Court's rule-making authority that they adopt a rule that tracked the legislation exactly, and it did, and repeal under its repeal powers the statute because it was now in the rules where it belonged, the court thought.

Well, that infuriated some people in the legislature, and they came back and passed -- repassed the same statute that they had passed the previous time and said the Supreme Court

couldn't repeal it. Then the Supreme Court -- and that had cure periods. Then the Supreme Court amended the rule and took the cure periods out. So now we have got a statute with cure periods, a rule with no cure periods, which one applies or both or which trumps which, I don't know, but they are both there right now.

But the Texas Constitution appears, in my judgment, to give the court rule-making authority as the third branch of government, but the court has never relied on that or never expressly relied on that because when it started in 1940 -- 1939, and the legislature of 1939 is when the Supreme Court got the legislature's okay to make rules, and since that time the Supreme Court has pretty much honored what the legislature set in place at that time whether it's constitutional or not. So that's just not resolved, and if you talk to some of the people you quickly get to pay dirt, which is that the legislature appropriates the funds to run the court system, and there is another piece being battled right there. Mike Gallagher.

MR. GALLAGHER: I do want to point out what happened, while it may not be probably within the purview of what we traditionally call sanctions, what the legislature has done and can do is create a statutory cause of action, and that's what has happened essentially in this context, Joe. They have created a cause of action for the filing of a frivolous cause of action.

I agree with Buddy that we need to go ahead and adopt such rules as we deem appropriate and then let the court and the legislature worry about this, but by way of background you should know that there is a great deal of conversation, Luke, relative to withdrawing the conveyance of the rule-making power of the court on the rules of evidence from the court and also consideration of withdrawing the court's rule-making power.

There is a real conflict going, and as you wisely pointed out, the appropriations section or power that the legislature has is no small tool, and I think we should be aware of the fact that at least the legislative intent is to create a statutory cause of

action, and for us through our advisory capacity to pass some kind of rule that will provide for stronger sanctions and in the absence of activity of that type, I think we can anticipate that the legislature will re-address this question and our rule-making power and the whole basic idea of whether or not we have the rule-making power.

CHAIRMAN SOULES: Okay. Joe Latting.

MR. LATTING: I am not prepared to declare this statute unconstitutional, and so what I want -- I agree with -- Buddy, I agree in general with you, but what I am going to be doing is asking the committee to write a rule that takes into consideration this statute and as best we can to write what I think TransAmerican says laid down with this statute. That's the direction I am thinking about heading, and maybe that's not the direction the committee --

MR. LOW: No. I didn't mean to write -- just to ignore that. That wasn't my purpose in saying you ignore it. I think we write what we think is proper, but we have to

be aware of it, and now so does the Supreme Court.

CHAIRMAN SOULES: Right. If the proposed rule departs or in any way potentially conflicts with the legislation then we certainly need to advise the court to that effect so that they can take that into account. Probably there is a way to do this so that we don't conflict with the statute, and we can still get good rules.

MR. LATTING: Please send us your letters. Please write and let me know how you feel so that we can take it into consideration in drafting the rules.

CHAIRMAN SOULES: Let Joe have your input on that. Anyone else down here? Okay. Judge Ann Cochran.

HON. ANN TYRELL COCHRAN: As I understand the constitutional question, it's not really so much a new standard of question of constitution as it's into the whole strong but meshy area of the power of courts, and the federal judiciary struggles with reference to what Richard Orsinger said a minute ago about how the legislation works in Congress. I

mean, the federal judges aren't real happy about it. A growing number of them feel that they have not exercised their inherent powers as they should have, but the body of law around the country is very small.

I mean, there will be in a Texas Law Review article later this year that came out of a judicial conference in Cincinnati an article by Dan Meader of the University of Virginia about inherent powers, but it's just something that judges do not -- it's got to really be, you know, go to the mat time. It has to be something that really threatens the independence of the judiciary before they start, you know, start that war because it's a war that, you know, leaves a lot of blood and bodies around after it's over and has long-term consequences.

So I would -- I am a big believer in the inherent power of the courts and that the judiciary doesn't exercise it often enough, but I sure wouldn't be betting that this is going to be something that this court is going to feel strongly enough that they are going to want to go to war with the legislature over

it, and I just don't think it's up to us to be making -- this isn't a should we look and see if it's unconstitutional. Inherent power is only something that exist if the judiciary decides to exercise it, and I think that's the court's call, not ours.

CHAIRMAN SOULES: Okay. Anything else on sanctions for now? We are going to be looking at a comprehensive report at our next meeting, which will be in July.

Okay. Let's go to Alex. Have you got your materials here today, Alex Acosta?

MR. ACOSTA: Yes, sir.

CHAIRMAN SOULES: This will be --

MR. ACOSTA: These are Rules 1 through 14.

CHAIRMAN SOULES: One through 14 in your big agenda, Volume One, and the report dated March 15th, 1995, that everybody received or that everybody was mailed. I don't know if you received it. With the recommendations of Alex's subcommittee. So let's start, Alex, I guess with Rule 1, and if you could tell us what the -- or is Rule 4 the

first one? Let's see.

MR. ACOSTA: On the first three rules including 3(a) the subcommittee recommends no change. The first recommended change comes with Rule 4. I think I said before we set forth the current rules a little index at the front and then we addressed the responses that we had, and we have red-lined the rules that we recommended changes for and have given you a subcommittee replication right after the rule. Of course, it's obvious that this format was done by Professor Albright and not done by me because it makes a lot more sense. Our first recommendation is on Rule 4, computation of time. The subcommittee recommends --

CHAIRMAN SOULES: Let's just take them one rule at a time. Somebody wrote in and wanted to change Rule 1. What did they say? Is that right?

MR. ACOSTA: Alex, do you have that?

PROFESSOR ALBRIGHT: I think the way we did this is if you look -- if we go through the changes, we have addressed all the

letters that we have received in the next page, and the changes, I think the best way to do it may be to go through our recommended changes. Most of the letters are addressed by our changes, but then we could go through the ones that we voted not to accept the recommendation after we have gone through our rules.

CHAIRMAN SOULES: So would we start on page 3?

PROFESSOR ALBRIGHT: I think if you look on page 1, which is the current rules.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: And it says which ones we have suggested changes. The place to start would be Rule 4, where we have recommended some changes be made.

CHAIRMAN SOULES: Well, but we need to make a record of why we don't agree with --

PROFESSOR ALBRIGHT: What I am saying is I think we should do that after we go through our changes because you will see that most of these are addressed by the

changes that we made.

CHAIRMAN SOULES: Okay. Okay. I understand. Okay. Go ahead and proceed then if that's the case.

MR. ACOSTA: Do you want me to proceed with the --

CHAIRMAN SOULES: Yes. In the manner that you are suggesting. We start with Rule 4 then?

MR. ACOSTA: Yes, sir. The subcommittee recommends that the reference to Rule 21 be deleted so that Saturdays, Sundays, and holidays are not counted in the three-day notice period required for notice of hearings. The change prevents giving notice on Friday of a Monday hearing. Notice of a Monday hearing must be given on Wednesday unless a court orders otherwise.

The subcommittee has also added the language from the Texas Rules of Appellate Procedure proposed Rule 5(a) regarding a closed or inaccessible clerk's office. The other change, "which" to "that," is grammatical.

The last issue, the subcomittee also

recommends that the TRCP contain a general rule for filed papers similar to TRAP 4 as reported out of the appellate rules subcommittee that would contain the provisions of at least TRCP 4, 5, 21, 57, 74, 75, and 57.

CHAIRMAN SOULES: Well, I want to be sure that we understand 21 and 21(a). The exception in Rule 4 was intended to mean only this: When three days are added because something is sent by certified mail you count the weekend in that three-day period only. Because otherwise you are going to be counting, maybe you count -- you can't count weekends twice. That's the only place. If you set a motion on three days notice they don't count. They are not a part of the three days, but if you add three days because of certified mail service they do count because you have already got 30. Now this extends to 33. That was the intention of the exception, and that was only intention of the exception.

MR. YELENOSKY: But it did refer to Rule 21, and if that was the intention, it wasn't --

CHAIRMAN SOULES: And that's an

error, is it?

MR. YELENOSKY: That's an error that we are correcting, I think.

CHAIRMAN SOULES: Well, help me understand that because I didn't want to --

MR. YELENOSKY: Well, I'm sorry I didn't raise my hand, but when we looked at it the reference is -- you'll see about halfway down the rule is Rules 21 and 21(a).

CHAIRMAN SOULES: Okay.

MR. YELENOSKY: And if what you are saying is the correct intention, and I think we all agree on that, then it shouldn't refer to Rule 21. It should just refer to Rule 21(a).

CHAIRMAN SOULES: Okay. I understand.

MR. YELENOSKY: And so we took out the reference to Rule 21.

CHAIRMAN SOULES: And left 21(a) in there?

MR. YELENOSKY: Yes.

CHAIRMAN SOULES: Great. Okay. That clarified it for me. Anyone else have a concern about that? Anyone opposed to that

change?

Being no opposition to it that will be recommended. So that's 21, and what's the next part of it, Alex? Alex Acosta.

MR. ACOSTA: The second part is we changed -- we made a grammatical change, which is that in the general rule to file papers similar to Texas Rules of Appellate Procedure 4, which we have the appellate rules to make it consistent.

CHAIRMAN SOULES: Okay. Any opposition to the underscored language that's proposed at the bottom of Rule 4 on page 4 of the committee report? No opposition? Further discussion? Bill Dorsaneo.

PROFESSOR DORSANEO: Rusty and I have been talking about this, and it's really a matter of trying to ascertain what everybody thinks the right interpretation of this would be, but let's assume that we file something by mailing it. I gather if the mails were open and available, that the clerk's office being closed and inaccessible provision would not be applicable. You follow what I'm saying? Let's say the clerk's office

is inaccessible but the mail office is open, available, and accessible. That would appear to be the case that you need to mail on the day that mailing is --

MR. YELENOSKY: Well, that's unless you --

CHAIRMAN SOULES: Bill, go ahead and finish.

MR. YELENOSKY: Okay. Sorry.

PROFESSOR DORSANEO: I'm finished.

CHAIRMAN SOULES: Okay. Who wants to respond to that answer? Who was talking?

MR. YELENOSKY: I was.

CHAIRMAN SOULES: I'm sorry, Steve. I didn't think he was finished.

MR. YELENOSKY: That's all right. I cut him off at the end. If you go to file something and find out that the clerk's office is inaccessible when you go to file it on the last day and putting it in the mail wouldn't count as filing then it's inaccessible, right?

CHAIRMAN SOULES: It would be

filed early. Alex Albright.

PROFESSOR ALBRIGHT: I think this is a bad rule because I think we now have Supreme Court cases that this is an attempt to codify Supreme Court cases. I think it's better to leave it alone and look at the Supreme Court cases precisely because of that reason, but the reason we added this was because we voted to include it in the appellate rules, and so we thought they should be consistent as to when and how you file, et cetera.

CHAIRMAN SOULES: Well, take the hypothetical that the clerk's office is closed as the governor closed the clerk's offices for the afternoon only of whatever, what was it, Good Friday, I guess it was, this year; and assume he closed it all day because it complicates it about half a day. Close it all day. If you go ahead and mail on Friday then you have until Monday to file. So you can file early if you go ahead and mail it. If you don't and you take it to the court, you have got 'til Monday. So why is mail an issue? I am not following why mail is a

factor. Rusty.

MR. MCMAINS: Well, but the point is this: The rule as changed here, and maybe we did this in the appellate rules, too, but I came and didn't catch it, but if the courthouse -- if the clerk's office is closed, under this rule and, therefore, doesn't open 'til the next day, then you under our rules and under these rules as proposed can wait to mail it 'til the next day.

CHAIRMAN SOULES: Right.

MR. MCMAINS: Because we changed it 'til the last day for filing. If the last day for filing is extended for physical filing, it's extended for mailing. Bill's point was if you are going to mail it, it's kind of stupid to worry about whether the clerk's office is open or not because you are mailing it on the last day anyway.

CHAIRMAN SOULES: Why make it an issue? I mean, it's three days. Why is it even a factor? Suppose even if you do get three extra days to mail it, we don't want to build in the trap that if you mail it you have got to mail it --

MR. MCMAINS: What do you mean, three extra days to mail it? I don't understand.

CHAIRMAN SOULES: Huh?

MR. MCMAINS: What are you saying, three extra days? Three extra days doesn't have anything to do with any of it.

MR. ORSINGER: Friday to Monday on Luke's example.

MR. MCMAINS: Yeah. But I'm just saying it doesn't make any difference. It doesn't matter whether you mail it on Sunday even under our current rules. It doesn't matter whether the post office is open or not.

CHAIRMAN SOULES: Let me see if I can articulate this a little bit better. Okay. You are going to file it, but the clerk's office is closed. You are going to physically file it, so you have got 'til Monday. Okay. Why make an exception to that and say but if you are going to file by mail you have still got to do it on the nonextended day? It just creates another trap when we are trying to get rid of traps, it seems to me,

and just because you -- because since the clerk's office is closed on Friday and you have forgotten it and you get lucky and you have got Monday to mail, so what?

Judge Duncan.

HONORABLE SARAH DUNCAN: This has perplexed me for three years now. Can somebody tell me where in 4, 21, or 21(a) it provides that you can file by mail, not certified mail, but file by mail in the lower courts, in the trial courts? It may be in here, but I just keep reading these rules.

MR. HAMILTON: Rule 5. In the second paragraph of Rule 5.

HONORABLE SARAH DUNCAN: Five, which is actually entitled -- okay. Okay.

MR. MCMAINS: Five. Yeah. It's not in four.

HONORABLE SARAH DUNCAN: Thank you.

CHAIRMAN SOULES: Okay. Buddy Low.

MR. LOW: Luke, I totally agree with you. I think the best thing we can accomplish is making these things simple

enough so when people know when they have got to file it, and the more you get in there the more complications you get. If you start drawing distinctions between these things, the different methods, then you complicate it. We need to uncomplicate it, and I don't care. I mean, it's not a sin if you get an extra day or two or something like that. That's not a big sin. Just be definite so people know when they have got to do it, and I think that will complicate things.

CHAIRMAN SOULES: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: My only point was I don't want it to be a trap for somebody to think when they go to the courthouse and it's closed that they don't have to mail it if the rules require them to mail it, to file it, because mailing is available.

CHAIRMAN SOULES: There is a court of appeals case at least that said that they should have filed -- they should have filed on time because even if the courthouse was closed they could have mailed it;

therefore, there were other ways to get it filed. So they are out of court, and this fixes that.

PROFESSOR DORSANEO: Well, my point is that it's not completely clear to me that the language "when the act to be done is the filing of a paper in court," that that means the physical filing with the clerk rather than filing it in court by mail.

MR. LOW: I see your point. You were thinking way ahead of me as usual.

PROFESSOR DORSANEO: I don't know whether we need to change the language, but just so we understand that it means one thing rather than something else.

CHAIRMAN SOULES: So you're saying the construction of this rule is that mailing on the next day the court is open may not get it?

I see. And we need to correct it so that mailing on the next day the court is open does get it, if I am understanding the consensus here. How many agree with that?

MR. LOW: Well, but if you put filing --

CHAIRMAN SOULES: Okay. Buddy Low. Speak up, please. I can't hear you.

MR. LOW: If you put "filing as defined by the rules," mailing is filing as defined by the rules. You know, go "filing as defined by the rules herein" or something like that and that takes care of both of them.

MR. YELENOSKY: Or just say "filing."

MR. LOW: Or "filing," yeah.

CHAIRMAN SOULES: Just fix that first clause. "When the act to be done is the filing or" phrase. "The filing of a paper in court."

MR. YELENOSKY: Just filing a paper.

CHAIRMAN SOULES: To be broad enough to include any type of filing that counts. That's fine. Alex Albright.

PROFESSOR ALBRIGHT: But if the mail service is open why should I have to -- I mean, it doesn't make any sense to call the courthouse to see if it's open to find out when I need to file it. I would move that we delete this sentence or these two sentences

here and in the appellate rules.

CHAIRMAN SOULES: Well, the appellate rules are gone. They have already gone to the court. Is there a substitute motion not to include this --

PROFESSOR ALBRIGHT: Yes.

CHAIRMAN SOULES: -- in the Civil Rules of Procedure? Is there a second? Fails for a second. So let's work on it.

What we have got to do is make this when the act to be done is filing of a paper in court, well, there are other ways to file than filing it -- well, I don't know whether there are or not but --

MR. YELENOSKY: Just filing. When the act to be done is filing.

CHAIRMAN SOULES: So that -- well, that's kind of awkward, too, when the act to be done is filing. Maybe that's the way we wrote it in the appellate rules, but is it the consensus of the committee that we would have this rule here and that any means of filing that is authorized by the rules would get extended to the next day when the clerk's office is open? Is that the

consensus? Those who agree show by hands.

Okay. Those who disagree? Everyone agrees that's what we are trying to accomplish. So we will rewrite it to do that, and Judge Duncan.

HONORABLE SARAH DUNCAN: I think we are going to make a serious mistake if we rewrite this in a way that's different from what we have got in the appellate rules, and I would point out that it's not -- what this rules does is it extends the period. It doesn't distinguish between types of filing. If the clerk's office is closed or inaccessible, the period is extended.

MR. YELENOSKY: Right.

MR. LOW: Right.

CHAIRMAN SOULES: Well, I just asked the subcommittee to give it some thought to see if there is any way to clarify it so that we are not -- we don't get a construction that some alternate method of filing is not extended. The consensus of the committee is that all methods of filing would be extended.

The last sentence concerns me, and I think it would fix my concern if it started

out "prima facie proof of closing or inaccessibility" because we have had a situation, and it's now the subject of a serious disciplinary proceeding in San Antonio where a lawyer and a party did some things to extend some time that were pretty bad. If all it takes -- if this was what this means that proof, you prove the courthouse was closed by the affidavit of a party, that doesn't seem to me to be enough. It ought to -- maybe prima facie proof like certificate of service is prima facie proof and its rebuttal. Anyone share that concern, or do you want to leave it the way it is?

MR. YELENOSKY: In the case you are talking about, does the case you are talking --

CHAIRMAN SOULES: Just to get to this, "Proof of closing or inaccessibility of the clerk's office may be made by a certificate of a party."

MR. LATTING: Well, that doesn't seem like it's too big a problem, Luke, because it just says it may be made. A party could say the clerk's office was closed

and then presumably the other side would offer testimony that it wasn't.

CHAIRMAN SOULES: So you are not concerned about prima facie?

MR. LATTING: It doesn't concern me.

CHAIRMAN SOULES: Judge Duncan.

HONORABLE SARAH DUNCAN: Judge Brister just said what I was thinking. It doesn't concern me because it doesn't say conclusive proof. It says that that is proof. It's up to the court to weigh all of the proof before and make a determination.

CHAIRMAN SOULES: Okay. Anyone else on this? Go ahead. Richard Orsinger.

MR. ORSINGER: I have just compared TRCP Rule 4 to TRAP Rule 5, and they are identical in this language.

CHAIRMAN SOULES: Okay. Okay. Are you proposing we vote on this just the way it is without any further changes, without even addressing the --

MR. ORSINGER: No. No.

CHAIRMAN SOULES: -- first part?

MR. ORSINGER: I just wanted

everyone to understand that if we have a problem here, we may have a problem there as well.

CHAIRMAN SOULES: Let me get a division of the house. Those who feel there should be some attention given to the first phrase itself as we talked about earlier so that all methods of filing are clearly extended -- or this may be better, are extended, or how many feel like this takes care of it?

Okay. Those that feel some additional attention should be given to that, show by hands. Eight. Those who feel like we should pass this just as written show by hands. Eight.

Everybody vote this time. We have got more than 16 people here. Take a position so that we can -- I mean, so that the committee will have guidance. Those who feel -- let me just put it this way. Those who are in favor of Rule 4 as presented by the committee here on page 4 show by hands, the whole thing. 13.

Okay. Those opposed? Eight. Okay. So it will go just the way it's written to the

Supreme Court. By a vote of 13 to 8 the committee's proposal is approved for recommendation to the Supreme Court. Judge Duncan.

HONORABLE SARAH DUNCAN: The one proposition I have today is I would like to vote on the subcommittee's recommendation of parallel to TRAP 4 that gets 5, 4, 21, and 21(a) all in the same place and organized.

CHAIRMAN SOULES: Is there any -- has that been proposed in writing someplace?

HONORABLE SARAH DUNCAN: I believe that's the last paragraph on page four.

CHAIRMAN SOULES: Okay.

MR. YELENOSKY: But since that encompasses rules outside of 1 to 14 we didn't draft it.

PROFESSOR ALBRIGHT: We are happy to do so.

MR. YELENOSKY: Yeah. We are happy to do it.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: In the division of labor here Rules 1 through 14 were selected for this committee because of what reason? Are those the general rules that begin the rules?

CHAIRMAN SOULES: They are there just way the old rule book is sectioned.

PROFESSOR DORSANEO: Well, the task force on recodification pointed out that really there are two general rule sections. The general rules that once applied to all of the rules including the appellate rules, which of course left the main rule book, and then the general rules that are applicable to district and county level courts; and those two groups probably ought to work together such that when the general rules are dealt with all of the general rules are dealt with by the same group of people.

CHAIRMAN SOULES: Okay. Well, if the chairs of those two subcommittees will get together and see if you can come up with a recommendation that -- or with language that

would meet this recommendation that your committee has made. Could you do that, Alex? And chair of the next subcommittee is who?

MR. ACOSTA: I think that's a real good idea.

CHAIRMAN SOULES: David Beck. Work with David Beck, or I may have to replace him because of his Bar duties this year. I am going to call him. I haven't talked to him about that, but if he has a problem with the load he's got, which I can't imagine he's not going to have a problem with that load, then we will work something out with you.

PROFESSOR DORSANEO: One other comment, Mr. Chairman. We did deal somewhat with a number of these problems in the recodification task force draft including this exact problem; and although, you know, what that small group of people did is, you know, only as good as what this committee thinks it is, you might want to take a look at that document to see if it provides you with any benefits from the standpoint of solving some of these problems from a drafting standpoint.

CHAIRMAN SOULES: Some of this

has already been done. You know, in 1990 we repealed Rules 72 and 73 and moved all of that into rule -- whatever we thought was necessary to preserve we recommended it be moved into Rule 21. The Supreme Court adopted those recommendations. So there is some progress on this that's been done. We just need to finish it, and if you -- Alex, if your subcommittee will work with David's or whoever his successor is on that, we will get to it.

MR. ACOSTA: Yes, sir.

CHAIRMAN SOULES: What's next? Good idea, Judge Duncan.

MR. ACOSTA: It's Rule 5. The subcommittee's recommendations, again, are consistent with trying to be consistent with the Rules of Appellate Procedure. Changes are made to make TRCP consistent with TRAP 4(b). The subcommittee has added the italicized language "in the absence of such proof" in the last line for clarity and suggests that that change be made to TRAP 4(b) as well. As the chair has informed us, the appellate rules have already gone forward to the court, but at the time that was our recommendation.

CHAIRMAN SOULES: Okay. Any opposition to Rule 5 as proposed by the subcommittee? Everybody have a chance to read it? Bonnie Wolbrueck.

MS. WOLBRUECK: I just have one question as far as the last sentence now. Does that clarify that the clerk does not have to keep the envelope or wrapper? I think that that's a real undue burden for the clerks to keep all the envelopes and wrappers that we receive, and I am just wondering if there could be some comment at least to the rule that says that the clerk is not required to do so.

CHAIRMAN SOULES: As I read it the wrapper of the -- does this even say that the wrapper of the package is --

HONORABLE SARAH DUNCAN: Legible postmark.

MR. MCMAINS: Yes. A legible postmark.

MS. WOLBRUECK: I know that this issue has been brought up to a couple of clerks in request for producing the envelope or the wrapper that the document was filed in

for proof of the postmark, and I think that's a real undue burden that's being placed on the clerk's office to keep every envelope that we receive.

HONORABLE SARAH DUNCAN: Luke?

CHAIRMAN SOULES: What do you propose? I'm sorry. Judge Duncan.

HONORABLE SARAH DUNCAN: I could offer a suggestion. I don't know if this would work or not. Our clerk has a stamp and stamps it "legible United States postmark affixed, dated," and you just fill in the date and throw away the wrapper.

MS. WOLBRUECK: That's a lot of work on a district clerk's office that receives thousands of envelopes daily.

MR. YELENOSKY: But what you're saying is --

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I'm sorry. What Sarah Duncan is saying literally under this rule wouldn't constitute proof because it's not a legible postmark. It's a record of a legible postmark signed by or certified by

the clerk. Even the rule -- but the rule as it reads doesn't require the clerk to keep that stuff. I don't know. If it's available and the party can prove it up, it's acceptable as proof, but the rule itself doesn't require you to keep it, and I don't know whether that's been -- the clerks have been instructed to keep that by the judges or what.

CHAIRMAN SOULES: Should we just delete that first "legible postmark" and require the parties to keep the receipt? Rusty.

MR. MCMAINS: I mean, as a practical matter I don't -- again, the thing says that -- what the rule actually says is that a legible postmark is conclusive proof.

MR. YELENOSKY: That's true.

MR. MCMAINS: So that in truth and in fact, the clerk need only confirm that there is a legible postmark with the date or make an entry somewhere of what the postmark shows and then they can throw the wrapper away. Because that's the only -- that's the conclusive proof. There is no real requirement that they keep the evidence of it

because it can't be disputed. It's just that somebody official has to determine it.

CHAIRMAN SOULES: Bonnie, you had your hand up and then I will get to Judge Brister.

MS. WOLBRUECK: Again I have to state that that's placing an enormous burden upon the clerk to note that on every envelope and wrapper that we receive.

HONORABLE SCOTT BRISTER: What is the problem?

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: What is the problem with keeping the envelopes and the wrappers? Just space?

MS. WOLBRUECK: Space.

HONORABLE SCOTT BRISTER: Well, I mean, you know, the fact is it was mailed. It's only going to be shown on the postmark. Which would you prefer, space or an effort to make a stamp? But we are going to have to do one or the other because that's the way it was sent. That's the article that was sent. The postmark shows when it was sent. So that's

what we need. So which would be better?

MS. WOLBRUECK: Again, I am just bringing it up as a problem that clerks' offices are having. The issue doesn't arise real frequently, but it has arisen in several clerks' offices. Of course, the space is a major issue. I mean, we get hundreds and hundreds of pieces of mail, and it's not our determination to decide which one is the one that we need to keep as far as, you know, is this an important filing deadline envelope, or is it not? So it would be -- you know, the determination has to be made by the clerk to keep all of it because we are not going to make the determination on is this document that we have received something that needs to be noted. I am just noting it's a problem, and please understand that it is.

CHAIRMAN SOULES: Well, we are obviously storing a lot of paper that doesn't need to be stored, and I'm assuming that it's the case that you keep envelopes for everything, even those that don't necessarily have filing deadlines.

MS. WOLBRUECK: That's exactly

right because the clerk cannot make that determination if there is a filing deadline or not.

HONORABLE SCOTT BRISTER: Sure.

CHAIRMAN SOULES: If somebody files a request for admissions, you keep the envelope, right?

MS. WOLBRUECK: That has been the practice in some clerks' offices.

CHAIRMAN SOULES: Even though the only thing that can be an issue as far as timing is concerned is whether or not the responses were filed on time. So now you have got two envelopes that you're keeping at least, and you're storing this forever, and you feel like that needs to be addressed and thought about.

MS. WOLBRUECK: Yes. I would just hope that the committee would address it some way, and I am not sure that there is a way for it to be addressed. I would suggest that if it becomes an important issue by somebody filing it, to get a certificate of mailing from the U.S. Postal Service would certainly -- I mean, if I were filing

something and wanted to make sure that it was timely filed I would certainly want to clarify that. That's my suggestion.

CHAIRMAN SOULES: Richard Orsinger, you've had your hand up for some time.

MR. ORSINGER: I know in my office that envelopes can make the files very unwieldy because they are not full-size, and the file starts getting "deelywamped" and everything else. So we strip the front cover off of the envelopes, but that's plausible in my office. That's not plausible for a district clerk. And out of the thousands of letters that they get, there is only going to be one or two that are mailed, you know, before the deadline that are received after the deadline; and if they throw the postmark away, you can still prove it up by an affidavit.

Somebody is going to have to lie under oath if they are going to commit a fraud on the court system, and I think that storing all of those letters and everything else is way too much a price to pay so that we have

district clerk proof of when it was mailed as opposed to relying on people not to commit perjury.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I would just like to second what Richard said. That's what I was going to say.

CHAIRMAN SOULES: Okay. Rusty, and then we will go around the table.

MR. MCMAINS: Well, all I was going to say is this rule does not say anything about the clerk has to keep anything. It is not the place that any of this issue should be addressed. This says if you do this then you have filed it in time, and it says this is the way that there is proof and gives you alternative means of proof. There is nothing here saying or directing the clerk to do anything. If the judges have told their clerks to do something, if they want to be addressed in some administrative rule somewhere or local rules, different deal, but none of our rules attempt to direct clerks to do anything with regard -- when we are talking about manners of proof. That's not something

that should be fixed or addressed in that rule.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yeah. I totally agree with Rusty, and I think that very few practitioners really expect the clerk to be keeping the envelopes to tell you the truth. In my office if we are concerned about filing, we get a receipt. If you are concerned about keeping the envelope, hell, send an envelope with it to the district clerk and say, "Please return the wrapper to me," but there is nothing in the rule that says that the clerk has to keep it, and I don't think we should be messing with it. I think all we are doing is creating work for everybody by changing the rule in that regard.

CHAIRMAN SOULES: Bonnie.

MS. WOLBRUECK: I agree with what you are saying. I just wanted to note that the issue has been brought up in court cases -- or not court cases, but just before court sometime where the clerk has been asked to testify on what date this was received, prove to me what date, you know, the postmark

said, and I am just telling you that, you know, it's come up, you know, and I agree with what you say. Not all clerks keep it. Some of them do. Some of them do not.

CHAIRMAN SOULES: Judge Cochran, did you have your hand up?

HON. ANN TYRELL COCHRAN: I think in the real world, I mean, judges don't tell district clerks what to do. District clerks look to the rules, and we do need to keep in mind that the clerks are looking to these rules for guidance just as the lawyers and judges are, and under our system of selecting district clerks there is no supervisory power. At least in some counties you have to -- you know, the judges and the district clerks fight all the time because of the selection system and the way the clerks' offices are run.

So I don't think it is -- I think we are taking an overly narrow view of who these rules are for if we say, well, we shouldn't be worrying about what the clerks do. I mean, if it says that this is going to be proof, I think that it would be very helpful on a very

important and practical level to state whether or not keeping them was required.

Also, keep in mind, Luke, going back to your example about the request for admissions, right now what you said is right. If we adopt this new set of discovery rules, the date that set of request for admissions was mailed could be an operative date in the litigation, and we are going to have more and more disputes over when the discovery period started and whether or not some of the last discovery events were done, you know, in time to actually be permitted. So the mailing is going to be more and more of a dispute.

I have one other real quick point to raise about the conclusive nature of the proof. It is not frequent, but I'd guess that probably every courthouse in the state at least at one time has had an envelope mailed to the clerk with nothing in it. You know, people do that. They mail -- sometimes it's certified and return receipt requested, and it's empty. What are you going -- I mean, do you really mean conclusive proof? You know, they have got green cards. It's easy to get a

green card. How do you prove what was in the envelope that went there? I just raise it.

CHAIRMAN SOULES: Let me go back to Doris Lange because she hasn't had a chance to speak on this yet and then we will come back around the table.

MS. LANGE: I believe that what the chair said earlier, a legible postmark affixed by the U.S. Postal Service, that part of that sentence puts it into the clerk. Where else would you get that legible postmark except from the envelope that was the clerk's property really, and I think if you just take out that part of it, it would solve all the problems and then no clerk or attorneys could determine that that would cause it because you are following up that registered receipt mail or certified mail. Those receipts would be acceptable, and this would do away with the postmark receipts being the problem.

CHAIRMAN SOULES: I mean, certainly some clerks being conscientious are going to say, "I have received proof that is germane to this case." It's the wrapper of a piece of mail. So that's proof under these

rules. Do I need to preserve that because it's a piece of proof or not? Some people would see that one way. Some people see it another way.

Also, the interaction of service versus filing. Service, we have prima facie proof of service by the statement of service that's on a pleading. And, of course, it has to be certified mail in order to comply with the service rules, but for filing, the statement of service means nothing. You don't even say, "I filed it" in the statement of service. You just say, "I served it." So we don't have anyplace else that says what's proof of filing because the statement of service doesn't have anything to do with filing.

So then you have to have legible postmarks. Okay. What does a lawyer do? What a lawyer does is he signs a statement of service and don't worry about getting a lot of receipts from the -- that it was served by certified mail. You don't have to worry about the white slip that you get from the post office for service because of the statement of service rule, but for filing you have got to

have a white slip stamped by the post office. They will still do that. I don't know how long they are going to do that.

They may pass a rule that says they don't have to do that anymore because it's too much trouble, but as long as they are doing that, careful practitioners will serve one way, but when it comes to filing they are going to go to the United States Post Office, and the metered mail does not serve as proof of service -- of filing. So if you run it through your postage meter, it means nothing, and the United States Post Office won't put a postmark on it if it's metered mail. It's got to be a stamp.

So for what you are going to file you have got to get some stamps, put it on the wrapper, go to the post office, get the white slip stamped, and get the piece of mail stamped, and away it goes. So you have got to have -- this is coming right straight to your comment. Somebody who is careful is going to have a stamped receipt because they have got to go to the post office and get their stamps canceled if it's going to be a filing. Pretty

complicated, and I'm not sure it ought to be that complicated, but that's the way it is. Steve Yelenosky, and I will get to you, Joe.

MR. YELENOSKY: I mean, I think we need to get back that this is a statement of what constitutes conclusive proof, and if we are going to take out a legible postmark then we are going to have a case where somebody is going to have it. Somehow they got it. The clerk kept it, or they had it mailed back to them, and they are going to be bringing it in, and the court is going to say, "Under this rule I can't consider that conclusive proof."

So I think we need to address this, what would be conclusive. If the clerks need to be instructed that they are not required to keep them, which is what I said at the outset, if the judges are telling them, now, I don't know. If it's coming from the rules and we need to say here in this transcript that we are not saying you have to keep it, and you want to make a copy of that transcript provision and circulate it, that may be the way to do it, but it's certainly not the way

to take it out of the rule.

The second thing I wanted to say was that there had been a suggestion earlier that a stamp by the clerk indicating a legible postmark of such-and-such date would suffice here. I think that was the suggestion, and I have to disagree with that because the question is what's conclusive proof to the court if there is a dispute about the filing date, and I wouldn't think that something the clerk noted would be conclusive proof. Particularly because it could be conclusive proof the other way. The clerk could have noted the wrong date that it came in, and then you're saying that that would conclusively show that it was filed late. So I think it has to be the postmark that's conclusive itself.

CHAIRMAN SOULES: Joe, and then I will get to Richard. Joe Latting.

MR. LATTING: It seems to me if we are really concerned about what Ann has raised and what Bonnie has raised, we can say in the rule that there is not any requirement that the clerk retain envelopes. No. 1, we

can just say that.

No. 2, why in 1995 are we telling the bar that it needs to send somebody in a car over to a post office to buy some paper stamps and get more paper stamped, and what is conclusive proof? Why are we doing all of this? It's the people who want to show that they have filed something that have the best way to be able to do that. Why are we in the business of outlining all of these things for the Bar that only come up in a tiny percentage of the litigation that goes on? I think all of this is foolishness.

I think we just ought to tell -- it ought to be up to the person who is trying to show that he filed something on time to do that the best way he can. We don't need to be telling them what is conclusive proof. Judges can make up their minds on things like this. If you want to show you filed something, you know what you are going to do, and I know what I am going to do, but we don't have to be telling people to go to the post office, buy stamps, get things stamped. Let the lawyers do their own business. We are just trying to enable

them to run up against deadlines. I mean, there is no point in all of this.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Couldn't we eliminate this problem by just having a comment following the rule that says this rule does not require the clerk to retain the envelope and leave the language in the rule the way it is?

CHAIRMAN SOULES: That would take care of your concern, wouldn't it, Bonnie?

MS. WOLBRUECK: Yes. That was one of my suggestions.

MR. LATTING: Yeah. That would be a step in the right direction.

CHAIRMAN SOULES: Bonnie has got the floor here. Let's hear what she has to say, please.

MS. WOLBRUECK: Yes. That was one of my suggestions when I first brought up this issue, that possibly we do make comments in the rule if we could just have a comment that says this rule does not require the clerk

to keep the package or wrapper.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: I don't have a problem with saying this rule doesn't require. The problem is the clerks' requirements are governed by statute in the government code. Now, I haven't gone and looked at them to find out whether or not they are subject to interpretation with regards to whether or not they have got to do it. And of course, if that's a legislative mandate, well, that's where what we have to do and what their obligations to do are required, and so I hesitate to put something in either a comment or a rule that might conflict with some kind of statutory requirement without at least somebody looking at it.

MR. YELENOSKY: They have looked.

MS. WOLBRUECK: We have looked.

MR. MCMAINS: Well, but --

MR. GOLD: I was going to say regardless of whether anybody looked or not I don't see what would be the problem with

saying this rule doesn't require it.

CHAIRMAN SOULES: Anyone else have a comment about this? Okay. How many feel we should as an accommodation to the clerks suggest to the Supreme Court a comment to this rule that says that this rule doesn't require the clerks to keep the wrapper, package wrappers, something to that effect. You-all can write it.

Any opposition to that? One. I need to count the votes again. Okay. Those in favor of the comment show by hands. 16 in favor. Those opposed? Seven.

Okay. We are going to take a short break here. Be back at 10 after, 15 minutes, whatever your clocks show. Mine may be wrong.

(At this time there was a recess, after which time the proceedings continued as follows:)

CHAIRMAN SOULES: Okay. Alex, so you are going to draft a comment, and will you get with Ms. Lange and Ms. Wolbrueck to satisfy them with the comment that you are going to draft to Rule 5 that takes care of their issues?

MR. ACOSTA: Okay.

CHAIRMAN SOULES: And, of course, it only affects -- it only says what this rule does or doesn't do. It doesn't say anything about the statutes or what their duties may be, just this rule doesn't impose that duty.

MR. ACOSTA: We will do so.

CHAIRMAN SOULES: Okay. Any further discussion about Rule 5 as proposed?

Okay. Those in favor of Rule 5 as proposed by the subcommittee show by hands.

HONORABLE SARAH DUNCAN: What are we voting on?

CHAIRMAN SOULES: Rule 5 on page five.

HONORABLE SARAH DUNCAN: With the comment?

CHAIRMAN SOULES: With the comment. Okay. They are kind of going up and down here. Holly nor I can keep up. Those in favor of Rule 5 as proposed with the comment that we talked about, please show by hands. 12 in favor.

Those opposed? 12 to 3. Okay. This

will be recommended then by a vote of 12 to 3.

And that gets us to Rule 6, Alex.

MR. ACOSTA: Steven Yelenosky warned me in the hall. I wasn't here at the first because the first flight from El Paso gets here at 9:15. I understand there was some significant debate about "so help me God," but I am going to forge forward with No. 6, and the subcommittee's recommendation is to delete the rule. There is no reason to preclude commencement of a suit or service of process on Sunday so long as clerks, judges, or process servers are willing to do what is necessary. This rule is probably a vestige of the old "blue laws," and that is, of course, our gratuitous comment to that. That's the subcommittee's recommendation.

CHAIRMAN SOULES: Okay. Discussion? David Perry.

MR. PERRY: I am opposed to it. I think that the -- I think that rules like this which reflect traditional values serve a useful purpose, and I think as a practical matter judges and clerks aren't going to be around to file lawsuits on Sunday, and I think

it makes good sense to leave the rule the way it is.

CHAIRMAN SOULES: All right. This comes from Todd Shields?

MR. ACOSTA: Yes, sir. I think if you look at the --

CHAIRMAN SOULES: "Constable Rankin indicated that his constables are available to serve process on Sunday and" --

MR. LATTING: Is this a big issue?

CHAIRMAN SOULES: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: My only experience with this rule is that Walker Railey was served in California on Sunday in the civil litigation that involved, you know, his problems, and I wasn't altogether sure whether this rule had anything to do with service in another jurisdiction on Sunday, but I was troubled by the fact that it might have invalidated that service or caused difficulties. I don't feel strongly about it, and I think traditional values are worth preserving as long as they don't get us into

some sort of conflict as a result of the fact that the traditional values that we are following have been abandoned elsewhere.

CHAIRMAN SOULES: Any other comments? All right.

Those in favor of repealing Rule 6 in it's entirety as it currently exists show by hands. Five to repeal. Those opposed? 11. 11 to, what was it, 6 -- 5.

By a vote of 11 to 5 we will recommend no change to Rule 6 as it currently exists except apparently there is another Rule 6 at the bottom of page five to get some attention. What is that one, Alex?

MR. ACOSTA: It's again our attempt to respond to the letters that were sent to us. It's a no smoking rule as a result of a letter we received, and the subcommittee's recommendation is that this is a new rule suggested by Gregory B. Enos on page 000004 of Volume I of the agenda, at which this letter appears.

The subcommittee made minor changes to the suggested rule, and the rule as suggested is as follows: "No person including judges,

attorneys, witnesses, jurors, and court reporters shall be permitted to smoke during any civil judicial proceeding including trials, hearings, and depositions, provided that each court may adopt its own rules regarding smoking in a judge's private chambers and in rooms used for jury deliberations."

MR. YELENOSKY: What you just read was the letter, but we made a change to that.

MR. ACOSTA: Yeah. We made a change with the proposed rule as follows: "No person including judges, attorneys, witnesses, jurors, and court reporters shall be permitted to smoke during any civil judicial proceeding including trials, hearings, and depositions, provided that each judge may adopt rules regarding smoking in his or her own private chambers." That's the proposed rule.

CHAIRMAN SOULES: Okay. Comments? Richard Orsinger.

MR. ORSINGER: There is a parenthesis that's missing after "court reporters" in the committee version, and I

would also suggest that we may collide with the decision of the county commissioners who, I believe, believe they control who smokes and doesn't smoke in the county courthouse if we say that judges can smoke in the chambers and the county comissioners say they can't. I don't know if we care about that, but I believe the county commissioners think they control that.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Why do we want to get involved in telling people whether they ought to smoke or not when, I mean, that has nothing to do with filing a lawsuit. I mean, a judge smoking in chambers, if this committee wants to devote its time to telling people whether they can smoke or not, I just think that's crazy.

MR. YELENOSKY: Well, we don't propose anything about judges in chambers, but the latter and some people's concern has been in depositions.

MR. LOW: Well, that, if there is a problem with smoking in depositions and somebody has got a problem with it, then take

it up with that judge, and that judge can decide something. I mean, there is a lot of controversy about smoking, and we are going to have enough controversy. I just don't think that that is a problem that we need to just address and say you just can't smoke.

I mean, for instance, I just tried a case where a judge let opposing counsel chew tobacco. It was all right 'til he spit it in the coffee I was drinking. We don't have to say that we can't drink coffee. You know, I mean, I can understand that to be a rule, but they let us do it, and why not do it where we say, well, each judge can establish his own rules, but if the rule says that then the judge says, "Oh, no." I just don't think we need to fool with it.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, another thing we imagined was with regard to jurors in the jury room. The letter had said that would be up to the judge, and we took that out because we don't think that any one juror should be put in the position of objecting and

getting a judge to decide that the other fellow jurors can't smoke, but it may be a significant problem for a juror to be forced to serve.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I agree with Buddy. I don't think we ought to get into regulating this behavior, and I think this particular behavior is so unpopular now that it might be the one that you would regulate as opposed to, you know, cussing, drinking, whatever.

MR. YELENOSKY: Like the drinking in the case --

CHAIRMAN SOULES: Just a moment. Let Bill finish. The court reporter can't take you all.

PROFESSOR DORSANEO: I just don't think we ought to get into it. I think it will look foolish at some point in the future.

MR. JACKSON: Wasn't there a statutory bill being passed yesterday on smoking in almost every city in the state of

Texas? You know, that might cover the smoking problem anyway.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Yeah. I mean, Chuck may know more, but I think that applies to some common areas, but I don't know that that would even apply in this instance, but do you know?

MR. HERRING: I don't know.

CHAIRMAN SOULES: Elaine, did you have your hand up?

PROFESSOR CARLSON: I just want to echo Bill's sentiment. I agree. I don't think we ought to have a rule addressing this.

MR. LATTING: Echo No. 3.

MR. ACOSTA: Can the committee be allowed to withdraw it to save face?

Thank you for all of these liberal, consumer-oriented committee members you gave me, Mr. Chairman. Did you do that because you realize I'm a rookie or because I'm from El Paso? Just so it doesn't go unnoted.

CHAIRMAN SOULES: Well, let's go ahead and get a vote of record because this

individual is entitled to a response from the committee, and I will put it this way. Those in favor of Rule 6, no smoking, as it appears on page five show by hands. Three. Those opposed? 13. By a vote of 3 to 13 that fails, and we will recommend that that -- we will make no recommendation to the Supreme Court.

MR. YELENOSKY: When we get to the final vote, I will get all the non-smokers here.

CHAIRMAN SOULES: I'm sorry. I'm not hearing what was said.

MR. YELENOSKY: I just said when we get to the final vote I will get all the non-smokers here.

MR. LATTING: You can't do that. You said we shouldn't do that.

MR. YELENOSKY: Well, I lost that vote.

CHAIRMAN SOULES: Okay. What's next?

MR. ACOSTA: Rule No. 7. The committee looked at Rules 7, 8, 10, and 12 regarding representation by an attorney in the

old version of the rules. We have a recommendation that deletes some of the language in Rules 7, 8, 10, and 12 and proposes to combine the rules. The subcommittee recommendation is as follows: The subcommittee has consolidated all of the rules relating to a party's representation by counsel. Substantive changes are few.

No. 1, the subcommittee added a provision requiring notice upon the attorney when the party is represented by counsel. No. 2, upon the failure to show authority to represent a party when challenged the rule now provides that the court "shall" strike the party's pleadings. The subcommittee recommends that the rule provide that the court "may" strike pleadings to give the court discretion in situations where it would be -- would not be appropriate to strike the pleadings. Other changes are intended merely to make the rule more concise and clear, and that's the subcommittee's recommendation with respect to Rules 7, 8, 10, and 12.

CHAIRMAN SOULES: Okay. So this starts at 7(a) on page 6, right?

MR. ACOSTA: That's correct.

CHAIRMAN SOULES: Everybody take a chance to read through this. And did you say 13? What rules are --

MR. ACOSTA: No, sir. 7, 8, 10, and 12.

CHAIRMAN SOULES: Where is the concept of attorney in charge now?

MR. ACOSTA: It's --

MR. YELENOSKY: Very first part.

MR. ACOSTA: Yes.

MR. YELENOSKY: The third sentence of the proposed rule.

CHAIRMAN SOULES: Okay. Any objection to the committee's proposal on paragraph (a)?

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I actually have an objection to the language "attorney in charge" that we added in some years ago. I don't think it's helpful by reference to our

discussion in the appellate rules for, I believe, roughly 200 pages of transcript, which we don't need to repeat, and I think we could just simply accomplish the same thing by saying, "If a party is represented by more than one attorney, notice shall be made to the attorney whose signature first appears on the initial pleading of the represented party" rather than adding in this concept of attorney in charge, whatever else that might mean to us and others.

MR. YELENOSKY: Right.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I like Bill's philosophy, but you need to be able to permit people to shift the responsibility for receiving the mail, and you can't shift the historical fact of who signed the first pleading. So don't you have to have the opportunity after the first pleading has been filed to designate someone else as the person who's responsible? And your language that the person who's responsible is always the one who signs first doesn't admit for voluntary

alterations of that later on.

PROFESSOR DORSANEO: Well, I would leave in "unless another attorney is specifically designated in that pleading or by notice," but the designated would be designated as the one to receive notice.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Just I think in the committee we discussed this, and in fact, originally drafted it along the lines of you are suggesting, and we decided that attorney in charge was -- that reference was made elsewhere, I believe, and that it was necessary to have a definition of attorney in charge if the reference is made elsewhere, but for these purposes, you're right. It doesn't need to be there. It doesn't need to be called the attorney in charge. All it needs to be is the person who receives the mail.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think it's helpful to have the concept of an attorney in charge in a piece of litigation. It seems to

me that one of the problems with litigation today is that there is a proliferation of attorneys involved in it, and sometimes it becomes difficult either for the court or counsel to get decisions on matters because it's hard to find out who is in charge, and I think that it is desirable to have a concept that places the responsibility on somebody of being the attorney in charge for each party and that this is a perfectly good way to do it, and I would suggest that it be retained.

CHAIRMAN SOULES: Bill, do you have a -- do you want to make a motion on this, or does this discussion change your mind? How do you want to handle this?

PROFESSOR DORSANEO: I will move the deletion of the attorney in charge language because I think it's gratuitous.

CHAIRMAN SOULES: Any further discussion on this? Those in favor of Bill's motion to delete attorney in charge? Two. Those opposed?

13 to 2 the motion fails. Now, those in favor of paragraph (a) as proposed by the committee.

HONORABLE SARAH DUNCAN: Luke, Can I make a couple of quick comments?

CHAIRMAN SOULES: I'm sorry. Judge Duncan.

HONORABLE SARAH DUNCAN: It was brought to my attention yesterday that I am not sufficiently sensitive to sexist language. We are continuing the use of "his," which doesn't bother me, but it seems to bother a lot of people.

And the second point is it's my understanding that the case law interprets "any party" to mean any noncorporate party, and if that's the committee's view of what it should be, we should say so because it's tripping some people up.

CHAIRMAN SOULES: That party means noncorporate parties only?

HONORABLE SARAH DUNCAN: In certain courts.

PROFESSOR DORSANEO: Huh?

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think what Judge Duncan is referring to is that there is case law that a corporate party may not appear pro

se because a corporation may not practice law. I think that's fine myself. I'm not sure that this rule impacts it, though.

MR. YELENOSKY: I don't think that --

CHAIRMAN SOULES: Yeah. That's right.

MR. YELENOSKY: It just means every time --

CHAIRMAN SOULES: What she's saying is correct, that you can't appear through a representative that's not a lawyer unless it's in JP court, FE&D cases.

MR. ORSINGER: Are they saying a corporation cannot be pro se?

CHAIRMAN SOULES: That's right, and that's the law.

MR. ORSINGER: That is the law?

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I don't see where that bears on this particular language. It just means that when you have a corporation there is going to have to be an attorney there, and that's who the notice

would go to, but like you say, I mean, in small claims I think a corporation may be able to represent itself, but how would that suggest any change to this language on this, or would it?

HONORABLE SARAH DUNCAN: Well, I just think it is to some extent deceptively written. If we changed the "his" to "his or her" then the his --

MR. YELENOSKY: Where is that?

HONORABLE SARAH DUNCAN: Second line.

MR. YELENOSKY: Oh.

CHAIRMAN SOULES: The first line of the rule is up at the top and then the rest of it is down below. "Any party to a suit may appear" --

MR. YELENOSKY: Oh, I'm sorry. I was looking down there.

CHAIRMAN SOULES: -- "either on his or her behalf."

MR. YELENOSKY: I'm sorry. I wasn't even paying attention on the sentence you are referring to.

MR. HUNT: Why don't you make

it "the party's behalf"?

CHAIRMAN SOULES: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: Mr. Chairman, I think we ought to either do what Don Hunt wants to do and just use the term "party" and "party's behalf," or if we want to clear up this other issue say, "Any individual who is a party to a suit may appear either on his or her own behalf or through an attorney." Do it one way or the other.

HON. ANN TYRELL COCHRAN: Why not just say "appear personally"?

CHAIRMAN SOULES: Who's speaking? Is that Judge Cochran? Go ahead.

HON. ANN TYRELL COCHRAN: Is there a problem with saying "may appear either personally or through an attorney"?

MR. MEADOWS: Yeah. That's right.

MR. PERRY: What's wrong with the words that was there before, "may appear in person or through an attorney"?

HON. ANN TYRELL COCHRAN: Uh-huh.

CHAIRMAN SOULES: Okay. Any other -- let me get the comments organized here. Judge Brister.

HONORABLE SCOTT BRISTER: I would vote for "personally" because "in person" may sound like you have to be there physically and you can't appear by filing a pleading, so but "personally" would take care of that.

CHAIRMAN SOULES: But isn't a corporation a person?

MR. YELENOSKY: Yeah.

HONORABLE SARAH DUNCAN: Yes.

CHAIRMAN SOULES: So how does that help?

HONORABLE SARAH DUNCAN: This is a rule that most of the courts --

CHAIRMAN SOULES: Sarah Duncan.

HONORABLE SARAH DUNCAN: It is the use of "his" that has been the basis, as I understand it, for the holding that a corporation can't appear through an officer or director of the corporation.

CHAIRMAN SOULES: I think --

HONORABLE SARAH DUNCAN: So

Bill's suggestion, "any individual," I think would limit it according to the case law, if that's what the committee wants to do.

MR. LOW: I second Bill's motion.

MR. YELENOSKY: I'm not familiar with the case law, but I thought that it was based more on the notion of a corporate entity and that any of the officers would not be the party.

HONORABLE SARAH DUNCAN: No. Because there are some cases that have held in instances where there is one shareholder, one director, and one officer, and they are all the same person, that they cannot represent the corporation because the corporation isn't a him.

HON. ANN TYRELL COCHRAN: Luke? Ann Cochran.

CHAIRMAN SOULES: Okay. Judge Cochran.

HON. ANN TYRELL COCHRAN: The current rule doesn't use the word "his." The current rule says "in person."

HONORABLE SARAH DUNCAN: The

current rule says, "and prosecute or defend his rights therein."

HON. ANN TYRELL COCHRAN: Okay. I mean, the problem is, too, that you have somebody trying to represent the corporation. We are saying you can either be there yourself or have an attorney and that having someone else represent you is not a third alternative. You only have two alternatives, and whether there is one shareholder, director, and officer or not, it is still someone trying to represent the real party, and that's where the problem is. And this language -- I mean, that's what the problem is. It's just that you are trying to -- the person appearing in court is not an attorney, and it's "and is not an attorney."

CHAIRMAN SOULES: Let me try to get this to focus. If we say in line one there, "Any individual party to a suit may appear either in person on his or her own behalf or through an attorney," that takes care of the individual parties. How do corporate parties -- we are going to have to write a sentence for parties who are not