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8 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
9 JANUARY 19, 1996
10 (MORNING SESSION)
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18 Taken before D'Lois L. Jones, a
19 Certified Shorthand Reporter in Travis County
20 for the State of Texas, on the 19th day of
21 January, A.D., 1996, between the hours of 8:50
22 o'clock a.m. and 12:40 o'clock p.m. at the
23 Texas Law Center, 1414 Colorado, Room 101,
24 Austin, Texas 78701.
25

COPY

JANUARY 19, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
David J. Beck
Prof. Elaine A. Carlson
Hon. Ann T. Cochran
Franklin Jones Jr.
Thomas S. Leatherbury
Harriet E. Miers
Anthony J. Sadberry

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon William Cornelius
Paul N. Gold
David B. Jackson
Doris Lange
Michael Prince
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
O.C. Hamilton Jr.
W. Kenneth Law
Hon. Paul Heath Till

JANUARY 19, 1996
MORNING SESSION

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1 CHAIRMAN SOULES: Good morning,
2 everyone. I appreciate your being here
3 promptly this morning. We had a little delay
4 here while we get some copies made, but two of
5 our committee reporters today are going to
6 have to leave early, so I needed to get Steve
7 Susman's report on summary judgment before and
8 also try to finish up the 200 series, the 200
9 and 300 series rules that Don Hunt and Bill
10 Dorsaneo have been working on.
11 Let's start with summary judgment and,
12 Steve, you have had a subcommittee of
13 yourself, Judge Brister, Judge McCown. Who
14 else was working on that?
15 MR. SUSMAN: Judge Hecht was
16 there.
17 MR. ORSINGER: Alex Albright.
18 MR. SUSMAN: Alex was there.
19 Paul Gold was there. Bobby was there. Who
20 else was on the phone? That's it, isn't it,
21 Alex?
22 HONORABLE SCOTT BRISTER:
23 Justice Hecht.
24 MR. SUSMAN: Yeah. In any
25 event, this is -- we met in Austin a few weeks

1 ago and then we had another phone conversation
2 following up, and you have before you a new
3 Rule 166a --
4 HONORABLE F. SCOTT McCOWN: Can
5 you speak up a little, Steve?
6 MR. SUSMAN: Scott was there
7 obviously. A new Rule 166a.
8 HONORABLE F. SCOTT McCOWN: We
9 couldn't hear you back here.
10 MR. SUSMAN: Excuse me. And I
11 think the best way is just to -- it's all been
12 reorganized. We tried to reorganize it in a
13 sensible way and rewrite it, and I think
14 probably the main change is in subdivision
15 (e), the burden change, but there are some
16 other changes as we go through, and we can
17 just discuss it.
18 Subdivision (a), the time for filing, I
19 don't think really changes much from the
20 current practice. We left the 21 days. The
21 response will be in seven days and the
22 possibility of a reply. Any questions
23 about -- I mean, I think we ought to discuss
24 it one section at a time.
25 CHAIRMAN SOULES: Okay. We

1 will take up 166a, subdivision (a).
2 HONORABLE C. A. GUITTARD:
3 Mr. Chairman?
4 CHAIRMAN SOULES: Judge
5 Guittard.
6 HONORABLE C. A. GUITTARD: A
7 technical thing, it says, "The motion shall be
8 filed at least 21 days after the hearing."
9 How do you know when it's going to be heard
10 when you file it? It seems like to me it
11 ought to be -- if it means anything, it ought
12 to be "shall be heard 21 days after it's
13 filed," at least 21 days after it's filed.
14 CHAIRMAN SOULES: I was trying
15 to find that and see if that's exactly the
16 language of the current rule.
17 MR. SUSMAN: "At least 21 days
18 before the time specified for the hearing."
19 Close.
20 CHAIRMAN SOULES: "Motion shall
21 be filed and served at least 21 days before
22 the time specified for the hearing."
23 MR. SUSMAN: We have shortened
24 the words, but it's the same concept as the
25 current one, and I think the suggestion is

1 that it probably makes more sense to -- and it
2 does make more sense obviously to say that the
3 hearing shall not be until at least 21 days
4 after the time a motion is filed, I guess.
5 HONORABLE C. A. GUITTARD:
6 That's good.
7 MR. SUSMAN: Yeah. I think
8 that would be very acceptable to the
9 subcommittee if we made that change. We can
10 make that change.
11 CHAIRMAN SOULES: If we can
12 make the -- I think it probably makes sense to
13 try to write these rules, if they can be
14 written, so that you count forward instead of
15 backward. Because we have had two cases, I
16 think a '94 case and a '95 case, from the
17 Supreme Court of Texas where the courts of
18 appeals were in disagreement on how to count
19 backwards.
20 HONORABLE C. A. GUITTARD: And
21 the 21 days provision ought to go down in
22 subdivision (d).
23 MR. SUSMAN: Okay.
24 HONORABLE SCOTT BRISTER: Well,
25 but how does that work with the seven-day

1 response? That's the --

2 MR. LATTING: Is there a reason

3 to change the rule that we have now in this

4 respect? The law is pretty well clarified.

5 You file your motion, you specify a time for a

6 hearing. It can't be more than -- or less

7 than 21 days. The respondent has to file a

8 response at least seven days before the

9 hearing, and the Supreme Court has just told

10 us what that meant. Well, whether it was

11 really seven or eight days. It's seven now.

12 So we finally got it clarified. Now we're

13 talking about changing the rule. Is there a

14 good reason to do that?

15 CHAIRMAN SOULES: Okay. Judge

16 McCown.

17 HONORABLE F. SCOTT McCOWN: I

18 really think this formulation works pretty

19 well. I don't think it's a problem. Unlike

20 appellate courts and trial courts, you know,

21 most lawyers are going to secure their own

22 hearing date. And so while it's kind of an

23 odd formulation in one sense, it actually

24 reflects reality, which is they call up the

25 coordinator and say, "Give me a hearing date."

1 They schedule the hearing and then they have
2 got to file their motion 21 days before that
3 hearing date.
4 HONORABLE C. A. GUITTARD: But
5 the hearing can be postponed.
6 HONORABLE SCOTT McCOWN: Well,
7 if it's postponed, that doesn't matter. The
8 motion was still filed 21 days before whenever
9 the postponed hearing is, and so we tried to
10 go with the general principal that if it
11 wasn't creating a problem then we would --
12 while we might clarify the language a little,
13 we weren't making major changes in the
14 practice.
15 CHAIRMAN SOULES: Rusty
16 McMains.
17 MR. McMAINS: Well, didn't you
18 say that the current rule talks about the date
19 specified for hearing?
20 CHAIRMAN SOULES: It does.
21 MR. McMAINS: Well, the change
22 is from that standpoint then -- and I'm not
23 saying it's a bad change, but it is definitely
24 a change, I think, is that if -- when you
25 serve the motion to specify a hearing date,

1 then essentially you know that you have got
2 seven days before that specified hearing date
3 to file a response. You know it's not going
4 to be changed by the trial judge or whatever
5 in terms of moved up or back, but
6 interestingly enough, if you have specified a
7 hearing date and then as you approach it, you
8 change it, you need another 21 days,
9 theoretically under the current rule because
10 it's -- it can't be heard until 21 days
11 specified.
12 So if you change the specification, then
13 some courts have basically held, okay, you've
14 got to go ahead and change it and push it
15 forward. I tend to agree that taking the
16 specification out probably is a good thing
17 because if it's been on file 21 days, you
18 ought to be able to go ahead and hear it
19 because you've gotten the minimum time that
20 you were required to get.
21 On the other hand, when that happens,
22 like if the judge changes it, which he does
23 periodically, if he's in trial or something
24 and can't take it, and therefore, he will
25 change the date, the only thing I'm concerned

1 about since we don't have anything that
2 requires really that they know when the --
3 that the litigant be notified by the opposite
4 party when the hearing date is, since we have
5 lost the specification language, is that if
6 the judge changes it and then maybe changes it
7 again, I mean, you have a kind of floating
8 period as to when your response is due, and
9 it's just kind of a hard -- to me, it's a hard
10 thing to be able to timetable when a response
11 to a summary judgment is due if they continue
12 to change these things, you know, change the
13 hearing dates. It may be that you filed your
14 response late. They move the hearing date one
15 day, now, it's on time.
16 HONORABLE F. SCOTT McCOWN: So
17 what's your opinion?
18 MR. McMAINS: But it may be
19 that you haven't filed a response at all.
20 They change the hearing date, and now you file
21 a response. It may be that you don't know
22 they changed the hearing date, which has also
23 happened, and so you don't know when your
24 response date or when you can supplement, from
25 that standpoint.

1 CHAIRMAN SOULES: It seems to
2 me like what we ought to be saying is the
3 court must give 21 days notice of a hearing
4 and then -- because it doesn't make any
5 difference what I specify as the date of the
6 hearing, that doesn't make it a hearing. It
7 doesn't accomplish anything until the judge
8 acts on it. So if we say the judge, that the
9 court -- there must be 21 days notice of a
10 hearing and anything that's got to happen in
11 that 21 days happens on notice from the court.
12 Bill Dorsaneo.
13 PROFESSOR DORSANEO: Well, I
14 think an adequate way to fix this would be to
15 eliminate the first paragraph, to put the
16 first sentence of the first paragraph in the
17 second paragraph (b) and to move the rest of
18 it down to (d) in some reworded way, and the
19 time for filing is kind of an odd thing there
20 at the top anyway.
21 So let's say, "A party may move for
22 summary judgment on all or any part of a case
23 at any time before the adverse party has
24 appeared," and then just continue to talk
25 about the motion, "The motion for summary

1 judgment shall be in writing," and then when
2 you get down to the hearing you could change
3 the sentence to say that -- talk about, you
4 know, the hearing and the notice of 21 days
5 and then talk about the response being due.
6 That will work, won't it? Huh?
7 MR. SUSMAN: Uh-huh.
8 PROFESSOR DORSANEO: Rusty's
9 point about the date specified for the
10 hearing, I think that's the same point you're
11 making, Luke, that that notice thing, that
12 that's the important concept.
13 MR. McMAINS: Yeah. Well, if
14 you're saying that you get 21 days notice of
15 the hearing on a summary judgment then this
16 rule does not accomplish that.
17 CHAIRMAN SOULES: That's right.
18 MR. McMAINS: I mean, the rule
19 change doesn't, whereas the current rule
20 theoretically does, that if you have specified
21 it and it changes, it's got to be at least 21
22 days or theoretically you'd have an objection
23 to it that is not necessarily waivable.
24 CHAIRMAN SOULES: Of course,
25 that all assumes that there is a hearing.

1 MR. McMAINS: Right. But I
2 think the current rule doesn't require that
3 the hearing actually take place, but it does
4 say that it can't take place any earlier than
5 that date specified; and if, in fact, it takes
6 place if you haven't -- if you don't have any
7 specified dates then you can't comply with the
8 21 days notice.
9 CHAIRMAN SOULES: Judge
10 Brister.
11 HONORABLE SCOTT BRISTER: Two
12 things, number one, we did discuss whether you
13 should require this to be an oral hearing or a
14 hearing by submission, and the subcommittee
15 decided to punt on that in favor of a general
16 rule since that applies to other things beside
17 summary judgments.
18 Number two, I have heard complaints that
19 relates right to this problem and suggested
20 that needs to be changed. Somebody files a
21 motion and doesn't specify a date and then
22 five days before the hearing, four days before
23 the hearing, gives notice of a hearing because
24 it's in terms of when was it filed. That's
25 more than 21 days if they filed it two months

1 ago, but it puts -- now, I would hold that's
2 not good enough, you know, but apparently not
3 everybody does because I've heard lawyers
4 complain of that.
5 And maybe you could do something like
6 Rule 87 for motions to transfer venue, says,
7 "Except on leave of court each party is
8 entitled to at least 45 days notice of a
9 hearing on the motion to transfer." So you
10 could do the same language, except on leave of
11 court. I think you wouldn't want to leave
12 that as an out, and that's what the last
13 sentence in there is to do. Each party is to
14 be -- respondent is entitled to 21 days notice
15 of hearing. The movant is entitled to seven
16 days notice of response.
17 CHAIRMAN SOULES: Justice
18 Duncan, did you have your hand up?
19 HONORABLE SARAH DUNCAN: At one
20 point I did. Part of what is left out that
21 caused a lot of litigation for a while was in
22 subsection (c) where the rule now states that
23 the motion and any supporting affidavits shall
24 be filed and served. This doesn't specify the
25 time for filing affidavits. It doesn't

1 specify that it has to be served, and once
2 again, we are back to my problem of redlines
3 because I'm trying to figure out what we have
4 left out that's been previously litigated that
5 we sure don't want to litigate again.
6 HONORABLE SCOTT BRISTER: We
7 were getting to that. I wanted that in and it
8 got dropped, but we were getting to that. I
9 think it does need to be that your supporting
10 brief and supporting materials have to be
11 filed with the motion response or whatever.
12 CHAIRMAN SOULES: Yeah. That
13 seems to be an omission that would cause the
14 rule to be unworkable. I mean, if they filed
15 a motion for summary judgment and don't have
16 any supporting summary judgment proof, then
17 you may not need any supporting summary
18 judgment proof in your response.
19 HONORABLE SCOTT BRISTER: Okay.
20 I will make a motion then. Move the first
21 sentence of (a) to become the first sentence
22 of the next section, which will become (a),
23 and then in the first sentence of (d) or the
24 section on hearing will be "except on leave of
25 court," language to the effect of the movant's

1 entitled -- the respondent's -- each party is
2 entitled to a 21 days notice of hearing on
3 motion for summary judgment.
4 CHAIRMAN SOULES: Why should
5 the court be entitled to shorten that?
6 HONORABLE SCOTT BRISTER:
7 Well --
8 CHAIRMAN SOULES: This is on
9 the merits.
10 HONORABLE SCOTT BRISTER: I
11 mean, I tried it once on the attorneys walk in
12 the week before trial and it's a duty to
13 defend case. That's easy. It's eight corners
14 rule. I look at the plaintiff's petition. I
15 look at the insurance policy as one inside the
16 other. Everybody agrees with that.
17 Well, let's -- you know, everybody has
18 got a brief on that, so we will have the
19 hearing next Monday. If you have anything in
20 addition you want to file, file it in two or
21 three days, and you file it two days
22 thereafter. There is no problem with that.
23 CHAIRMAN SOULES: Everybody is
24 agreeable.
25 HONORABLE SCOTT BRISTER: Sure.

1 MR. ORSINGER: No.

2 HONORABLE SCOTT BRISTER: Well,

3 or even if --

4 CHAIRMAN SOULES: In your case.

5 HONORABLE SCOTT BRISTER: Or I

6 think sometimes I will have somebody, you

7 know, "Boy, that's too quick for me." Why?

8 Well, I mean, some people will just not agree

9 to things. I think the judge ought to -- can

10 be reversed for abuse of discretion like any

11 other thing I do too fast or too slow, but you

12 know, the problem on summary judgments is, you

13 know, the summary judgment is either good or

14 it's no good.

15 And if you need more -- everybody who

16 loses a summary judgment is going to say they

17 wanted to do more discovery, spend more money,

18 wanted another six months, everybody.

19 CHAIRMAN SOULES: Huh-uh. Not

20 everybody.

21 HONORABLE SCOTT BRISTER: Well,

22 almost everybody. And if they can't state

23 "Like what?"

24 "Well, we just want to depose everybody

25 in the world."

1 "Like what, looking for what? How is it
2 going to change anything?"
3 "Well, we just want to do it."
4 CHAIRMAN SOULES: Judge McCown.
5 HONORABLE F. SCOTT McCOWN: I
6 was just going to suggest --
7 CHAIRMAN SOULES: Judge
8 Brister, were you -- I'm sorry. I got myself
9 out of order here. Judge Brister, had you
10 finished stating your motion?
11 HONORABLE SCOTT BRISTER:
12 Pretty much, I mean, obviously that's --
13 MR. SUSMAN: Scott, I didn't
14 get -- the insertion on (d), is what now?
15 HONORABLE SCOTT BRISTER: It
16 would be "Except on leave of court each party
17 is entitled to at least 21 days notice of a
18 hearing on the motion for summary judgment and
19 seven days" --
20 MR. SUSMAN: That's really not
21 what you're --
22 HONORABLE SCOTT BRISTER: Well,
23 that really doesn't work with the response.
24 HONORABLE F. SCOTT McCOWN: Can
25 I make a suggestion on this?

1 CHAIRMAN SOULES: Well, let
2 me -- okay. Go ahead.
3 HONORABLE F. SCOTT McCOWN: I
4 think that we understand what the committee is
5 saying about (a). This is a really important
6 rule. Maybe if we could go through all the
7 subdivisions, we could even have a short
8 drafting session at lunch and bring back a new
9 copy people could see in writing rather than
10 try to make the change right here, because
11 each subdivision affects rewriting that will
12 have to be done in the others.
13 CHAIRMAN SOULES: Well, this is
14 the first time this rule has been on the
15 table, and I'm not anticipating that it's
16 going to be up or down finally at this
17 meeting.
18 MR. SUSMAN: We will redraft it
19 and bring it next time.
20 CHAIRMAN SOULES: But we do
21 need to know where you see flaws in the
22 omissions from the concepts in the new rule
23 and where you think some additional direction
24 or wrong direction is being taken so that the
25 committee can respond to our concerns. And so

1 if we could just maybe talk about it
2 conceptually and give the committee that kind
3 of guidance, as we have on many of the other
4 rules, then we can -- that would be helpful.
5 If we had another draft for this afternoon and
6 maybe gave it another good brushing out, but
7 it's probably going to be next time before we
8 really get this resolved.
9 HONORABLE F. SCOTT McCOWN:
10 Okay.
11 MR. SUSMAN: That's fine.
12 CHAIRMAN SOULES: Okay. David.
13 MR. PERRY: It had been my
14 understanding that the primary reason for
15 looking at this rule was to deal with the
16 burden of proof issues that are in subdivision
17 (e), and it appears to me that the idea of
18 overall reorganizing the rule and rewriting
19 the rule in its entirety perhaps is
20 unnecessary and that it might be more
21 efficient to take the old rule as it presently
22 exists and simply make specific changes in
23 specific places to accomplish the specific
24 changes that are needed. And it might save
25 time, and also, when the new rule comes out it

1 would be easier for the Bench and the Bar to
2 know what was changed and what was not
3 changed.
4 MR. SUSMAN: The urge to
5 rewrite is irresistible.
6 CHAIRMAN SOULES: Judge
7 Brister.
8 HONORABLE SCOTT BRISTER: Well,
9 and also, I mean, the current summary judgment
10 rule, which is closely alike to the Federal
11 rule, and that's a policy decision that needs
12 to be made. You can try to keep it uniform or
13 try to change it. And our feeling was it's
14 two full pages printed, single-spaced type
15 with important distinctions like paragraph
16 (a), "For the claimant, a claimant can move
17 for summary judgment." Paragraph (b), "or
18 anybody else can move for a summary judgment."
19 That's a waste of paper, a waste of trees, and
20 it makes it, in my opinion, harder to find,
21 harder for the Bench and Bar to find what they
22 are looking for.
23 I know it says it somewhere in this rule,
24 but it takes you four minutes to read through
25 probably close to 8 or 900 words for what's a

1 very simple concept I think we all understand,
2 and so that -- I think as a policy matter we
3 should abandon trying to stay parallel to a
4 rule which has been cobbled onto over the
5 years, and it just has a lot of stuff in there
6 that's duplicative and unnecessary.
7 CHAIRMAN SOULES: Justice
8 Duncan.
9 HONORABLE SARAH DUNCAN: I
10 don't disagree that there is surplusage in the
11 rule, but each of what Scott calls cobbled
12 onto represents maybe 15 or 20 cases that
13 somebody had to pay for to litigate whether
14 that's included or not included within this
15 rule, and the urge to rewrite is I guess
16 irresistible for all of us because we all
17 prefer the way we write to the way anyone else
18 writes, but I think we are inviting a lot of
19 litigation each time we rewrite things that
20 are settled without including a comment that
21 we are rewriting it solely for stylistic
22 purposes and no substantive change is
23 intended.
24 The second thing I would like to raise
25 when we are talking about the concept, and I

1 may be the only person in the room that feels
2 this way, and we can establish that.
3 MR. LATTING: No.
4 HONORABLE SARAH DUNCAN: I
5 think there needs to be some room in the rule
6 to affirm a summary judgment on a ground not
7 specified in the motion.
8 HONORABLE SCOTT BRISTER: It's
9 on the last paragraph.
10 MR. SUSMAN: We have done that.
11 HONORABLE SARAH DUNCAN: Well,
12 the last paragraph says, "On appeal from any
13 order under this rule the appellate court may
14 consider any grounds set forth in the motion."
15 I'm saying that I think --
16 HONORABLE SCOTT BRISTER:
17 Because the appellate opinion -- that
18 considers the word they use. They say we
19 cannot consider anything other than what the
20 judge said why he or she was doing it.
21 HONORABLE SARAH DUNCAN: That's
22 not what I was --
23 HONORABLE SCOTT BRISTER: We
24 can change the language, but that was the
25 idea.

1 HONORABLE SARAH DUNCAN: That's
2 not what I said. What I said was I think
3 there needs to be discretion to affirm a
4 summary judgment on a ground not set forth in
5 the motion when it has been litigated by the
6 parties or established and it is dispositive
7 of a cause of action.
8 And to give an example, we had a case
9 where an employee sued the parent of a
10 subsidiary. The parent and the subsidiary
11 each moved for summary judgment. No one in
12 the trial court disputed and everyone agreed
13 that the parent and the subsidiary had that
14 relationship, but the grounds specified in the
15 motion by the parent was not, "You can't hold
16 me liable because I'm a parent of this
17 subsidiary and I have no independent tort
18 liability."
19 The ground specified in the motion was
20 something else. The ground specified in the
21 motion was wrong. It went up on appeal, and
22 even though everybody agreed that it was a
23 parent/subsidiary relationship, our court held
24 that it could not affirm on the ground that
25 there was no cause of action against the

1 parent because that was not a ground specified
2 in the motion. It doesn't happen very often,
3 maybe one case a year, but it is silly to
4 reverse and remand that case for a trial or
5 for a second summary judgment proceeding when
6 that cause of action is precluded as a matter
7 of law on the agreed facts.
8 HONORABLE F. SCOTT McCOWN:
9 Luke?
10 CHAIRMAN SOULES: Judge McCown.
11 HONORABLE F. SCOTT McCOWN: To
12 follow up on that example, I think it
13 illustrates exactly why we need the present
14 rule. In that instance if the appellate court
15 had said on its own, "You can't sue
16 parent/subsidiary here, reversed, judgment
17 rendered, res judicata," but suppose instead
18 that had been a ground for summary judgment.
19 I move for summary judgment on the ground
20 of the parent/subsidiary relationship. Then
21 you would have had due process so that you
22 could have filed an amended pleading, alleged
23 alter ego, done discovery, and avoided summary
24 judgment by showing there wasn't a
25 parent/subsidiary relationship, that it was,

1 in fact, an alter ego. I mean, that's the
2 whole notion of due process, and to say that
3 an appellate court could look at a record and
4 find some reason on that record which the
5 parties had no notice of, no opportunity to
6 amend, no opportunity to do discovery and
7 grant summary judgment, that would be
8 frightening.
9 CHAIRMAN SOULES: Well, let's
10 see. To steal a phrase from Don Henley,
11 "getting to the heart of the matter," the way
12 I understand the architecture of this rule
13 responding to the burden of proof problem, it
14 is that prior to the discovery cut-off the
15 present Texas rule applies, but after
16 discovery cut-off the Federal Celotex rule
17 applies, and that was the balancing that was
18 done in the committee. I think initially that
19 was Judge Brister's concept.
20 MR. SUSMAN: Right.
21 CHAIRMAN SOULES: Which is
22 designed to give the respondent the protection
23 of the current Texas rule while discovery is
24 still being conducted, or permitted at least
25 to be conducted, but then after that requiring

1 the respondent to meet the more stringent
2 requirements of the Federal rule because at
3 that point the case is in the can, ready for
4 decision, or should be ready for decision, in
5 our concept, near ready for decision on the
6 merits.
7 Let's talk about that because that's
8 really getting to the heart of the matter, and
9 if we are going to do that change then -- if
10 we are not going to do that, then what are we
11 going to do about burden of proof, and if we
12 are not going to do anything about burden of
13 proof, we are not going to need to change the
14 rule at all.
15 HONORABLE SCOTT BRISTER:
16 That's probably right.
17 CHAIRMAN SOULES: Bill
18 Dorsaneo.
19 PROFESSOR DORSANEO: Well, I
20 don't dislike that concept, but I think in
21 this paragraph (e) it ought to be articulated
22 more clearly. It seems to me in paragraph (e)
23 that we jump over the middle part because it
24 doesn't say when a response is due, you know,
25 during an applicable discovery period, then

1 the current Texas standard applies, unless I'm
2 not thinking clearly.
3 CHAIRMAN SOULES: Well, the
4 writing may not be right, but what about the
5 concept? What about the idea? Huh?
6 PROFESSOR DORSANEO: I haven't
7 thought about it more than just the few
8 seconds since you commented on it, but it
9 seems a very -- it is responsive to the idea
10 of not having the harsh Federal standard be
11 applicable before the nonmovant is ready to do
12 something. And that's a big problem at the
13 Federal level, the hurrying up the motion
14 before there is an opportunity for a plaintiff
15 to be ready to make a response.
16 CHAIRMAN SOULES: Paula.
17 MS. SWEENEY: Well, it's
18 certainly the way it's written builds in a
19 great king's X because, as was just pointed
20 out by Judge Brister, the movant brings up an
21 issue that hasn't been brought up before or
22 brings up a summary judgment and, hey,
23 discovery is closed. So if you haven't taken
24 a deposition on it, even though you know about
25 it and you know what your testimony is going

1 to be at trial but you didn't depose that
2 witness because you're conserving judicial
3 resources and you didn't want to depose that
4 witness, discovery window is closed.
5 HONORABLE SCOTT BRISTER: But
6 that's an objection to discovery windows.
7 MS. SWEENEY: No. It's an
8 objection to being trapped by them.
9 HONORABLE SCOTT BRISTER: Well,
10 if that's going to be a trap for summary
11 judgment and you forget about summary
12 judgment, that trap is going to be sprung on
13 you at trial.
14 MS. SWEENEY: So far the
15 discovery rules don't require us to depose
16 everybody.
17 CHAIRMAN SOULES: But if you
18 are sufficiently in control of the testimony
19 that you have not taken in discovery, if you
20 are sufficiently control of that to rest
21 assured that you will have it at trial, why
22 couldn't you get an affidavit for summary
23 judgment proof?
24 MS. SWEENEY: He's not a fact
25 witness to you. He's not important to you

1 unless the issue is raised. He's a rebuttal
2 person. I mean, I can see all kinds of traps
3 being built in that if you didn't talk about
4 it in discovery, even though it's not
5 particularly important and you think everybody
6 agrees to it, suddenly after discovery people
7 don't agree to it anymore. No, we don't agree
8 that -- in Sarah's example, anymore about the
9 undisputed facts. They are not undisputed
10 anymore. We are going to raise it with this
11 new affidavit. We are going to bring up this
12 new information.
13 The other question that I would really
14 love to know is you mentioned earlier, Luke,
15 when you were explaining the rule that this
16 addresses the problem, and I would like a
17 definition of "the problem." You used the
18 word "problem" and I am not aware of it and I
19 would like to know what the problem is that we
20 are fixing with this.
21 CHAIRMAN SOULES: The Court and
22 some members of the Bar, as I understand it,
23 and maybe only some members of the Court, feel
24 that the summary judgment practice in Texas
25 should be more aligned to the Federal practice

1 so that summary judgments are more easily
2 obtained, and the impetus is to move to the
3 Federal rule. Now, there is a good bit of
4 resistance on the committee to doing that, at
5 least while discovery is available.
6 MR. SUSMAN: This represents a
7 Missouri compromise.
8 CHAIRMAN SOULES: So that moves
9 that problem that away.
10 MR. SUSMAN: This was a big
11 compromise because, I mean, some of us are
12 just very scared of having _Celotex_ adopted in
13 its entirety in the state system, and if we
14 can hold it at bay until discovery is over,
15 until essentially the eve of trial when the
16 party who's got the burden ought to be in a
17 position to marshal his evidence and create a
18 fact issue, we felt that was as good as we
19 could hope for in the current environment.
20 I mean, that's the rationale for it.
21 It's better than just a full-fledged adoption
22 of _Celotex_. I mean, there are a lot in this
23 room that would be very happy living under the
24 current regime, but I'm not sure that will
25 happen.

1 HONORABLE SARAH DUNCAN: Maybe,
2 Luke, could --
3 CHAIRMAN SOULES: Justice
4 Duncan.
5 HONORABLE SARAH DUNCAN: Maybe
6 we could vote just conceptually under current
7 regime, Celotex, and the Missouri compromise.
8 CHAIRMAN SOULES: Okay. Could
9 I ask a question before we do that? I thought
10 in this rule or maybe it's -- I have seen
11 several versions of these flowing in the last
12 few weeks. Does this continue to say in the
13 summary judgment rule that the judge can grant
14 additional time for discovery in the interest
15 of justice, or has that been dropped?
16 HONORABLE SCOTT BRISTER: We
17 consolidated all the stuff about continuance,
18 and that was kind of -- my opinion was
19 everything in current Rule 166 about
20 continuances is identical to what's in current
21 Rule 251, and so we just cross-reference it.
22 MR. ORSINGER: That's a
23 different question. He's asking about
24 reopening discovery.
25 CHAIRMAN SOULES: Yeah. I

1 think the reason that that was expressed in
2 166a was that it could suddenly become
3 apparent at the time a motion for summary
4 judgment is filed that a party needs discovery
5 they hadn't anticipated. And that could be
6 before or after discovery period closes, but
7 there is not -- the answer to my question is
8 there is nothing about continuances in the
9 proposed rule; is that right?
10 MR. SUSMAN: Yes.
11 HONORABLE SCOTT BRISTER: No.
12 MR. SUSMAN: Second sentence of
13 paragraph (d).
14 CHAIRMAN SOULES: Of paragraph
15 (d), dog?
16 MR. SUSMAN: Yeah. (D), dog.
17 "The court may continue the hearing pursuant
18 to Texas Rules of Civil Procedure 251."
19 HONORABLE SCOTT BRISTER: And
20 so, for instance, the first -- actually
21 because the whole section of the 250s is
22 continuance and the first sentence of 252 is
23 "If the ground for such application," meaning
24 for continuance, "be want of testimony, the
25 party applying therefore shall make affidavit

1 that such testimony is material, showing the
2 materiality," all the things that you do with
3 a affidavit in support of a continuance on
4 summary judgment. It's all identical, except
5 spelled out more clearly, and why not -- why
6 say it twice?
7 PROFESSOR DORSANEO:
8 Mr. Chairman?
9 CHAIRMAN SOULES: Bill
10 Dorsaneo. Then I will go around the table
11 counterclockwise.
12 PROFESSOR DORSANEO: With
13 respect to the Celotex standard, I haven't had
14 a Federal summary judgment case here in the
15 last year or so, but has it -- so I have a
16 question. Is it the case now across the
17 circuits that the plaintiff must produce in
18 order to raise a fact issue admissible
19 evidence or evidence that's in a form that's
20 admissible at trial? That's not what Celotex
21 itself holds, and this gets back to Paula
22 Sweeney's point and, frankly, the point that
23 you just made.
24 What do you do when the plaintiff could
25 say there is a fact issue in this case and I

1 plan to raise that fact issue at trial by
2 calling John Jones, who was within subpoena
3 range, and asking him these questions?
4 Perhaps, I can't get an affidavit from John
5 Jones because he won't give me one, and I will
6 not vote for a rule that forecloses a
7 plaintiff on that technical basis when they
8 could provide information that should be
9 satisfactory to the court that would indicate
10 that they will survive a directed verdict
11 motion at trial by calling a particular
12 witness and asking that witness questions.
13 MR. SUSMAN: I mean, I don't
14 quite understand that, what you're saying.
15 Don't you have to have what that witness is
16 going to say in affidavit form or deposition
17 form?
18 MS. SWEENEY: No.
19 CHAIRMAN SOULES: Under
20 Celotex?
21 MR. SUSMAN: No.
22 HONORABLE SCOTT BRISTER: You
23 can just assert it, just baldly assert it?
24 MR. SUSMAN: The Federal
25 rules --

1 HONORABLE SCOTT BRISTER: "I
2 think he's going to say -- I think he's going
3 to say the light's red."
4 CHAIRMAN SOULES: Just a
5 moment. One at a time.
6 HONORABLE SCOTT BRISTER: "I
7 hope he's going to say the light's red."
8 MR. SUSMAN: I mean, the
9 Supreme Court in the Matsuhita case, which is
10 part of that Celotex ruling, said the problem
11 was you couldn't prove that the Japanese
12 electronics makers were conspiring to set
13 predatory prices. I can solve that by just
14 filing something that says, "I could call one
15 of these guys to trial and they will admit
16 that they fix prices"? I mean, that's not
17 what that case means. You have got to produce
18 evidence that they were fixing prices.
19 CHAIRMAN SOULES: Bill.
20 PROFESSOR DORSANEO: I could
21 certainly prepare an affidavit that says
22 something like this, that I talked to the man
23 or one of my clients talked to the man at a
24 particular point in time, and he at that time
25 said this and that, and that might all be

1 true. You know, I expect him to repeat it,
2 but that's not going to be admissible
3 evidence.
4 It's more than, you know, there is
5 substance to what you say, but there is still
6 a technicality aspect to it as well when I
7 have to make sure that this evidence is
8 admissible at trial because of the, you know,
9 hearsay problems and other similar problems.
10 And I may have a real basis for saying that
11 when I go to trial I will have this in
12 admissible form under the trial rules, and
13 these rules are different and more strict,
14 probably because summary judgment was meant to
15 be hard to obtain and the burden was on the
16 movant. Now, if we are going to change it
17 around, the strictness that protected the
18 nonmovant, it hurts the nonmovant.
19 CHAIRMAN SOULES: Okay. Going
20 down this -- Paula Sweeney.
21 MS. SWEENEY: Just to follow up
22 on what Bill said, there are times when I know
23 I'm going to get X evidence at trial because
24 I'm going to subpoena so-and-so, who is
25 hostile as can be to me, and I'm going to make

1 him say it.

2 PROFESSOR DORSANEO: The

3 defendant.

4 MS. SWEENEY: By way of

5 example, and I can't go get an affidavit from

6 him, and I may have chosen for good, valuable

7 reasons not to depose such a person. So there

8 is nothing on the record, I have saved

9 judicial resources by not deposing everybody

10 in the world and haven't beaten them about the

11 head and shoulders to extract this whatever

12 from them because I know I can get it at

13 trial, haven't chosen to share with them how I

14 intend to do that because I still believe

15 there is such a thing as trial strategy. And

16 I am going to get it and I know I am going to

17 get it, but I don't have it now because I'm

18 not in trial and I can't subpoena him to give

19 me an affidavit. And something needs to be

20 built in to make sure that that's possible.

21 CHAIRMAN SOULES: Okay. After

22 Paula, Joe Latting.

23 MR. LATTING: If we were going

24 to do something like the committee suggested

25 in the rule in subdivision (e) and say that,

1 "(2), when the response is due after any
2 applicable discovery period is closed and the
3 moving party specifically states as a ground
4 for summary judgment that no evidence exists
5 on an element in the claim, then the
6 responding party has the burden of raising the
7 fact issue on that element."
8 Couldn't we say that "Upon proper motion
9 the court shall extend the discovery period
10 with the limited purpose of responding to
11 that"? If that's the problem, isn't that the
12 solution?
13 CHAIRMAN SOULES: Okay.
14 HONORABLE SCOTT BRISTER:
15 Automatically or -- because if it's automatic
16 then people -- there is no reason to have a
17 discovery window. People do some discovery,
18 it runs, they decide they want to open it up
19 again, and somebody files a motion, and it
20 automatically opens it back up, and you have
21 got no discovery window left.
22 Or do you mean if you are in Paula's
23 situation you can go and explain that to the
24 judge? Because as I understand it under the
25 discovery rules the judge can always reopen

1 the window, correct?

2 MR. SUSMAN: Right.

3 HONORABLE SCOTT BRISTER: But

4 you have to get the judge to do that. You

5 can't just the parties decide to do that.

6 MR. SUSMAN: Correct.

7 HONORABLE SCOTT BRISTER: So

8 then if you were in Paula's situation, you go

9 ask the judge, explain why you do it, take the

10 defendant's deposition or whatever you need to

11 respond to the summary judgment.

12 MR. LATTING: Well, if I could

13 answer --

14 CHAIRMAN SOULES: Okay. Joe,

15 go ahead, and then I will get the rest of you.

16 MR. LATTING: If I could answer

17 your question, it seems to me what happens is

18 this: We get through with discovery, and the

19 other side moves for summary judgment. I'm

20 the respondent. I say, "Well, they have moved

21 that I don't have any evidence on Point A and

22 I know I can get some." And so I tell the

23 other side I'd like to take so-and-so's

24 deposition. The other side says, "No, you

25 can't do that. The discovery is closed. Too

1 bad for you."

2 It seems to me that it's going pretty far

3 to say that I have to go in and face a

4 discovery -- I mean, a summary judgment motion

5 where I have the burden of raising a fact

6 issue, but I don't have any way to raise it

7 unless I can do what Paula says, which is just

8 to say that, "Well, when I get to trial I will

9 raise it," and that doesn't seem to solve the

10 problem, Celotex problem, either. That sort

11 of gets us to the law using affidavit as a way

12 out of a summary judgment.

13 CHAIRMAN SOULES: David

14 Keltner.

15 MR. KELTNER: As I understand

16 the applicable Federal cases now, in answer to

17 Bill Dorsaneo's question, I do think it has to

18 be admissible. So it seems to me there is two

19 fixes, possible fixes, to the rule. There

20 seem to me to be two problems with this one,

21 and Paula has identified, I think very well,

22 one of them.

23 The other is, remember, this could very

24 well be a plaintiff moving for summary

25 judgment, and quite frankly, if you did it

1 strategically, what the plaintiff might do is
2 allege broadly, as one can still do under the
3 pleadings, avoid taking discovery of one's own
4 persons to prove-up all the elements of one
5 cause of action that could be somewhat hidden
6 in the pleadings. Then move for summary
7 judgment after everything is closed, and quite
8 frankly, in Federal practice that happens not
9 infrequently and is not only a legitimate
10 trial strategy but one that is advocated in
11 Federal trial advocacy courses. But the point
12 is what happens is you --
13 CHAIRMAN SOULES: I don't
14 understand what you just said. I'm sorry.
15 MR. KELTNER: Well, the
16 situation is it could work either plaintiff or
17 defendant, is what I'm saying; and the
18 situation is, one, the piece of evidence that
19 Paula raised that is missing, I've got to
20 depose the affiant, for example, that the
21 other side puts forward in the affidavit. The
22 other one is just missing because no one knew
23 this piece of evidence was going to be
24 important until the summary judgment time.
25 CHAIRMAN SOULES: Right.

1 MR. KELTNER: Scott, I don't
2 think -- I mean, Judge Brister, I don't
3 believe 251 solves the problem because that
4 deals with continuance and doesn't deal with
5 the discovery window, and we are going to have
6 to have something I think in this rule to give
7 the trial judge an opportunity to reopen the
8 discovery window specifically in the summary
9 judgment rule because of the switch of
10 burdens.
11 If we decide to go with the switch of
12 burdens, we are going to have to do that.
13 That takes care of Paula's problem to a great
14 extent, and it takes care of also the problem
15 of the fact no one thought was an important
16 issue, in my opinion. So I think it's going
17 to have to be more than 251. I think it's
18 going to have to be reopen discovery window,
19 and I think we will have some case law talking
20 about a judge abusing his or her discretion
21 and refusing to reopen the discovery window
22 based on that.
23 CHAIRMAN SOULES: Mike Prince.
24 MR. PRINCE: Real quick to
25 support David's point, Mr. Chairman, Rule

1 56(f) of the Federal rules deals specifically
2 with getting a continuance in order to respond
3 to the Rule 56 motion, and there is a good bit
4 of case law on that about how -- under what
5 you have to prove to show that you are
6 entitled to a continuance for further
7 discovery in order to be able to respond to
8 the motion. It's pretty well developed.
9 CHAIRMAN SOULES: Well, 252
10 really doesn't get at this either because it
11 says the only way you can go get evidence is
12 to show that you used due diligence to procure
13 the testimony. So if this is a big surprise
14 suddenly, you can't -- I don't know how you
15 show due diligence.
16 MR. KELTNER: Luke, it's even
17 worse than that. It's the use of it at trial,
18 and it's the reason to postpone, but all the
19 case law on it is about a trial setting and
20 all the 250 series is going to deal with that.
21 I think we are going to have to have a
22 separate provision regarding reopening the
23 discovery window on a witness no one thought
24 was important. Otherwise, we are going to
25 have a consequence for a lawyer misjudging

1 what evidence was important on maybe some
2 technical part of the case that's really not
3 terribly in controversy.
4 CHAIRMAN SOULES: Judge McCown.
5 HONORABLE F. SCOTT McCOWN:
6 Well, I agree with David and I have a sentence
7 to propose, but before I do that, you're going
8 to have one disadvantage or the other. There
9 is no way to create a rule that allows a judge
10 to grant a summary judgment on a no evidence
11 case and allows Paula to try her case where
12 she's going to get the defendant a la Perry
13 Mason to admit he did it.
14 I mean, you have got to pay the cost one
15 way or the other and you may tilt it, but you
16 are either going to live in a regime where the
17 no evidence case, the trial judge just can't
18 get rid of or a regime where a few of Paula's
19 cases go by the board so we can have summary
20 judgment in the no evidence case. And I think
21 what this group has to decide is whether they
22 are going to take a stand for the present rule
23 and advise the Court that we think they ought
24 not leave the present standard or whether
25 maybe we are going to face political reality

1 that they are going to leave the present
2 standard regardless of our advice and fashion
3 a compromise that we think is better than what
4 they might do unadvised by us.
5 And that's what the committee tried to
6 do, was fashion a compromise, which is that
7 subdivision (e), and I think what David is
8 suggesting and what Joe is suggesting is we
9 just add a sentence along the lines of, "Leave
10 to take additional discovery outside the
11 discovery period may be granted or shall be
12 granted when a respondent shows that it may be
13 responsive to the claim of no evidence." And
14 so just say expressly that if they have moved
15 on no evidence, you are outside the discovery
16 period, you're the respondent, but you can
17 show that you need some discovery, and it may
18 be responsive to that claim. That doesn't
19 solve Paula's problem, but you can't get
20 there.
21 MR. LATTING: How about "should
22 be granted"?
23 HONORABLE F. SCOTT McCOWN:
24 "Shall."
25 MR. LATTING: "Should." It's

1 in the middle.

2 CHAIRMAN SOULES: Okay. Judge

3 McCown, I think we are going to get to the

4 point, though, where the committee is going to

5 want this requirement for additional discovery

6 to be whether within or without the discovery

7 period, like it is today.

8 MS. SWEENEY: Say that again.

9 CHAIRMAN SOULES: They are

10 going to want this because there is nothing --

11 HONORABLE F. SCOTT McCOWN:

12 That's right.

13 CHAIRMAN SOULES: There is

14 nothing that precludes a party moving for

15 summary judgment inside the discovery period.

16 HONORABLE F. SCOTT McCOWN: But

17 the rule doesn't operate inside the discovery

18 period.

19 MS. SWEENEY: It doesn't shift

20 the burden.

21 HONORABLE F. SCOTT McCOWN: The

22 burden is only shifted if you are outside the

23 discovery period.

24 CHAIRMAN SOULES: But today

25 under the Texas rule there is an express

1 provision that the judge may permit further
2 discovery before ruling on the motion, and I
3 think we want to preserve that.
4 HONORABLE SCOTT BRISTER: In
5 other words, if you want a continuance, you
6 can also get one whenever.
7 HONORABLE F. SCOTT McCOWN:
8 Yeah. Well, we can put that back.
9 MR. SUSMAN: (G), it's in (g).
10 It's subdivision (g).
11 HONORABLE F. SCOTT McCOWN:
12 Yeah. We can put that back.
13 PROFESSOR DORSANEO: That's the
14 same thing that Mike Prince was talking about
15 in the Federal rule as subparagraph (f) or
16 paragraph (f). Ours is (g), and we ought to
17 put it back in with or without some
18 accompanying language of the type stated by
19 Judge McCown.
20 HONORABLE F. SCOTT McCOWN:
21 Yeah. We can do that.
22 CHAIRMAN SOULES: Your
23 proposition was to have it apply to a motion
24 filed after discovery was closed, and I'm just
25 suggesting we are probably going to want it to

1 apply no matter when the motion is filed.
2 HONORABLE F. SCOTT McCOWN:
3 Right. But maybe, maybe -- yeah. I agree
4 with you it out to apply whenever, but maybe
5 have a special tag on this no evidence point
6 that it shall be granted if there is going to
7 be discovery responsive to the no evidence
8 point.
9 HONORABLE DAVID PEEPLES: I
10 think a lot of our discussion has been
11 assuming that we are talking about the great
12 big cases which take a long, long time. I
13 deal with a lot of cases where, you know, we
14 get to trial in seven months in Bexar County.
15 It's a nonjury trial, as fast as you can agree
16 on it. They will never reach the discovery
17 deadline, and I have had a good many cases
18 where usually the defendant moves, didn't
19 quite prove as a matter of law that there is a
20 no fact issue. I ask the plaintiff's lawyer,
21 "Are you going to be able to raise a fact
22 issue?"
23 "No, I don't think so, but I want to keep
24 this case on file and put them to the line."
25 And under this rule you can't grant a summary

1 judgment in a case where the plaintiff has
2 admitted either on some causes of action or
3 the whole thing "I don't think I am going to
4 be able to raise a fact issue. I'm hoping,
5 hoping they will pay me something."
6 And so I think it's wrong for us to
7 assume that we are talking about great big
8 cases here. Yeah, there are great big cases
9 where this will apply, but I deal and a lot of
10 us deal with many cases where something is
11 alleged and they are not going to be able to
12 raise a fact issue. Everybody knows it, and
13 the court ought to have the discretion to
14 grant summary judgment on that.
15 CHAIRMAN SOULES: So are you
16 suggesting then, Judge Peeples, that Celotex
17 should apply -- we should just not --
18 HONORABLE DAVID PEEPLES: I'm
19 not sure I know what the time periods are in
20 Celotex, frankly, but I think the courts ought
21 to have the discretion to not have to wait for
22 the discovery period.
23 CHAIRMAN SOULES: Okay. Anne
24 Gardner.
25 MS. GARDNER: In Celotex the

1 Supreme Court specifically said that the
2 scheme that it was adopting, like the shifting
3 the burden of proof, would only apply after
4 adequate opportunity for discovery, and I just
5 wanted to add that I wanted to include that
6 specific language in the committee -- the
7 court rules committee's proposed version of
8 Rule 166a, which is similar to what the
9 subcommittee is proposing now.
10 The court rules committee recommended
11 adopting a similar type of a concept of having
12 the shifting of the burden of proof for the
13 reasons as stated by Judge Peeples but not
14 adopting wholesale the Federal approach across
15 the board. And I think that it's important
16 for the same reasons and I certainly support
17 it, but I do think that it's very dangerous to
18 allow it to be used when there is not adequate
19 time for discovery.
20 So I think that we -- as someone else
21 pointed out, there isn't a large body of case
22 law that's developed on -- I believe it's
23 subdivision (g) in the Federal rule that
24 allows motion for continuance with affidavits,
25 and the motion for additional discovery in

1 connection with that really ought to be set
2 out in the rule for adequate protection.
3 I have been on both sides of cases, where
4 I normally do defense work, but I have been a
5 plaintiff in a Federal court case where the
6 defendant hauled off and filed a motion for
7 summary judgment saying that I could not
8 produce any evidence, basically no evidence
9 exists, on an essential element of the
10 plaintiff's claim like three months into the
11 discovery period, and we had to try to scurry
12 around in 10 days under the Federal rule
13 instead of 21 and try to produce evidence on
14 paper in admissible form to prove every
15 element of our case.
16 And that is just really, really a harsh
17 burden to put on a plaintiff when they have
18 not had adequate opportunity for discovery,
19 and the whole concept of having -- allowing a
20 defendant to move based on no evidence or a
21 plaintiff to move based on no evidence if it's
22 an affirmative defense of the defendant has
23 got to be premised on adequate discovery.
24 CHAIRMAN SOULES: Chip, I'm
25 sorry I skipped over you. I apologize.

1 MR. BABCOCK: Two points. It
2 seems to me that it is, I would guess,
3 relatively obvious that if somebody says that
4 they need discovery to respond to the motion
5 for summary judgment, there ought to be
6 something in this rule that allows that. I
7 would suggest that we not overlook Rule 252,
8 which sets out in considerable detail what you
9 have to show. Because if we don't apply the
10 Rule 252, what you are going to have is
11 perfunctory responses saying, "Oh, I need more
12 discovery," without the detail that's required
13 in Rule 252.
14 Second, an unrelated point: I wonder,
15 Steve, if the subcommittee has considered how
16 you are going to get your motion for summary
17 judgment heard in advance of trial dependent
18 upon what the discovery period is. Because
19 under current practice, for example, in Dallas
20 County you're never going to get this motion
21 heard probably in most courts because the
22 discovery period ends 30 days before the trial
23 setting. Most judges in Dallas County, Paula,
24 are not going to even set your motion --
25 MS. SWEENEY: That's right.

1 MR. BABCOCK: -- on 30 days
2 notice. So you're not going to get heard.
3 Now, if the proposal that we have before the
4 Supreme Court on the discovery rules on the
5 nine-month discovery is enacted, maybe that
6 will alleviate it somewhat, but it seems to me
7 that there ought to be a consideration given
8 here that if we go with the Missouri
9 compromise about getting your motion heard
10 somehow in advance of trial so that you are
11 not having your motion heard -- either not
12 heard at all or heard on the Monday you're set
13 for trial so that you have had to spend all of
14 the weekend getting ready as if you are going
15 to try the case, which is a huge waste of time
16 if you show up Monday morning and the judge
17 says, "Motion granted."
18 MR. SUSMAN: I mean, we
19 considered it only in this respect: Obviously
20 you can have a summary judgment under our
21 Missouri compromise. You can file one at any
22 time and get it heard at any time, but if you
23 do it before the discovery period is over, you
24 do it under the current Texas practice.
25 HONORABLE SCOTT BRISTER: Well,

1 not just that. If the response is due after
2 discovery period.
3 MR. SUSMAN: That's right.
4 HONORABLE SCOTT BRISTER: So
5 the idea was you can file it two months before
6 discovery closes.
7 MR. BABCOCK: I was just going
8 to ask, is that okay?
9 HONORABLE SCOTT BRISTER: Then
10 the discovery -- then you can set it for seven
11 days after the discovery period closes, which
12 is still 20 something days before trial,
13 admittedly not a long time, but at least it's
14 before you get everybody in town and bring
15 them down to the courthouse.
16 MR. BABCOCK: Well, that's
17 better. You are still going to have trouble
18 in Dallas County. Probably not as much in
19 Harris County.
20 CHAIRMAN SOULES: Buddy Low.
21 MR. LOW: I just want to
22 address all of the things that are going on
23 because people have different concepts and so
24 forth, but one of the things that --
25 MR. MARKS: Buddy, we can't

1 hear you.

2 CHAIRMAN SOULES: Speak up,

3 please.

4 MR. LOW: I don't want us to

5 get into the situation where we are trying to

6 save costs and somebody says, "My God, I've

7 got to take a hundred depositions or I might

8 get a summary judgment against me." I mean, I

9 don't know. I'm not saying the answer to that

10 may be that we have to have some door open

11 where you need to respond. I'm not addressing

12 that. I'm just saying we need to stay focused

13 on the concept that we are trying to save

14 money, and we don't want to force people into

15 taking 100 depositions just to do that.

16 Now, with that preface, did the

17 subcommittee for some reason omit when

18 affidavits are unavailable, like Sarah was

19 talking about, and a party can present an

20 affidavit? If I can't get his affidavit, he's

21 in Germany, but I mean, that would answer some

22 of it. Did you-all consider -- is that just

23 totally deleted?

24 MR. SUSMAN: We deleted it and

25 probably as a mistake. I mean, we were led to

1 believe or thought that in 251 --

2 HONORABLE SCOTT BRISTER: Put

3 it back.

4 MR. SUSMAN: We can put it

5 back.

6 MR. LOW: No, no, no, Steve.

7 I'm not arguing with you because there is so

8 much about this I don't understand and so

9 little that I do until I just ask the

10 question.

11 MR. SUSMAN: We don't want to

12 change it.

13 HONORABLE SCOTT BRISTER: Just

14 thought it was duplicative, but if people want

15 it back in...

16 MR. LOW: Okay.

17 CHAIRMAN SOULES: Steve. And

18 then we'll go around again.

19 MR. SUSMAN: Well, it seems to

20 me one of the things we could do fairly

21 quickly, Luke, would be to take a straw vote

22 on this issue of whether this group has agreed

23 upon <u>Celotex</u>, like in the Federal courts, or

24 current practice or the compromise, kind of a

25 straw vote. And then we might also go on, I

1 mean, if the feeling is that we ought to also
2 present to the Court something, because in
3 spite of what we want, you know, I mean, we
4 might present some stand back, you know, some
5 alternative rule or something like that, but
6 we could take that kind of vote and see how
7 far we get on that.
8 CHAIRMAN SOULES: All right.
9 First thing you want to say, ignoring the
10 political realities, what's the sense of the
11 committee on Celotex, the compromise, or the
12 current rule?
13 HONORABLE SCOTT BRISTER: Can I
14 say just one more thing on that argument?
15 CHAIRMAN SOULES: Judge
16 Brister.
17 HONORABLE SCOTT BRISTER: As I
18 understand from talking to Federal
19 practitioners and one Federal judge, the
20 problem with Celotex is -- or one problem is,
21 putting aside shifting the burden, is when is
22 adequate discovery and what happens is
23 whenever you get one of these motions it is a
24 standard response to say, "I haven't had
25 adequate discovery" and so the dispute becomes

1 not whether there is a material fact issue,
2 but you have a disputed hearing, satellite to
3 and previous to that about how much discovery
4 has been done and how much is left to do.
5 The advantage of our compromise is there
6 is no such a dispute. The discovery period is
7 closed. Yes, in particularly strong
8 circumstances a judge can open it back up
9 again, but don't forget the whole idea of what
10 we did all summer was to have a discovery
11 period, when it started and when it stopped.
12 If you don't like that, then we shouldn't have
13 done that, but that was the idea and it was
14 going to be done and you had your case in the
15 can.
16 And at the end of that period to my mind
17 there is very little excuse to say, "Oh, gosh,
18 I want to do some more." So if you have got
19 that concept, you start your discovery, you
20 get on it, and you finish it, then to have a
21 bright line rule to say, look, no -- generally
22 speaking or almost always no additional
23 discovery. You had a discovery period.
24 Unless there is some particular -- somebody
25 dies or something like that when you can

1 reopen it, well, you remove the Federal
2 dispute about have we had adequate discovery.
3 It's a bright line rule. Let's get to the
4 facts.
5 I do think that we need to have a
6 shifting thing on this. Just in the last
7 three months I have had to sit through the
8 first half of two medical malpractice trials
9 in which everybody knew the plaintiff did not
10 have a testifying expert. Now, the defendants
11 in both cases the week before trial came to me
12 with motions saying, "We have taken the
13 plaintiff's expert and he says my guy didn't
14 do anything wrong," and I, of course, said,
15 "That ain't enough." That's great if I was a
16 Federal judge. Motion denied, pick the jury,
17 call every witness, and sure enough the
18 plaintiff's expert gets on the stand, says, "I
19 don't think he did anything wrong," and I
20 direct the verdict and that's a waste of time
21 and money and we all know it and there needs
22 to be something to do about that.
23 CHAIRMAN SOULES: Joe Latting.
24 MR. LATTING: But in connection
25 with what we said earlier, we don't

1 necessarily need to grant a summary judgment
2 on it because that's not -- I mean, in
3 connection with Paula's concern, if there is a
4 summary judgment on the plaintiff's motion,
5 and typically the plaintiff does not have the
6 evidence, it doesn't seem to be too much
7 violence to this discovery period to say then
8 the court shall reopen discovery for the
9 purpose or for the limited purpose of
10 responding to that motion or that portion of
11 the motion. That's all you would be
12 responding to. You are not opening the
13 discovery period cart blanche. It's just for
14 that one thing. The defendant says there is
15 no evidence as to X and the plaintiff says,
16 "Yes, there is. I can get some if you let me
17 take so-and-so's deposition."
18 CHAIRMAN SOULES: John Marks.
19 MR. MARKS: The rule as written
20 by Steve's committee says that a summary
21 judgment can be moved on the basis of no
22 evidence, that no evidence exists on an
23 element of a claim. So you have a claim that
24 has been pled, we presume, and I would presume
25 that the plaintiff, if the plaintiff does not

1 have or the nonmoving party does not have the
2 evidence in hand or in control of that
3 evidence to present at trial, then he is going
4 to get that evidence in discovery. And if he
5 has control of the evidence, then he doesn't
6 need to get it in discovery, you see.
7 In any event, I think as written this
8 would work okay because you are going to do
9 discovery on the elements of your claim that
10 you need to prove and you don't have the
11 evidence in hand to prove, and if a summary
12 judgment is moved on you -- I hope I'm making
13 sense.
14 MR. LATTING: Yeah.
15 MR. MARKS: If summary judgment
16 is moved on you, then you have got your
17 witnesses that you were going to present at
18 trial, and you know what they are going to
19 say. All you have to do is get those
20 affidavits and file your response. So I think
21 that it's perfectly appropriate to have this
22 kind of a summary judgment after the close of
23 discovery period.
24 CHAIRMAN SOULES: Rusty, you
25 haven't spoken yet. Go ahead.

1 MR. McMAINS: Well, one of the
2 things I'm curious about that I really didn't
3 notice until John mentioned it is why is it
4 only that this second part applies to a
5 plaintiff?
6 HONORABLE F. SCOTT McCOWN:
7 Defense is in No. (1).
8 PROFESSOR ALBRIGHT: Look at
9 No. (1).
10 MR. McMAINS: Yes, but they are
11 different time periods. I mean, No. (2) is --
12 only talks about "when the response is due
13 after any applicable discovery period is
14 closed and the moving party" -- it's general.
15 And it just says "states a ground for summary
16 judgment that no evidence exists on the
17 element of the claim."
18 HONORABLE F. SCOTT McCOWN:
19 Subdivision (1) is the law right now.
20 MR. McMAINS: I understand.
21 HONORABLE SARAH DUNCAN: No.
22 HONORABLE F. SCOTT McCOWN: And
23 that's why there is no time period on it.
24 It's the law now. Subdivision (2) is a new
25 burden or change in the law, and the time

1 periods there is a compromise.
2 MS. SWEENEY: So the new change
3 is to make it a one-way rule? That's what
4 Rusty is saying.
5 HONORABLE F. SCOTT McCOWN: No,
6 no, no.
7 MR. SUSMAN: Scott, I think all
8 he was saying is why don't you insert after
9 "claim" there the word "defense"?
10 HONORABLE F. SCOTT McCOWN: I
11 know what he's saying. Defense is in
12 Subdivision No. (1).
13 MR. McMAINS: Yeah. But the
14 point is it doesn't do any violence to put it
15 there. This basically suggests that there is
16 no difference, that you always have the -- you
17 know, that on the affirmative defense that you
18 have a -- see, I don't think that the first
19 one says that you can't say that there is no
20 evidence of an affirmative defense.
21 PROFESSOR ALBRIGHT: What he's
22 saying --
23 MR. McMAINS: The question is,
24 shouldn't you be able to say there is no
25 evidence of an affirmative defense after the

1 discovery period is closed --
2 PROFESSOR ALBRIGHT: Right.
3 The plaintiffs --
4 MR. McMAINS: -- and have the
5 same advantages that the defendant has with
6 regards to the claim?
7 CHAIRMAN SOULES: David
8 Keltner.
9 MR. McMAINS: That's what I am
10 getting at, if you are talking about enhancing
11 the burden.
12 MR. KELTNER: I want to address
13 two things, one, what Rusty said is one of the
14 points I was trying to make earlier and didn't
15 do artfully, and I think that's right. The
16 second item -- and I think this is extremely
17 important. The point has been made that
18 Celotex is okay after the close of the
19 discovery period without reopening of the
20 discovery period because the plaintiff
21 knows -- either has the evidence in hand or
22 not, and let me tell you, I don't think that's
23 accurate, and it goes against one of the
24 philosophies we agreed about going into
25 limiting discovery.

1 The truth of the matter is one of the
2 reasons we decided to limit by number and time
3 of depositions, interrogatories, and other
4 things and then also limit the time for
5 discovery was that you didn't need to do
6 discovery to have to be admissible at trial
7 and that parties in smaller cases would be
8 able to go out and just talk to somebody or
9 get that evidence even from an adverse party
10 at the time of the trial, and you wouldn't
11 need formal discovery to do it.
12 So to take the position -- and I disagree
13 with John on this radically. To take the
14 position that, well, you either have it in
15 hand or control it or you don't at the time
16 the discovery period closed is not accurate
17 and is a decision contrary or a theory
18 contrary to what we agreed before. That's why
19 I think it is extremely important that you be
20 able to reopen discovery to some extent if you
21 follow Celotex.
22 The Supreme Court in Celotex, as Anne
23 Gardner said, made it very clear that's the
24 case, and I want -- in that regard I want to
25 correct something I said before or clarify it.

1 What Bill Dorsaneo said about Celotex is also
2 right. Celotex and two of its other companion
3 cases basically say it doesn't have to be
4 admissible into evidence in a contravening
5 affidavit, that you could do -- and, Steve,
6 you took exception with what Bill said, but
7 the truth of the matter is you don't have to
8 do that under Celotex.
9 I found that strange in Celotex because
10 there were decisions from five of the circuits
11 that say it had to be admissible to challenge
12 it, but one of the reasons that Celotex
13 reached the conclusion it did was saying we
14 are giving you some due process over here
15 because all you have got to raise is the
16 suggestion. That's completely contrary to
17 Texas practice, which has been it's got to be
18 admissible into evidence; and if, you know,
19 for example, if the affidavit is not made on
20 personal knowledge, like Jennings vs. KFE
21 issue, you don't get it in.
22 So my point is two-fold. If we don't
23 have a reopening of the discovery period
24 resting within the discretion of the court, we
25 will have gone against one of the theories we

1 initially adopted to limit discovery, and I
2 think that would be wrong. Now, I am for the
3 Celotex after the discovery cut-off, but I
4 would not be for it if we did not allow a
5 reopening of that. And, Judge Brister, I
6 recognize that there is a problem in Federal
7 court with Celotex in terms of everybody says
8 we need additional discovery, but I think
9 those are decisions pretty easily made. I
10 mean, if you deposed somebody on that issue,
11 maybe that was your chance, and that's a
12 given.
13 CHAIRMAN SOULES: Go ahead,
14 Alex.
15 PROFESSOR ALBRIGHT: I think
16 everybody in the subcommittee recognized that
17 there would be reopening discovery in some
18 situations. I don't think that is an issue.
19 I don't think we should vote against the
20 compromise because of that. I think we all
21 agreed that that should happen. I think it's
22 just after the discovery period you have to
23 come forward with some specific discovery that
24 you need to take in response to the summary
25 judgment motion, and I think that's what

1 everybody has been saying around here. So I
2 don't think that's an issue anymore. I think
3 that's what we all had in mind.
4 CHAIRMAN SOULES: Richard
5 Orsinger.
6 MR. ORSINGER: I want to
7 support Rusty's suggestion that we include
8 defense in this switching of the burden of
9 proof, and I want to propose that rather than
10 having three alternatives to vote on that this
11 compromise be offered with a discovery safety
12 valve clause written in this rule, not in the
13 general discovery rule, because I would feel
14 much more comfortable voting for the
15 compromise knowing that there was a sentence
16 that the court has the discretion to permit
17 discovery on certain issues that were raised
18 in the proceeding, summary judgment
19 proceeding, and I would probably vote against
20 it if you are not going to guarantee me a
21 clause like that.
22 PROFESSOR ALBRIGHT: I think we
23 have all agreed to put that in in the
24 subcommittee. As I understand it, we have
25 said, "Let's put it in."

1 CHAIRMAN SOULES: John Marks.
2 MR. MARKS: Going back to what
3 Mike Prince said, why couldn't we add
4 something like is in the Federal Rule 56(f)?
5 CHAIRMAN SOULES: Read it,
6 please.
7 MR. MARKS: Okay.
8 PROFESSOR DORSANEO: It's in
9 our rule right now. The same exact language
10 is in our 166.
11 HONORABLE SCOTT BRISTER: Yeah.
12 Put it back in. Just trying to save trees,
13 that's all.
14 MR. MARKS: You want me to read
15 it?
16 CHAIRMAN SOULES: All right. I
17 don't know which to vote on first, the chicken
18 or the egg, but it seems that probably there
19 would be more of a comfort level on deciding
20 either this rule up or down, either compromise
21 up or down, or current rule compromise or
22 Celotex, however we may articulate that, if we
23 first take a consensus on whether there should
24 be a limited -- be available to the parties a
25 motion for a limited reopening of discovery in

1 the face of a summary judgment motion. So I'm
2 going to do that first.
3 How many feel that there should be
4 available to the parties a motion for a
5 limited reopening discovery in the face of a
6 summary judgment?
7 MR. HATCHELL: Whatever the
8 rule is?
9 HONORABLE SARAH DUNCAN:
10 Whatever the rule?
11 CHAIRMAN SOULES: 27. Those
12 opposed? Okay. None opposed. So all are in
13 favor of that.
14 MR. SUSMAN: With that
15 amendment could we see whether people will
16 support the compromise?
17 CHAIRMAN SOULES: Okay. Now,
18 those in favor then of a compromise that --
19 MR. SUSMAN: Shifts the burden.
20 CHAIRMAN SOULES: -- shifts the
21 burden to a Celotex concept after the
22 discovery period closes but prior to the
23 closure of the discovery period preserves the
24 current Texas practice.
25 MR. LATTING: Question. Are we

1 talking about just about subdivision (e)?
2 CHAIRMAN SOULES: I'm not
3 talking about any subdivision. I am not
4 talking about anything that's on paper.
5 MR. LATTING: Well, he's saying
6 "yes," and you're saying "no."
7 CHAIRMAN SOULES: No. I'm
8 saying, "no."
9 MR. SUSMAN: He's the chairman.
10 CHAIRMAN SOULES: We are not
11 talking about anything on paper. We are not
12 talking about anything on paper. We are
13 talking about this concept so that once we
14 have a consensus, particularly if it's heavy
15 in one direction or another, we can better, I
16 think, approach the specific complaint.
17 MS. SWEENEY: Could you define
18 "in favor of"?
19 MR. McMAINS: When forced to
20 change.
21 MR. MARKS: State the concept.
22 MR. BABCOCK: Paula makes a
23 good point.
24 MS. SWEENEY: No, I'm serious
25 about that actually.

1 CHAIRMAN SOULES: I do want to
2 try to respond to your question, and I don't
3 understand what you're asking. Paula, please
4 help me.
5 MS. SWEENEY: Well, I mean, in
6 favor of if we have to have something is this
7 okay, or are we going to address the threshold
8 question of do we want this in the first
9 place?
10 MR. KELTNER: I thought this
11 was the threshold.
12 MR. LATTING: What is "this"?
13 MS. SWEENEY: Shifting the
14 burden, changing an unbroken system.
15 CHAIRMAN SOULES: Well, we have
16 a rule right now. This is a proposed change
17 to the rule. The proposed change to the rule
18 is to basically preserve the current Texas
19 practice up to the close of discovery and
20 after the close of discovery to change to the
21 Celotex rule on the burdens of the respective
22 parties and summary judgment practice.
23 Okay. Those in favor of the proposed
24 change show by hands. 14.
25 Those opposed? Ten. So it's a close

1 vote of 14 to 10, but that's as good as we can
2 do.
3 MR. BABCOCK: Wait a minute.
4 Wait a minute.
5 CHAIRMAN SOULES: Okay. Chip
6 Babcock.
7 MR. BABCOCK: There is some
8 confusion here about -- there is at least some
9 "no" votes in that ten that want to go further
10 than the compromise toward Celotex, and there
11 is some in that ten that don't want to go as
12 far as the compromise.
13 MR. SUSMAN: Right. That's
14 exactly right. Well, I was getting ready to
15 switch my vote.
16 HONORABLE SARAH DUNCAN: Very
17 true.
18 CHAIRMAN SOULES: So do you
19 want a consensus on that?
20 MR. BABCOCK: Well, the
21 original proposal Steve had was to take three
22 votes.
23 MR. SUSMAN: Three
24 possibilities.
25 MR. BABCOCK: Let's have

1 current practice, compromise, Celotex.

2 CHAIRMAN SOULES: Everybody

3 vote just once.

4 MR. KELTNER: Let's not perfect

5 the tradition.

6 CHAIRMAN SOULES: Early and

7 often I know is the practice, but the

8 Democrats have somehow lost that, that notion.

9 HONORABLE SARAH DUNCAN: Not in

10 San Antonio.

11 CHAIRMAN SOULES: Maybe the

12 Republicans have picked it up. I don't know.

13 Anne Gardner.

14 MS. GARDNER: There is another

15 middle ground between the compromise and

16 Celotex, and that's the court rules

17 committee's proposed rule which just shifts

18 the burden of proof without regard to the

19 discovery period, but it does have the

20 opportunity for additional discovery whenever

21 the motion is filed.

22 MR. SUSMAN: When does it shift

23 it?

24 CHAIRMAN SOULES: Okay. Well,

25 we have a unanimous directive to --

1 MS. GARDNER: Yes. It shifts
2 any time, but it presupposes you will have
3 adequate time for discovery or else you would
4 get a continuance with an additional
5 opportunity for discovery.
6 HONORABLE SCOTT BRISTER: Isn't
7 that the same as Celotex, Anne?
8 MS. GARDNER: Well, not really
9 because Celotex goes further than Texas law in
10 some other respects. It goes further than we
11 would want to go. It gets into a
12 philosophical difference, I think, on how much
13 discretion a Federal judge is given in
14 deciding whether there is some evidence; and
15 they can, you know, look at it qualitatively
16 and so on and so forth that we don't want to
17 do.
18 HONORABLE SCOTT BRISTER: Well,
19 right.
20 MS. GARDNER: Maybe it is the
21 same as Celotex.
22 HONORABLE SCOTT BRISTER: On
23 this issue it seems like it is.
24 CHAIRMAN SOULES: Let me ask
25 you this, Anne, for clarification. We have a

1 unanimous directive that there be available,
2 at least, a motion for limited additional
3 discovery in the face of a summary judgment
4 motion. So assume that. Then does the State
5 Bar Rules Committee, it basically adopts the
6 Celotex burdens at all stages for summary
7 judgment practice?
8 MS. GARDNER: Yes, it does, and
9 the feeling of the court rules committee was
10 that the whole reason for shifting the burden
11 of proof or adopting the Celotex approach is
12 to make a summary judgment motion a more
13 efficient vehicle for eliminating
14 unmeritorious claims and defenses. And the
15 cost of litigation is not going to be cut down
16 any if you have to go through an entire
17 discovery period before you can invoke the
18 Celotex type motion.
19 And so it doesn't really do that much
20 good to have it if you are almost up to within
21 30 days of trial before you can even use it.
22 You have wasted all that time on discovery on
23 other aspects of the case if you can't get to
24 the jury on an essential element, but the
25 defendant can't do anything about it until the

1 time of trial. In other words -- well...
2 CHAIRMAN SOULES: Okay. I'm
3 really not --
4 MS. GARDNER: I don't see what
5 good having a Celotex type motion available is
6 going to do if you can't use it until you are
7 almost to the trial stage anyway. Why not
8 just wait and move for a directed verdict?
9 MR. BABCOCK: Just to follow up
10 on that briefly, and my point was that the
11 compromise as written here conceivably could
12 even exacerbate that problem because not only
13 do you have to wait until all the discovery is
14 done, but because of the way these motions are
15 set you are going to be right up on the eve of
16 trial preparing for trial before your motion
17 is heard.
18 HONORABLE SCOTT BRISTER: If I
19 could respond to those?
20 CHAIRMAN SOULES: Judge
21 Brister.
22 HONORABLE SCOTT BRISTER:
23 Number one, in a lot of courts the discovery
24 period is not going to be closed right before
25 trial.

1 MR. BABCOCK: I recognize that.
2 HONORABLE SCOTT BRISTER: It
3 may be closed right before the first trial
4 setting, but that may be a long time before
5 the trial. So you may save a lot of time.
6 Number two, and there is some
7 disagreement about this. I think under the
8 discovery rules we have sent to the Court I
9 could imagine a situation where I could
10 shorten the discovery period. You tell me
11 that they don't have evidence of it, they are
12 never going to have evidence of it, and
13 because of some quirk about this point I can't
14 put an affidavit contrary. Remember, you can
15 always do that.
16 You have got proof that they will never
17 do it, and your guy can swear to it, that they
18 will never be able to do it. You can file it
19 any time. And when? As long as you carry the
20 burden, but just for some quirk it's a
21 situation they don't have evidence, they will
22 never have evidence, and I can't prove to the
23 contrary. I mean, under the third track the
24 judge did always adjust the discovery period
25 to be something different and if -- you know,

1 subject to whether that was arbitrary and
2 stuff. So I think that will take care of that
3 problem.
4 CHAIRMAN SOULES: Okay.
5 Celotex apparently has nuances that we are not
6 even discussing here that has to do with
7 whether the response has to be or the summary
8 judgment proof has to be in admissible form or
9 can be in some other form, the differences in
10 how trial judges can approach the
11 determination of legally insufficient or
12 sufficient evidence and that sort of thing. I
13 am not trying to talk about those parts of
14 Celotex if that's okay. We will set those
15 aside.
16 Really what I am trying to get at here or
17 get the committee to focus on is the burdens
18 of Celotex on the parties in summary judgment
19 practice. Okay. Again, we are going to vote
20 on three options, if you will all vote once
21 only. One will be to preserve the Texas
22 practice at all stages. Second will be the
23 compromise that we just voted on, 14 voted in
24 favor of, and the other would be to change to
25 the Celotex burdens at all stages.

1 Okay. Number one, those in favor of
2 preserving the current Texas practice at all
3 stages.
4 PROFESSOR ALBRIGHT: What's
5 this vote?
6 HONORABLE F. SCOTT McCOWN:
7 Current.
8 PROFESSOR ALBRIGHT: Current
9 Texas rule.
10 CHAIRMAN SOULES: Ten. Okay.
11 Those in favor of moving to the Celotex
12 burdens at all stages? Nine.
13 Those in favor of the compromise package?
14 HONORABLE SCOTT BRISTER: As
15 usual, the minority.
16 MS. SWEENEY: Well, I want to
17 vote twice because I'm in favor of this if I
18 can't have what I want.
19 CHAIRMAN SOULES: Seven.
20 HONORABLE SCOTT BRISTER: So
21 now let's vote between the two extremes.
22 MR. SUSMAN: It seems to me
23 it's so close that the compromise is
24 probably --
25 HONORABLE SCOTT BRISTER:

1 That's what a compromise is.
2 MR. SUSMAN: The fact is we are
3 split right down the middle on the vote.
4 HONORABLE F. SCOTT McCOWN:
5 Well, the way you do it scientifically is you
6 eliminate each extreme and see if that drives
7 it toward the compromise, and of course, it
8 will.
9 HONORABLE SCOTT BRISTER: The
10 least supported, of course, is --
11 CHAIRMAN SOULES: All right.
12 MR. SUSMAN: It's a vote for
13 the compromise. Why don't we take a vote for
14 the compromise and see now that everyone knows
15 how we stand?
16 HONORABLE DAVID PEEPLES: Can I
17 suggest something?
18 CHAIRMAN SOULES: Judge
19 Peeples.
20 HONORABLE DAVID PEEPLES: If
21 the Supreme Court wants to leave it as-is,
22 they know how to do that. Why don't we send
23 them the compromise and some language where
24 they can go with Celotex or the court rules
25 committee or something like that and let them

1 decide it, which they are going to do anyway?
2 We can help them with the drafting, and they
3 can make the decision.
4 CHAIRMAN SOULES: All right.
5 As I understand it, this committee least
6 favors the compromise. So that's off.
7 MS. SWEENEY: No. That's not
8 right at all.
9 CHAIRMAN SOULES: That's how we
10 just voted.
11 HONORABLE SCOTT BRISTER:
12 That's how everybody just voted. It went down
13 in flames.
14 MS. SWEENEY: No. Because you
15 didn't let us vote how we wanted. If you tell
16 us, okay, now take as a given the Court is
17 going to change it, that's going to change my
18 vote. Then I abandon what I can't have, and I
19 will vote for the other options.
20 CHAIRMAN SOULES: All right.
21 We will take --
22 MR. YELENOSKY: Take a vote on
23 people's first choice and second choice, and
24 you will have it.
25 HONORABLE SARAH DUNCAN: Luke,

1 assume that the Court is going to move away
2 from current summary judgment practice. Do
3 you prefer Celotex or the compromise?
4 CHAIRMAN SOULES: All right.
5 MS. SWEENEY: There you go.
6 MR. SUSMAN: That's a good way
7 to vote.
8 CHAIRMAN SOULES: Okay. Did
9 everybody hear what Sarah said? Celotex.
10 MR. LATTING: If the court is
11 going to move away from the current summary
12 judgment --
13 CHAIRMAN SOULES: Hold up hands
14 for Celotex at all stages. Eight. Okay. And
15 then those circumstances she just suggested,
16 those in favor of the compromise. 18.
17 MR. SUSMAN: It took Paul Gold
18 and I exactly two minutes to figure this out
19 in our first meeting.
20 CHAIRMAN SOULES: Eighteen to
21 eight.
22 MR. LOW: Luke, could I ask a
23 question?
24 CHAIRMAN SOULES: Buddy Low.
25 MR. SUSMAN: Two minutes.

1 MR. LOW: All right. If the
2 Court, to make it simple for the Court --
3 MR. YELENOSKY: Less democratic
4 but it works.
5 CHAIRMAN SOULES: Wait a minute
6 now. Buddy Low has got the floor.
7 MR. LOW: To make it simple for
8 the Court, if they want to follow it, they
9 have got the current rule. If they want to
10 follow totally Celotex, that came about by the
11 Federal rules.
12 HONORABLE SCOTT BRISTER: No.
13 No.
14 MR. LOW: Pardon?
15 HONORABLE SCOTT BRISTER: The
16 Federal rule is identical to the state rule.
17 The Federal rule has nothing about Celotex in
18 it.
19 MR. LOW: I understand, but
20 Celotex didn't overrule the Federal Rules of
21 Procedure, did it?
22 HONORABLE SCOTT BRISTER: It
23 just added something that ain't in the rule at
24 all.
25 PROFESSOR DORSANEO: Celotex

1 just said it means something different from
2 what it's meant before. It was a fraud.
3 MR. LOW: I understand, but if
4 they want to do that, the Court can very well
5 do that on their own, but there are
6 differences in Federal and state and --
7 HONORABLE SCOTT BRISTER:
8 Absolutely.
9 MR. LOW: -- if they want to
10 adopt that, they can say, "Okay. We have got
11 the Federal rule now. Celotex applies," and
12 then put a window like we are talking about
13 for discovery. And then the third thing we
14 give them is what we voted on and try to reach
15 a compromise.
16 CHAIRMAN SOULES: Well, does
17 the committee want to send the Court two
18 versions?
19 MR. LOW: No, no, no, no. I'm
20 merely making a statement it would be simple
21 for the Court to on its own if they decide one
22 of the other versions, the way it is, Celotex,
23 they could do that simply. So I'm saying I
24 think our duty would be to give them what we
25 think is the best compromise.

1 CHAIRMAN SOULES: Well, the
2 consensus that we have gotten so far, as I am
3 perceiving it, is we have the discovery part
4 of it that we talked about and then we have
5 the compromise and that that be sent to the
6 Court as our recommendation.
7 MR. LOW: That's my
8 understanding.
9 CHAIRMAN SOULES: Okay.
10 MR. SUSMAN: Could I ask
11 another question? I mean, kind of a general
12 question, and that is could we get a straw
13 vote as to whether people think the correct
14 approach in drafting is to rewrite the whole
15 thing as we have done or to leave everything
16 as-is except introduce the compromise.
17 Because basically everything is here. I
18 mean, everything is -- and that would help us,
19 if you-all think that the rule as-is works
20 great and we could go through the current rule
21 and just if there is some real problem with
22 something, change it, and we just change the
23 burden somewhere and don't rewrite. I mean,
24 that would help us.
25 CHAIRMAN SOULES: There is not

1 much appellate litigation on summary judgment
2 procedure anymore.
3 MS. SWEENEY: Now.
4 CHAIRMAN SOULES: Right now.
5 MS. GARDNER: But there will be
6 if we change the rule language.
7 CHAIRMAN SOULES: If we add
8 this paragraph that engrafts Celotex after the
9 discovery window closes, then there is going
10 to be some appellate litigation about what
11 that means. If we change the rule, then we
12 are going to generate appellate litigation
13 from one end to the other.
14 HONORABLE SCOTT BRISTER: I
15 disagree with that.
16 CHAIRMAN SOULES: Judge Brister
17 disagrees.
18 HONORABLE SCOTT BRISTER: I
19 mean, listen to this. This is the things you
20 can -- "The judgment shall be rendered
21 forthwith if (i) the deposition transcript,
22 interrogatory answers, other discovery
23 responses are set forth in the motion or
24 response and (ii) pleadings, admissions,
25 affidavits, stipulations, and the parties

1 authenticate --" I mean, you can list
2 everything in the rules in this rule, which is
3 what this does, but it adds nothing.
4 There is no reason to have paragraph (a)
5 be "The claimant can move for summary
6 judgment" in ten lines and then paragraph (b),
7 oh, and anybody else can move for summary
8 judgment, too. Except to just be like the
9 Federal rule there is no reason to have a rule
10 that is hard to use. I mean, how long -- if I
11 have told you "Find me in the rule where it is
12 that you can use request for admissions," we
13 all have to stop, let me -- this is no -- this
14 is just a lot of old verbiage we need to junk.
15 If there is any change, and there is
16 none, then obviously we ought to keep it, and
17 if you need a footnote to say we intended no
18 change, we just intended to get rid of
19 language that is just a list of things, that's
20 what we did in Rule 215. Remember, 215 covers
21 four pages single-spaced and lists everything,
22 tries to, that attorneys could ever do wrong,
23 and that makes no sense to try to do that, and
24 it's not changing the law to say "if you
25 violate the discovery rules" rather than

1 listing everything people can do wrong.
2 CHAIRMAN SOULES: Justice
3 Duncan.
4 HONORABLE SARAH DUNCAN: What I
5 would suggest is that the subcommittee take
6 the current rule as written, if you think it
7 is surplusage, strike it.
8 HONORABLE SCOTT BRISTER:
9 That's what we did. Been done.
10 HONORABLE SARAH DUNCAN: Well,
11 no, that's not what you have done because one
12 of the things that you left out is the
13 question that is most being litigated in our
14 court on summary judgment procedure, with
15 which we have a conflict with the El Paso
16 court, as to when an expert's supporting proof
17 needs to be attached, when the objection has
18 to be made, when it can be sustained, what do
19 you do when you sustain it. But you left out
20 all of subsection (f) and got rid of Ceballos
21 and Nesh and we don't know anymore.
22 CHAIRMAN SOULES: Well, I asked
23 your subcommittee chair if you could give me a
24 redlined version of this old 166a for us to
25 see at this hearing, at this meeting, and I

1 was advised that it was so changed that it
2 would not make sense to even try to do that.
3 MR. SUSMAN: This is true. But
4 it doesn't mean it has to be this way, though.
5 CHAIRMAN SOULES: So there is a
6 disagreement on the committee about just
7 exactly what the approach is.
8 HONORABLE SARAH DUNCAN: But if
9 it's surplusage, it can be stricken. We can
10 all agree that it's duplicative and it can be
11 stricken, but we might not agree on what is
12 duplicative and what isn't duplicative.
13 HONORABLE F. SCOTT McCOWN:
14 Steve?
15 CHAIRMAN SOULES: Okay. Judge
16 McCown.
17 HONORABLE F. SCOTT McCOWN: Let
18 me suggest, we have gotten a lot of direction
19 from the committee, and the Chair has already
20 said we are going to have to bring this back
21 at our next meeting. It's going to be simple
22 for us to do it both ways. We can take the
23 present rule, make the one change by adding
24 the compromise, and have that for you. We can
25 take the rewrite with the compromise and

1 provide the redline. I think Luke's right
2 that a redline would help so you could see
3 exactly what was not there and have that for
4 you next time so that you could either go with
5 the present rule with the compromise in it or
6 the rewrite if you were convinced after
7 looking at a redline that the rewrite was
8 enough of an improvement to justify doing it.
9 CHAIRMAN SOULES: Sounds like a
10 good idea to me. Anybody opposed to that?
11 MR. SUSMAN: We can do that.
12 CHAIRMAN SOULES: Alex
13 Albright.
14 PROFESSOR ALBRIGHT: Well, I
15 think we could do a disposition table like we
16 did for the discovery rules that might make
17 everybody feel better and also make us focus
18 on what we are leaving out and what we are not
19 leaving out, but I think it's important that
20 we do not simply adopt old language. I sat
21 for two years on Bill Dorsaneo's task force to
22 rewrite the rules of procedure, and I thought
23 one of the things we were supposed to be doing
24 in this task of rewriting the rules was to
25 make them easier to read and more organized

1 and easier to follow. So I would support that
2 we do that in rules like the summary judgment
3 rule, which are very difficult to get through.
4 CHAIRMAN SOULES: Justice
5 Duncan.
6 HONORABLE SARAH DUNCAN: If you
7 do it in two set steps, we all know what's an
8 intended change and what's not an intended
9 change, but when you just come back without a
10 redlined version --
11 HONORABLE F. SCOTT McCOWN:
12 Okay. We will have it.
13 MR. SUSMAN: We will do it.
14 HONORABLE SARAH DUNCAN:
15 -- having rewritten the rule, we don't know.
16 MR. SUSMAN: You're right.
17 You're right.
18 HONORABLE SARAH DUNCAN: If I
19 can just make a couple of points just in
20 concept, in subsection (b) as now written I
21 think it entirely changes the burden.
22 Hatchell and I were talking about this. What
23 this says now is that if I prove there is no
24 genuine issue of material fact, I get a
25 judgment. That's not what the law is. I

1 mean, the "therefore" is just wrong. It gives
2 a wrong impression that I think we would all
3 agree is a wrong impression.
4 HONORABLE F. SCOTT McCOWN:
5 Where are you?
6 CHAIRMAN SOULES: Third line.
7 HONORABLE SARAH DUNCAN:
8 Current subsection (b), second and third
9 lines, "shall state specifically why there is
10 no genuine issue as to any material fact and
11 why the moving party is therefore --"
12 HONORABLE F. SCOTT McCOWN:
13 That came out at subcommittee. I don't know
14 why it's in this draft. We have already
15 agreed to that. That's out.
16 HONORABLE SARAH DUNCAN: Okay.
17 Subsection (e), I think one of the most common
18 grounds for motion for summary judgment is
19 statute of limitations, and we need to either
20 include in (e)(1) affirmative defenses to
21 affirmative defenses or otherwise deal with
22 it.
23 Also in subsection (e), the way it's
24 written right now, if I just plead the statute
25 of limitations, I have forced the responding

1 party to raise a fact issue when the current
2 rule is that I not only have to plead the
3 statute of limitations but I have got to prove
4 it. That will then shift the burden to the
5 responding party to raise the fact issue
6 either as to my statute of limitations defense
7 or as to an affirmative defense to my
8 affirmative defense, and we haven't -- this
9 version doesn't deal with that.
10 MR. SUSMAN: Okay. Do you
11 understand that, Scott?
12 HONORABLE F. SCOTT McCOWN: I
13 do. I don't think I agree if -- what this
14 says is if I have got a suit on a note and I
15 am the movant and I plead and I file my motion
16 for summary judgment and the respondent pleads
17 statute of limitations, but in his response to
18 the motion he doesn't raise a fact issue on
19 that, then I win. He's got -- it says the
20 responding party has the burden of raising a
21 fact issue on the affirmative defense.
22 HONORABLE SARAH DUNCAN: Right.
23 But you're forcing the responding party to
24 raise a fact issue on the affirmative defense
25 when all --

1 HONORABLE F. SCOTT McCOWN: I
2 think that's the present law. If I move -- if
3 I sue on a note and I move for summary
4 judgment and you've pled limitations and we go
5 to the summary judgment hearing and you don't
6 raise a fact issue on limitations, it's not my
7 burden. It's yours. I get my summary
8 judgment.
9 HONORABLE SARAH DUNCAN: I
10 guess I don't understand that's what (1) says.
11 So maybe it's just me.
12 HONORABLE F. SCOTT McCOWN: And
13 likewise, on your point about affirmative
14 defense on affirmative defense it would work
15 the same way, which is if I move on my note,
16 you plead limitations, you raise a fact issue
17 on limitations, I plead discovery rule, then I
18 have got to raise a fact issue on discovery
19 rule.
20 MR. HATCHELL: That is a
21 change.
22 HONORABLE F. SCOTT McCOWN: No.
23 That's the law now.
24 MR. HATCHELL: No, it's not.
25 HONORABLE F. SCOTT McCOWN: Oh,

1 yeah.

2 PROFESSOR DORSANEO: Not

3 everywhere.

4 CHAIRMAN SOULES: And it even

5 gets fuzzed up more than that because

6 fraudulent concealment may -- is not treated

7 the same way as discovery in terms of avoiding

8 affirmative defense of limitations.

9 HONORABLE SARAH DUNCAN: And I

10 am not trying to advocate that it be handled

11 any particular way. It's just caused enough

12 problems in the last ten years or however long

13 it's been -- I only know about the last ten

14 years -- that it seems to me that we ought to

15 deal with it.

16 HONORABLE F. SCOTT McCOWN:

17 Well, what do you think the law is, Bill?

18 PROFESSOR DORSANEO: Well, on

19 the discovery rule issue?

20 HONORABLE SCOTT BRISTER: No.

21 On the affirmative defense.

22 HONORABLE F. SCOTT McCOWN: On

23 affirmative defenses.

24 PROFESSOR DORSANEO: Well, the

25 person who has -- is this a person resisting

1 summary judgment on the basis of an
2 affirmative defense?
3 HONORABLE F. SCOTT McCOWN:
4 Right.
5 HONORABLE SCOTT BRISTER: Yes.
6 PROFESSOR DORSANEO: They must
7 raise a fact issue on it.
8 HONORABLE F. SCOTT McCOWN:
9 Right. That's what No. (1) says.
10 CHAIRMAN SOULES: Or defeat the
11 claim as a matter of law. They could show
12 limitations as a matter of law.
13 PROFESSOR DORSANEO: Yes.
14 Yeah.
15 CHAIRMAN SOULES: And this
16 doesn't accommodate that, either. The due
17 date on the notes is more than four years old.
18 That's not even a fact issue at that point.
19 PROFESSOR DORSANEO: But on the
20 discovery rule it is different.
21 HONORABLE F. SCOTT McCOWN:
22 Well, the discovery rule may have been the
23 wrong example then, but you agree that
24 subdivision (1) here, (e)(1), you think that
25 accurately states the law?

1 PROFESSOR DORSANEO: Yes.
2 HONORABLE F. SCOTT McCOWN: All
3 right.
4 PROFESSOR DORSANEO: I probably
5 wouldn't use the word "to avoid judgment,"
6 words "to avoid judgment," but I think in
7 substance it does state the law accurately,.
8 I think that's Swilley vs. Hughes.
9 HONORABLE F. SCOTT McCOWN:
10 Okay. So just put a comma after "defense" and
11 take out "to avoid judgment."
12 HONORABLE C. A. GUITTARD: Take
13 out "then," too.
14 HONORABLE SCOTT BRISTER: Take
15 out "then," too.
16 HONORABLE F. SCOTT McCOWN:
17 Yeah. Okay.
18 MR. SUSMAN: What are you
19 doing, Scott, now?
20 HONORABLE SCOTT BRISTER: Got
21 it.
22 HONORABLE F. SCOTT McCOWN:
23 Just put a comma after "defense" and take out
24 "to avoid judgment, then."
25 CHAIRMAN SOULES: Richard

1 Orsinger.

2 MR. ORSINGER: I wanted to

3 mention two things on paragraph (f). It seems

4 to me to be a very important change that's

5 never been mentioned about in the last line if

6 the testimony is clear, credible, and direct;

7 and the case law and the rule is clear,

8 positive, and direct; and by sticking the word

9 "credible" in there you are either -- you are

10 doing one of two things.

11 Either the word is useless because the

12 trial judge is going to deny summary judgments

13 on grounds that in the judge's opinion the

14 affiant is not credible or the expert is not

15 credible or the judge is going to grant a

16 summary judgment and the appellate court is

17 going to reverse it on the grounds that in the

18 appellate court's opinion the affiant or the

19 expert is not credible. And I don't think

20 that that's a proper function for a summary

21 judgment, is to have the trial courts engage

22 in credibility assessment. I think either you

23 have established something as a matter of law

24 or you haven't and that that's antithetical to

25 the idea of weighing the credibility of what

1 someone says.

2 That's one of the points I wanted to

3 make. The other one, and I don't know whether

4 I am on firm ground here or not, but the

5 current language at 166a talks about summary

6 judgments on claims, counterclaims, or

7 cross-claims and then our paragraph (a),

8 second line, we now talk about any part of the

9 case. Now then, it's always been my view, and

10 I don't know if I am right or not, that a

11 summary judgment should be addressed at

12 knocking out a claim by nailing some element

13 of that claim, and therefore, the entire claim

14 falls.

15 Now, in family law practice in

16 particular, there is no such thing as a

17 summary judgment that knocks out a claim

18 because the claim is the property division,

19 and you can't knock that out unless it's

20 something like the parties were never married.

21 So in family law practice lawyers frequently

22 will file a motion for summary judgment on

23 some partial issue like whether a specific

24 asset is separate or community or whether the

25 law of California or the law of Texas should

1 be applied.

2 And that's always been in my view,

3 soliciting opinion, a pretrial ruling on a

4 matter of law by the court that helps the

5 parties determine how their case is going to

6 go, and I have always thought that that was an

7 improper use of a summary judgment, even

8 though it's frequently used. And if you use

9 the phrase "any part of the case" here, I

10 think that you are endorsing the idea that I

11 can come in and maybe get 15 or 20 preliminary

12 legal rulings by sequential motions for

13 summary judgment, even though it doesn't knock

14 out a particular claim or defense.

15 CHAIRMAN SOULES: Okay. Sarah.

16 HONORABLE SARAH DUNCAN: If I

17 could just respond to that, Rule 166a,

18 subsection (a) right now refers to "any part

19 thereof." My understanding has always been

20 the opposite of Richard's, that you could get

21 summary judgment on any aspect of a case, even

22 if that's a single issue. And in my view we

23 need more pretrial determinations of the

24 applicable law and ruling out particular

25 issues than we do less. If there is a --

1 PROFESSOR DORSANEO: Well --
2 HONORABLE SARAH DUNCAN: If
3 there is a conflict as to what version of the
4 Tort Claims Act applies, both parties need to
5 know that in advance of trial in order to
6 prepare either their claims or defenses, if
7 the four-year statute applies and not the
8 two-year statute.
9 HONORABLE SCOTT BRISTER:
10 Choice of law.
11 HONORABLE SARAH DUNCAN: They
12 need to know that. Choice of law. So I would
13 be in favor of stating affirmatively on the
14 record that when this rule says "or any part
15 of a case," that includes discrete issues,
16 whether they be of law or of fact.
17 CHAIRMAN SOULES: Bill
18 Dorsaneo.
19 PROFESSOR DORSANEO: Well, I
20 think over time we have had a real controversy
21 on this point, and the practice has changed
22 from Richard's position to something closer to
23 Justice Duncan's position. My overview is the
24 rule has right now -- and I think there is an
25 effort to reduce the size of the

1 provision -- a paragraph on it with respect to
2 a case that's not fully adjudicated or a claim
3 or a defense that's not fully adjudicated on a
4 motion, that that provision is little used by
5 trial judges. If it's used at all by any
6 trial judge, I suspect, Judge Brister, that
7 you could use it --
8 HONORABLE SCOTT BRISTER: I do
9 it.
10 PROFESSOR DORSANEO: -- in your
11 case that you were just talking about to say,
12 all right, let's put on your expert and see
13 maybe even before the jury is picked if we are
14 going to hear anything from him that's worth
15 hearing without going through all of this
16 rigmarole beforehand. I don't know if all
17 appellate judges would be happy with that way
18 of conducting the trial or --
19 HONORABLE SCOTT BRISTER:
20 Definitely not.
21 PROFESSOR DORSANEO: -- some
22 immediate proceeding, but this notion of doing
23 things piecemeal by partial summary judgment
24 can be efficient, but I have handled cases on
25 appeal where there have been these partial

1 rulings and they have really screwed up the
2 trial because there is something missing in
3 the trial and the judge has to somehow clue
4 the jury in that he or she has ruled against a
5 party on a particular matter. And we don't
6 normally like that because it looks like
7 somebody is picking sides, and I wonder if
8 it's worth the trouble when you get down to a
9 particular issue that's related to something
10 that's going to need to be tried anyway, and I
11 frankly, end up agreeing with Richard Orsinger
12 that the old, traditional way is probably
13 safer for everybody and probably as efficient.
14 CHAIRMAN SOULES: Okay. Buddy
15 Low.
16 MR. LOW: I think maybe the
17 subcommittee -- I don't think when they were
18 using the term -- and I wasn't on it, but I'm
19 just assuming "credible" meaning, you know,
20 like they are talking about an expert, you
21 know, and he says, "Well, the world is flat."
22 I mean, you know, that's not credible. That's
23 scientific. Maybe he has to prove that it's,
24 you know, within the scientific community
25 accepted. I'm assuming that's probably what

1 they meant under Robinson. Maybe. I don't
2 know.
3 MR. SUSMAN: I don't think we
4 intended a change.
5 HONORABLE F. SCOTT McCOWN:
6 Well, "credible" is in the rule now. I mean,
7 Richard just left it out when he read it to
8 you. "If the evidence is clear, positive, and
9 direct, otherwise credible and free from
10 contradictions and inconsistencies, and could
11 have been readily controverted.
12 MR. LOW: I was merely asking
13 the question to see if that was keying in
14 to --
15 MR. SUSMAN: There was no
16 attempt to change anything there.
17 MR. LOW: Okay.
18 MR. SUSMAN: We were just
19 trying to use fewer words, and that's the
20 danger of it. On the notion of partial
21 adjudication, what we really did, I mean, some
22 at the subcommittee meeting thought that maybe
23 judges ought to have that power independently
24 of the summary judgment proceeding to cut the
25 case down to rule that certain facts are not

1 in dispute and certain matters as a matter of
2 law. We recognize that that might be useful
3 but wanted it done in the context of summary
4 judgment motion with notice and hearing. So
5 essentially we have left it in, and it's part
6 of subdivision (e) right now of the existing
7 rule that now appears kind of at the bottom of
8 our section (d).

9 CHAIRMAN SOULES: Chief Justice
10 Cornelius.

11 JUSTICE CORNELIUS: I agree
12 with Richard that "credible" should be taken
13 out because it goes against current case law
14 on the point. Neither the trial court nor the
15 appellate court is allowed to conduct a
16 weighing of the evidence or to judge the
17 credibility of testimony on summary judgment.
18 I would add that comment.

19 CHAIRMAN SOULES: Judge
20 Brister.

21 HONORABLE SCOTT BRISTER: And,
22 of course, my proposal was to drop (f)
23 entirely since except for the "readily
24 controverted," which is easily put into the
25 continuance question, when affidavits through

1 testimony is otherwise unavailable, what are
2 we saying? If it's an expert or an interested
3 witnesses, we are only going to believe it if
4 it's clear, direct, and credible. Of course,
5 if it's not, then even if it's unclear,
6 indirect, and incredible, then we are going to
7 believe it? Of course, that's the test for
8 all.
9 If some disinterested nonexpert comes in
10 and files an affidavit, which is indirect,
11 muddled, et cetera, you know, we are going to
12 take that because it's not listed in this
13 section. This adds nothing, except for "that
14 could have been readily controverted." That's
15 the only time this is ever used, as far as I
16 know. I mean, you know, when was the last
17 time the Supreme Court affirmed a summary
18 judgment on unclear summary judgment evidence,
19 whether it's by a total nonexpert.
20 The only time this is ever used is "could
21 have been readily controverted," and that's
22 the question that's in the -- at least in part
23 it's the similar thing as the continuance
24 matter. If you want to leave that separate
25 and say, look, if it's an intent issue or

1 something hard to understand, you know, you
2 can pass it or something like that, but the
3 rest of this is just surplusage.
4 CHAIRMAN SOULES: Judge
5 Guittard.
6 HONORABLE C. A. GUITTARD: On
7 Judge Brister's point, I think this language
8 was put in the rule to change the rule as
9 interpreted that no opinion of an expert or
10 testimony of a party witness could --
11 CHAIRMAN SOULES: Interested
12 witness.
13 HONORABLE C. A. GUITTARD: Or
14 interested witness could support a summary
15 judgment. So this is put in there to make it
16 easier to get a summary judgment if you had a
17 competent expert opinion that would uphold the
18 summary judgment. Now, as between the issue
19 as stated between Richard and Judge Duncan, I
20 think it's quite useful to have preliminary
21 determinations of important legal questions in
22 the case, and I think that putting it in the
23 context of a summary judgment procedure is a
24 good way to do it.
25 In the last case that I tried as a trial

1 judge there were numerous, very important
2 questions of law and motions for summary
3 judgment were filed on these questions and
4 extensive briefs were filed and I studied
5 those briefs and I went so as far as
6 being -- and because of my appellate
7 experience I can rarely come up with a good
8 answer without writing an opinion and so I
9 wrote some opinions that had the effect of
10 controlling those questions and, of course,
11 the trial -- it made the trial a lot easier
12 and simpler because the important legal
13 questions had been determined in advance. So
14 I would favor the position that says that you
15 can determine an important legal question, one
16 that would be important in the trial in the
17 terms of -- in the context of summary
18 judgment.
19 Finally, on the question of credible, of
20 course, the rule as now written says
21 "otherwise credible." I'm not sure just what
22 that means, and I think maybe "credible" is
23 not a good word here. I think it means
24 something other than clear and direct and
25 could have been readily controverted or

1 something -- has some context of or
2 connotation of unambiguous, free from internal
3 contradictions, things of that sort. Maybe
4 that kind of language should be used there.
5 CHAIRMAN SOULES: Judge
6 Peeples.
7 HONORABLE DAVID PEEPLES: I
8 think this discussion shows that to totally
9 rewrite this rule is a big task and we haven't
10 even scratched the surface yet. Hittner and
11 Liberato write a LAW REVIEW article every
12 year. Tim Patton has got a treatise on
13 summary judgment, and we are proposing to
14 totally redo the thing. We have dealt with
15 the problem, shifting the burden, and the
16 materials we have all got in our briefcases,
17 as I review it, there are letters from the
18 1980s that we haven't even dealt with yet that
19 we need to get around to. So I respectfully
20 suggest that we maybe take a show of hands
21 just to see if we want to take on a total
22 rewrite of 166a or deal with the problems,
23 deal with them and send them to the Supreme
24 Court and move on to something else. I would
25 like for us to decide that as a committee.

1 CHAIRMAN SOULES: Okay. Before
2 we do that there is one other -- this writing
3 really only contemplates summary judgment
4 where there is no genuine issue of material
5 fact and doesn't really contemplate or
6 articulate where you are entitled to judgment
7 as a matter of law where the facts -- no facts
8 are involved, and there is a piece of that in
9 the current rule. It's not written very well,
10 but it's there.
11 Okay. We need to -- we can take a show
12 of hands. How many feel we should attempt to
13 rewrite the rule and incorporate the consensus
14 of the committee, or how many feel we should
15 just essentially leave the rule as-is and then
16 draft the consensus of the committee to the
17 old rule first? Okay. Total rewrite. Those
18 show by hands. Hands keep coming up. Put
19 them up high and hold them up. Ten.
20 All of those who feel we just engraft
21 changes on the current rule? 15. By a vote
22 of 15 to 10 the committee is being asked to
23 engraft the changes on the current rule and
24 otherwise leave it alone.
25 PROFESSOR DORSANEO: That might

1 end up being a total rewrite, but at least we
2 will rewrite it consciously.
3 CHAIRMAN SOULES: Okay. Let me
4 give you a little bit of scheduling and then
5 we want to take a morning break.
6 Unfortunately, I have a commitment at the
7 Litigation Update at 1:30. They scheduled me
8 at 1:30 for a 30-minute talk. So I am going
9 to need to leave. I will be back here
10 about -- well, I will be back by 2:00 for
11 sure, but sooner than that if possible. I
12 would like to work until at least 12:30,
13 quarter to 1:00, something like that, if
14 possible, but that may not be comfortable for
15 you. If it's not, that's okay.
16 And I will probably -- I will find
17 something to schedule where everybody can keep
18 working while I'm gone. We will work, of
19 course, 'til 5:30 today. We will convene
20 again in the morning at 8:00 and 'work til
21 noon. So sandwiches, I'm sure, are going to
22 come before we break, but if anybody decides
23 you want to move to break for lunch before I
24 do, that's fine. Just let me know, and we
25 will stop whenever you want to and convene

1 about an hour later, and I will get somebody
2 who's a committee chair to start their report
3 while I'm gone. I apologize for having an
4 overlap here today. Let's take about ten
5 minutes and come back, and we will go to work
6 on Don Hunt's report.
7 (At this time there was a
8 recess, after which time the proceedings
9 continued as follows:)
10 CHAIRMAN SOULES: Bill, you
11 have the floor, and those that want to laugh
12 and talk at the back can just be off the
13 record. Please leave and go into the hallway
14 if you need to talk. We are ready to go.
15 PROFESSOR DORSANEO: Does
16 everyone have a redlined version of Rules 296
17 through 331?
18 PROFESSOR ALBRIGHT: Where are
19 they? Are they here, or were they mailed?
20 PROFESSOR DORSANEO: They were
21 not mailed.
22 MR. KELTNER: Is this the one
23 that was with the November 13th letter?
24 PROFESSOR DORSANEO: No. They
25 were not mailed. They are here.

1 You will recall that on the morning and
2 afternoon of November 17, 1995, we went
3 through the report of Don Hunt's subcommittee
4 with respect to Rules 296 through 330. We had
5 a lot of discussion, a lot of suggestions, and
6 many changes. Since that time -- and I
7 apologize for not doing it in a manner to
8 convey the redraft to you sooner. I have
9 reviewed the transcript of approximately 600
10 pages of discussion and made all of the
11 changes as best I could based upon the votes
12 and the discussion that we had in November of
13 last year.
14 This draft is meant to primarily
15 accomplish that objective. There are several
16 additional matters and several matters that
17 were left for reconsideration that I want to
18 bring up as we go through this draft in, I
19 hope, a relatively expedited manner in
20 comparison at least to November of last year.
21 First on this page one I want to make a
22 change in paragraph (b), premature filing, at
23 the bottom. Change that sentence following
24 the subheading "premature filing" to "a
25 request for findings of fact and conclusions

1 of law is effective," rather than "are
2 effective," and change the next sentence by
3 adding the word "premature" after "a." So it
4 should begin "the premature request" and
5 change "shall be" to "is," such that it says,
6 "A premature request for findings of fact and
7 conclusions of law is deemed to have been
8 filed on the date of, but subsequent to, the
9 signing of the judgment." Now, with
10 respect --
11 CHAIRMAN SOULES: Now, where is
12 that, Bill? Excuse me.
13 PROFESSOR DORSANEO: "A
14 premature request is deemed."
15 CHAIRMAN SOULES: Okay.
16 PROFESSOR DORSANEO: Now, on
17 the two alternatives on this page one, I think
18 that they probably mean the same thing. The
19 second alternative is based on Richard Perry's
20 draft that was done pursuant to a suggestion
21 by Justice Duncan along with similar comments
22 by Richard Orsinger. All I want you to do, I
23 think all that needs to be done, is to just
24 decide do you want it like the first day or
25 like the second one?

1 MR. LATTING: Can you tell us
2 what those differences are? Can you summarize
3 that for us?
4 PROFESSOR DORSANEO: Well, yes.
5 The second one tries to more specifically
6 identify the circumstances in which there
7 would be an entitlement to findings of fact in
8 the types of cases that we were talking about.
9 The first one doesn't make that specification.
10 I presented it in two alternatives because I
11 said I would do it that way on November 17th.
12 HONORABLE F. SCOTT McCOWN:
13 Which do you recommend?
14 PROFESSOR DORSANEO: I will
15 recommend the second alternative.
16 MR. McMAINS: Is this Richard's
17 problem, Orsinger's problem, that he had
18 talked about or an attempt to deal with that?
19 PROFESSOR DORSANEO: Well, it's
20 Richard's problem with respect to (c), "tried
21 to a jury in which ultimate issues by law must
22 be tried to the court." That was, I believe,
23 Richard's problem.
24 MR. McMAINS: And is that
25 unaddressed in the first alternative?

1 PROFESSOR DORSANEO: No. It's
2 addressed in the first alternative, too, in
3 the sentence that says "trial of an issue of
4 fact to a jury in the same case does not
5 excuse the judge from making findings of fact
6 on an ultimate issue tried to the judge."
7 HONORABLE C. A. GUITTARD:
8 Motion.
9 CHAIRMAN SOULES: Discussion?
10 Those in favor of alternative two?
11 PROFESSOR DORSANEO: But, Lee,
12 wasn't that second -- wasn't that underlined
13 sentence in (a) also in (b)? Did you take
14 that out, or did I do it?
15 MR. PARSLEY: I didn't take it
16 out intentionally. I mean, I thought your
17 drafting had taken it out.
18 PROFESSOR DORSANEO: Uh-huh.
19 Actually in my draft that I faxed a telecopy
20 to Lee, after (a), (b), and (c) in the end of
21 that first sentence I had the parenthetical
22 continue. I meant continue to be "trial of an
23 issue of fact to a jury in the same case does
24 not excuse," which would involve a certain
25 amount of redundancy, but it was intentional.

1 So I'm going to change my recommendation.
2 I am recommending both alternatives, a
3 redundant statement of the same point by
4 moving the underlined sentence in (a), such
5 that it is the second sentence of alternative
6 two's (a), and then everybody's concerns are
7 covered twice or at least once and sometimes
8 twice. Justice Duncan.
9 HONORABLE SARAH DUNCAN: On (b)
10 and (c) in alternative two where we have got
11 "the ultimate issues" in (b) and "ultimate
12 issues" in (c), don't we mean "one or more
13 ultimate issues"? Because when the case is
14 tried to the jury and then there are also
15 issues tried to the court --
16 PROFESSOR DORSANEO: I think
17 "one or more" would be acceptable. I followed
18 Richard Perry's language perhaps too closely.
19 HONORABLE SARAH DUNCAN: That's
20 just a suggestion.
21 CHAIRMAN SOULES: So that's
22 okay, "one or more"?
23 PROFESSOR DORSANEO: Yeah.
24 CHAIRMAN SOULES: Okay. And
25 you're going to -- you're suggesting that we

1 move the second sentence of alternative one
2 where?
3 PROFESSOR DORSANEO: Make it
4 the second sentence of alternative two.
5 CHAIRMAN SOULES: Before "such
6 request shall be entitled," put it there?
7 PROFESSOR DORSANEO: Uh-huh.
8 HONORABLE C. A. GUITTARD: I
9 don't like this language, "does not excuse."
10 I think we ought to be talking about when
11 findings shall be made rather than when a
12 judge shall be made -- that a judge should not
13 be excused from making findings. Perhaps we
14 could say that the findings shall be made on
15 an ultimate issue tried to the judge even
16 though other issues may have been tried to the
17 jury or something like that.
18 PROFESSOR DORSANEO: I don't
19 mind changing the language to say the same
20 thing a different way.
21 HONORABLE C. A. GUITTARD:
22 Yeah.
23 PROFESSOR DORSANEO: But I
24 don't really want to because I don't think
25 it's necessary, but I don't mind doing it if

1 it doesn't involve a lot of extra redoing.
2 HONORABLE C. A. GUITTARD:
3 Well, Lee is going to send us a draft which
4 makes changes like this. We might as well
5 make them now.
6 CHAIRMAN SOULES: Well, is it a
7 substantive -- I mean, we are going to reach
8 burnout here at some point with Bill, and if
9 it's not -- if it's just saying the same thing
10 a different way --
11 HONORABLE C. A. GUITTARD:
12 Okay. Let's go on.
13 CHAIRMAN SOULES: We need to
14 probably going on, but if it's not, then we
15 need to fix it.
16 Okay. Bill, then your recommendation is
17 that we adopt alternative two, modified to
18 move the sentence from alternative one, the
19 second sentence that starts "trial of an
20 issue" and ends "provided in Rule 279," that
21 sentence, to follow "conclusions of law" in
22 the fifth line of (a) and before "such request
23 shall be entitled." And the second line of
24 (a) to change the word "the" to "one or more"
25 before "ultimate issues" and then in (b) to

1 change I guess the word "are" at the end of
2 the first line to "is."
3 PROFESSOR DORSANEO: Yes. The
4 reason that is "are," is pursuant to a vote we
5 moved the premature filing rule, which is Rule
6 308 in Don Hunt's draft, I believe, up into
7 the findings of fact area insofar as we are
8 talking about findings of fact. And that rule
9 right now talks about two things, premature
10 request for findings and premature motions for
11 new trial; hence, in the current rule there
12 are two things we need to pull.
13 CHAIRMAN SOULES: All right.
14 And then in the second line of (b) after "a"
15 insert "premature" before "request for
16 findings"?
17 PROFESSOR DORSANEO: In order
18 to have the sentence make sense.
19 CHAIRMAN SOULES: And then at
20 the beginning of the third line of (b) strike
21 "shall be" and change that to "is."
22 Okay. Any further discussion on this?
23 Those in favor show by hands.
24 MR. HUNT: In favor of what?
25 CHAIRMAN SOULES: Alternative

1 two as modified by the discussion I just made.
2 Let me change that. Is there any opposition
3 to it? There is no opposition. So that's
4 unanimous.
5 PROFESSOR DORSANEO: 297 is
6 exactly as voted. The vote was to remove the
7 last sentence. My recollection is Judge
8 McCown challenged the last sentence. We voted
9 almost unanimously to remove it, and there are
10 no other adjustments in 297. So I don't even
11 think we need to take a vote on that at this
12 point.
13 CHAIRMAN SOULES: Any
14 opposition on 297 as written? That's
15 unanimous.
16 PROFESSOR DORSANEO: 298, there
17 are a couple of changes in this draft in
18 addition to what was voted on. What was voted
19 on was to remove the last sentence that's
20 stricken from paragraph (a) and to change "10"
21 to "20 days" in paragraph (a). I made some
22 irresistible editorial changes by adding
23 subtitles to the paragraphs, "Time for
24 Request," "Time for Judge's Response."
25 In addition, I moved the sentence that is

1 now at the end of the second paragraph in 298,
2 "No findings or conclusions shall be deemed or
3 presumed by any failure of the court to make
4 any additional findings or conclusions," to
5 paragraph (b) of 299, which is about presumed
6 findings. It seemed to me that it just simply
7 was in the wrong rule, and I moved from Rule
8 299 the sentence, "Refusal of the court to
9 make a finding requested shall be reviewable
10 on appeal" to 298, giving that the subheading
11 "Appellate Review." It seemed once I put the
12 subheadings in that two sentences were
13 misplaced as a matter of logic, and I put them
14 where I thought they should go with the proper
15 headings.
16 CHAIRMAN SOULES: Any objection
17 to 298 as written?
18 Okay. No objection to 298, and there was
19 none to 297. So those are unanimously
20 approved.
21 PROFESSOR DORSANEO: 299, and
22 you will have to, perhaps, forgive me for a
23 tiny bit of innovation, is drafted slightly
24 differently from the current rule in Don
25 Hunt's prior draft that we voted on last time.

1 I added subheadings, "Omitted Grounds" and
2 "Presumed Findings." The language of (a) is
3 identical to the first two sentences of what
4 we approved last time and, in fact, the
5 current rule, except for the fact that it ends
6 with a period rather than a semicolon, but the
7 language of (b) is slightly changed in some
8 respects, and there is a significant change in
9 another respect.
10 The slight change is to change "thereof"
11 to "of a ground of recovery or defense." The
12 slightly larger change is the addition of the
13 words -- and you can just vote this up or
14 down. It doesn't matter to me, "of the ground
15 to which the element or elements found are
16 necessarily referable" and the addition of the
17 words "factually sufficient" before the word
18 "evidence" in the last line. I made the first
19 change -- well, let me back up.
20 I made both changes to make this Rule 299
21 exactly like or as exactly like Rule 279 as
22 possible, and I made the first specific change
23 to correct a mistake made, by the admission of
24 Judge Staten, in 1940 where he removed the
25 "necessarily referable" language from this

1 rule by accident, stating in LAW REVIEW
2 articles later that it really wasn't meant to
3 be removed from the predecessor law, that it
4 really is there anyway, and I added the
5 factual sufficiency test because why should it
6 be different for presumed findings than it is
7 for deemed findings in a jury case, but that's
8 just probably --
9 CHAIRMAN SOULES: Any
10 opposition to 299 as written?
11 HONORABLE C. A. GUITTARD: I
12 have a question. What does this language mean
13 that's taken from the current rule "embraced
14 therein"? Embraced in what, in the findings?
15 Is that necessary language? Can we just
16 strike that?
17 PROFESSOR DORSANEO: I think we
18 could strike it, Judge.
19 HONORABLE C. A. GUITTARD:
20 Okay.
21 PROFESSOR DORSANEO: But I
22 don't think it needs to come out. I think
23 "embraced therein," you know, doesn't add
24 anything.
25 MR. JACKS: Does the last

1 sentence of 299 need to have "be," "shall be
2 deemed or presumed"?
3 MR. McMAINS: Yeah.
4 MR. YELENOSKY: That's a typo.
5 CHAIRMAN SOULES: Where is
6 that?
7 MR. YELENOSKY: The last
8 sentence says, "No findings shall deemed."
9 PROFESSOR DORSANEO: Yeah.
10 Thank you.
11 MR. McMAINS: "Be deemed" is
12 what it's supposed to be.
13 CHAIRMAN SOULES: "Shall be
14 deemed." Okay. Thank you. And I didn't
15 understand that. We just strike out "embraced
16 therein"?
17 PROFESSOR DORSANEO: In the
18 first sentence of (a).
19 CHAIRMAN SOULES: Okay. Any
20 opposition to that?
21 None. Any opposition to 299 as modified
22 by dropping the words "embraced therein" from
23 the first sentence and adding the word "be" in
24 the last sentence?
25 There is no opposition. That's

1 unanimously approved.

2 I'm sorry, Rusty. I didn't see your hand

3 up.

4 MR. McMAINS: Well, it wasn't

5 in opposition to those particular changes. It

6 was just a question about the addition of the

7 "necessarily referable."

8 CHAIRMAN SOULES: My apologies.

9 I did not see your hand up.

10 MR. McMAINS: It's all right.

11 Well, you weren't looking. You were assuming.

12 CHAIRMAN SOULES: No.

13 Incorrect.

14 MR. McMAINS: The only problem

15 I have about the notion of keeping the -- or

16 importing "necessarily referable" in the

17 findings of fact is the kind of notions that

18 we have in our findings of fact and

19 conclusions of law that you kind of deal with

20 findings of fact in one segment, which is

21 traditional, and conclusions of law in

22 another, not necessarily related to each other

23 and as opposed to a verdict in a deemed

24 findings situation where you usually have a

25 series submission.

1 Now, if you have what has been happening
2 and what we have witnessed has happened in
3 some cases where you send in about 150
4 findings of fact, many of which are not
5 ultimate issues, some of which may be or don't
6 appear to be ultimate issues, they might well
7 be evidentiary issues, but just out of
8 abundance of caution and in order to make it
9 more difficult to appeal you get the judge to
10 enter a whole bunch of findings of fact, which
11 you would never get to submit to a jury, and
12 then you have a conclusion of law that may be
13 broad or it may be that your conclusion of
14 law -- since our rules say that they can be
15 treated as findings of fact if they really are
16 or if they are findings of fact they be
17 treated as conclusions of law if they really
18 are, the notion of or the importation of
19 necessary referability becomes a real maze as
20 far as I see.
21 You could pick finding 27, finding 36,
22 finding 45, and construct a ground of recovery
23 they may arguably not even have been pleading,
24 but nobody kind of noticed when you put all of
25 those findings together, and I'm just trying

1 to figure out right now if you -- you know, we
2 have a rule on presumed findings, but I'm not
3 sure whether or not the -- does the addition
4 of the "necessarily referable," I mean, is
5 that intended to be a limitation?
6 PROFESSOR DORSANEO: It's a
7 limitation on what can be presumed, yes. Like
8 if there is only a damage finding, right?
9 MR. McMAINS: Right.
10 PROFESSOR DORSANEO: A damage
11 finding, it is not necessarily referable to
12 any ground of -- any particular ground of
13 recovery. All right. So I wouldn't presume
14 negligent and causation, you know, any more
15 than I would presume breach of warranty and
16 causation.
17 MR. McMAINS: Well, I
18 understand, but the concern I have is our
19 imprecision, and I'm not saying it's
20 necessarily a criticism of the addition of
21 this notion but since we -- of the notion of
22 necessary referability. You are trying to
23 make it parallel to Rule 279 in that regard,
24 but the concern I have is where we have grown
25 up now in the findings practice is most people

1 when in doubt put it in, you know, put in the
2 kitchen sink, things that clearly nobody is
3 going to approve submitting to a jury, and
4 then constructing from that presumed findings
5 and saying, well, you know, that they -- and
6 creating this area there that it may well be
7 that you could say, well, it's necessarily
8 referable because I gave a conclusion over
9 here and it refers to that.
10 PROFESSOR DORSANEO: The best
11 example I can --
12 MR. McMAINS: But we don't have
13 any required link between the conclusions and
14 the findings in our rules, and I am not sure
15 how the necessarily referable thing operates
16 really as a limitation.
17 PROFESSOR DORSANEO: The best
18 example I can give you in the case books,
19 there is a case in which there is a claim on a
20 particular series of contracts that they were
21 cancelled. Okay. A declaratory claim, let's
22 say. The findings are that the notice was
23 orally given to Mr. X. There are no -- I'm
24 simplifying a little bit. The contract
25 required a written notice for there to be

1 cancellation. The argument was made in
2 support of a presumed finding that written
3 notice was given, that the oral notice given
4 to X is part of the process of giving written
5 notice to why; hence, you should presume when
6 the court rendered judgment for cancellation
7 that there was a presumed finding of written
8 notice, even though the only finding was oral
9 notice.
10 And the court that dealt with that in a
11 different way by saying, well, you can't
12 presume a finding because there was a request
13 for a finding of written notice which was
14 refused, but in the opinion there is the
15 recognition that a finding of oral notice
16 would not be referable or part of or in any
17 way suggestive of the idea that there was
18 satisfaction of the written notice ground for
19 cancellation.
20 And now, to me, adding in the
21 "necessarily referable" language would mean in
22 that context and in similar contexts that you
23 can't presume a finding on a matter that was
24 not found unless what is found is part of that
25 same thing and you can see that it's part of

1 it necessarily because it's referable to that
2 ground, and I think that's the same concept we
3 have and have had in jury submission even when
4 we had granulated submission.
5 MR. McMAINS: Well, but let me
6 give you an example. I mean, for instance, a
7 judge need not in a findings of fact, if a
8 judge is going to find that particular conduct
9 was a proximate cause of damage or something,
10 he may only make that finding once; but that
11 issue may actually be referable to a number of
12 theories of recovery, and so the question
13 I -- and it may be that in sequence he may
14 actually be talking about it from, you know,
15 one theory of a cause of action, depending on
16 how one organizes their findings of fact.
17 And the question is, does this inject
18 some kind of an organizational problem because
19 if he's made a finding that X conduct is a
20 proximate cause and that conduct may be
21 characterized legally in three or four
22 different ways, how can you really
23 legitimately say consistent with our current
24 279 practice, where we don't use out of
25 sequence findings to support a positive by

1 saying it's necessarily referable, because you
2 have got a little compartmentalized notion
3 over here of what the cause of action is?
4 But because of the kind of loose way that
5 we deal with the findings of fact and
6 conclusions of law he can have two or three or
7 four statements over here and then amplify the
8 conclusions and just -- you kind of borrow the
9 ones as may be argued as necessary. I mean, I
10 don't -- what I'm saying is there is not a
11 link most of the time.
12 The judge doesn't have to explain his
13 reasoning. He just says, okay, I will say
14 there is a recovery, you know, negligent
15 breach of warranty, DTPA, whatever, in his
16 conclusions and the plaintiff recovers and the
17 most he can recover is such-and-such and his
18 findings may run across the gamut. And if
19 they run across the gamut, if they are that
20 kind, I don't know how you can apply the
21 necessarily referable standard.
22 And what we don't want to happen is cases
23 to be reversed when they shouldn't because
24 it's not necessarily referable because of some
25 form of the way that it's -- that these are

1 done, and I mean, that's just a problem I
2 realize we have with the way our request
3 practice has been handled in the past, but we
4 could try to be more liberal with the courts
5 because theoretically it's their obligation to
6 prepare it, but in reality it's done by the
7 parties as a practical matter, maybe slightly
8 modified by the judges or scratched through,
9 but more often than that not done by the
10 parties. And the parties are going to do
11 whatever they think they can get away with
12 that makes it hard for the other people to
13 attack, and I'm not sure that this fixes that
14 problem, to the extent that's a problem that
15 you're trying to address.
16 PROFESSOR DORSANEO: Well, what
17 you're saying is you don't like the concept,
18 in effect. You don't like the concept in this
19 finding of fact. We can just vote on that,
20 and I would be happy to withdraw it rather
21 than spend forever talking about it, and I am
22 not being critical of what you're saying,
23 either. I mean, the concept may be a concept
24 that doesn't transfer into findings of fact as
25 well as it operates or that we believe it

1 operates in the jury charge context, and I
2 would be just as happy to -- this is my
3 innovation. I would be just as happy to take
4 it out in the interest of efficiency, if for
5 no other reason.
6 MS. GARDNER: If I could
7 just --
8 CHAIRMAN SOULES: Anne Gardner.
9 MS. GARDNER: Thank you. Make
10 a point that's probably a question more than a
11 point, but in order to have a deemed or
12 presumed finding in a jury case, well, you
13 have to have not had -- there has to have been
14 no objection as well as no request, and there
15 is no concept that's comparable to that in
16 findings of fact and conclusions of law.
17 PROFESSOR DORSANEO: That's
18 because both parties object by requesting.
19 Okay. That's because you request. Both sides
20 request. There is no object, request. The
21 request is the way that you complain about
22 what the judge has done so far, regardless of
23 who you are, plaintiff, defendant, winner,
24 loser. So I don't see that as a difference.
25 MR. McMAINS: Well, except that

1 the last sentence of the rule talks about --
2 and when we modified the provision, "No
3 finding shall be deemed or presumed by any
4 failure of the judge to make additional
5 findings." What you're saying is if you -- if
6 a judge doesn't make an additional finding,
7 then in order to treat that parallel to the
8 jury practice then actually that should
9 preclude a deemed finding. That's not really
10 what that sentence is saying.
11 PROFESSOR DORSANEO: What, the
12 last sentence?
13 MR. McMAINS: Yeah.
14 PROFESSOR DORSANEO: No. The
15 last sentence does not say that. It
16 addresses --
17 MR. McMAINS: It says just
18 the -- it says that --
19 PROFESSOR DORSANEO: It
20 addresses a line of cases --
21 MR. McMAINS: Right.
22 PROFESSOR DORSANEO: -- where
23 parties made specific requests that were
24 refused, including one Supreme Court case, and
25 the Supreme Court in that case said that will

1 act like the failure to find was a finding,
2 which is, you know, it was like --
3 MR. McMAINS: Yeah.
4 PROFESSOR DORSANEO: The truth
5 is falsity, will act like truth is falsity,
6 but that's what that sentence was put it in
7 there for when they put it in.
8 MR. McMAINS: I agree with that
9 aspect of the change. I think that's a good
10 thing that you should not be presuming in
11 favor of the judgment findings that the judge
12 didn't make, address, or talk about, but the
13 question is, if you are going to carry this
14 analogy to the jury part further then you also
15 should put in that, however, that you may not
16 presume or not create a deemed finding if the
17 opposing party has made a request on the
18 omitted issue.
19 PROFESSOR DORSANEO: We will
20 agree to put that sentence in for
21 clarification. I think the clarification is
22 necessary based on what you said and what Anne
23 Gardner has said. I think it's meant to be
24 embedded in the short three words "omitted
25 unrequested elements" and that it would just

1 be a simple matter for Don Hunt to add that
2 sentence in for clarification. Okay.
3 Especially if we are going to move the other
4 sentence for clarification.
5 And the sentence, we can take it from the
6 transcript just in the manner that you stated
7 it, but the principal would be that there is
8 no presumed finding on an element that's been
9 requested and the request has been denied, and
10 I think that's perfectly consistent with
11 current law and makes the rule better and
12 clearer.
13 MR. McMAINS: Okay.
14 PROFESSOR DORSANEO: Happy now?
15 MR. McMAINS: Well, I have less
16 problem with it in that context.
17 CHAIRMAN SOULES: All right.
18 Requested and denied.
19 PROFESSOR DORSANEO: Uh-huh.
20 CHAIRMAN SOULES: What about
21 requested and ignored?
22 PROFESSOR DORSANEO: Well,
23 requested and -- maybe that's right. Maybe
24 requested and ignored is fine.
25 HONORABLE SARAH DUNCAN: Where

1 the finding wasn't made for whatever reason.
2 MR. McMAINS: It's requested
3 and not found or not expressly found. Not
4 contained in the findings.
5 CHAIRMAN SOULES: Requested and
6 not made?
7 MR. HUNT: Not found.
8 HONORABLE DAVID PEEPLES: Can I
9 ask a question? How much of this problem goes
10 away if we encourage trial judges to make
11 broad form findings, comparable to those made
12 by --
13 PROFESSOR DORSANEO: All of it.
14 Almost all of it.
15 MR. McMAINS: All of it, yeah.
16 HONORABLE SARAH DUNCAN: Luke?
17 CHAIRMAN SOULES: Justice
18 Duncan.
19 HONORABLE SARAH DUNCAN: I
20 started wondering about this. Maybe we took a
21 vote on it and I have forgotten and that's why
22 I have this vague memory in the back of my
23 mind.
24 HONORABLE SCOTT BRISTER: I was
25 thinking the same thing.

1 HONORABLE SARAH DUNCAN: What
2 really is wrong with submitting --
3 HONORABLE SCOTT BRISTER: PJC
4 to the judge?
5 HONORABLE SARAH DUNCAN: Right.
6 PROFESSOR DORSANEO: That is
7 probably the law anyway.
8 MR. McMAINS: That is, in fact,
9 what it's supposed to be.
10 PROFESSOR DORSANEO: That's the
11 law of Gomez vs. Toledo and my case book case
12 says that that's what you're supposed to do.
13 HONORABLE SCOTT BRISTER: Well,
14 I'm relieved to know that because I never get
15 less than 20 pages of requested findings and
16 conclusions of law.
17 HONORABLE SARAH DUNCAN: I was
18 going to say, that's not, I don't think, what
19 people are requesting and it's not what trial
20 judges are doing and I at least tried to read
21 Orsinger's article and figure out what I was
22 supposed to do, but I couldn't figure it out
23 and I really couldn't figure out what I
24 was -- what was I supposed to be requesting?
25 Was I supposed to be requesting everything

1 from proper service, subject matter,
2 jurisdiction, all the way through? Was I
3 supposed to be requesting, you know, whether
4 there was a deceptive trade practice? Have we
5 voted on that, Luke, and rejected it?
6 CHAIRMAN SOULES: I don't think
7 we have voted.
8 HONORABLE SARAH DUNCAN: Or is
9 there a reason we haven't voted on it? Could
10 we vote on it?
11 MR. KELTNER: Sarah, it was
12 discussed. We discussed it, and it became my
13 thoughtful conclusion that what happens is a
14 winner gets overly greedy and goes through all
15 of those things and gets to put some very so
16 specific fact findings to indicate to the
17 court it couldn't have turned out any other
18 way and all of those types of things. I think
19 we ought to do something to encourage broad
20 form because that is really what we are doing,
21 and that gives everybody the same shot they
22 have at the jury trial, and right now it is
23 easier to reverse a case tried to the court
24 than to a jury, and that ought not to be the
25 way it is.

1 HONORABLE SARAH DUNCAN: Second
2 it.
3 CHAIRMAN SOULES: The way it
4 would be done would be to take something like
5 the first sentence of Rule 277 and modify it
6 or perhaps --
7 MR. McMAINS: Say "to the
8 extent practicable."
9 PROFESSOR DORSANEO:
10 -- inclusion in 297 or even 299. You know,
11 "In all nonjury cases the court shall whenever
12 feasible make broad form findings of fact."
13 HONORABLE SARAH DUNCAN: What
14 about in subsection (b) of Rule 296, say,
15 "Form of findings. In all nonjury cases the
16 court shall --" whatever, broad form findings.
17 But make it -- put it in the first -- well,
18 no. Actually, you're right. 297 is entitled
19 "Findings and Conclusions," so never mind.
20 CHAIRMAN SOULES: Okay. We are
21 going to --
22 HONORABLE SARAH DUNCAN: I
23 withdraw that.
24 CHAIRMAN SOULES: We are going
25 to lose Bill in a minute because I know his

1 schedule is tight. Is that something that
2 needs to be done here, or is that something to
3 be proposed separately? It needs to be done
4 here, right now? Okay.
5 MR. KELTNER: Is there any
6 objection?
7 MR. McMAINS: Well, let me --
8 CHAIRMAN SOULES: Rusty, go
9 ahead.
10 MR. McMAINS: That's what I was
11 trying to -- yeah. I think that the party
12 that might object to it isn't here, Richard
13 Orsinger, and I mean, a lot of these problems
14 were designed to deal with Orsinger's problem
15 in the family law area. And my concern is
16 that, you know, while that's a perfectly
17 acceptable thing in all of the areas basically
18 that I practice in, since the ultimate issue
19 in the division of property is merely who gets
20 what and his real complaint is that he wants
21 findings of fact on some subcomponents of that
22 that he's tried to the jury, I'm not sure if
23 you put that in that you haven't undone what
24 he was trying to accomplish by the part where
25 he's entitled to any findings.

1 PROFESSOR DORSANEO: He won't
2 like that, but he's stuck with it in whatever
3 feasible language is serviceable in behalf of
4 the same argument that he would make about
5 what's ultimate and what isn't ultimate. So
6 it doesn't really hurt him anymore than he's
7 hurt already.
8 MR. McMAINS: No. Well, I
9 agree. His position right now is he's screwed
10 at the present. So this was an effort in part
11 to address that issue, as I understand it, and
12 all I'm saying is that I'm not sure there
13 isn't, and I don't know whether or not we make
14 an exception in the family law area or if
15 there is a basis to make an exception in the
16 family law area or if he feels like that
17 he's -- that that's okay.
18 PROFESSOR DORSANEO: Well,
19 Mr. Chairman, I don't know whether we are
20 going to bring these back again for a third go
21 around, but we could certainly draft a
22 sentence to add as subparagraph (c) to 297
23 modeled on the first sentence of 277 and see.
24 CHAIRMAN SOULES: Those in
25 favor show by hands.

1 Okay. Anyone opposed? No one is opposed
2 to that. So that's fine.
3 HONORABLE DAVID PEEPLES: Bill,
4 I would say that I think that we ought to talk
5 to Richard Orsinger about it and see if we
6 could say "except in family law cases." They
7 are different from cause of action cases.
8 They are just different, and a different rule
9 would be fine, I think.
10 CHAIRMAN SOULES: I don't know
11 where Richard is.
12 MR. McMAINS: Yeah. I don't
13 know where -- I didn't notice he wasn't here
14 until he wasn't speaking up.
15 PROFESSOR DORSANEO: Well, it's
16 probably good that he's not here because he
17 would talk about it for longer, and we already
18 understand his concern.
19 CHAIRMAN SOULES: So now we
20 have got to -- we are up to 297, and we are
21 going to write some language to add to it.
22 Any other changes in 297? There is Richard.
23 Those in favor show by hands.
24 Anyone opposed? No one is opposed. It
25 passes.

1 HONORABLE SARAH DUNCAN: Read
2 it and weep.
3 CHAIRMAN SOULES: Okay. 290 --
4 PROFESSOR DORSANEO: 9a.
5 CHAIRMAN SOULES: -- 9a.
6 PROFESSOR DORSANEO: I
7 innovated just a tiny bit. I added "unless
8 otherwise provided by law" because as I
9 understand it, the family code does require at
10 times -- and, Richard, correct me if I am
11 wrong -- findings of fact to be recited in a
12 judgment.
13 MR. ORSINGER: For when you
14 deviate from the child support or visitation
15 guidelines that's required on oral requests
16 made before the judgment is signed.
17 PROFESSOR DORSANEO: And I
18 otherwise --
19 CHAIRMAN SOULES: 299a?
20 PROFESSOR DORSANEO: 299a. I
21 added "unless otherwise provided by law."
22 MS. MCNAMARA: Luke, you're
23 looking at the wrong -- turn it over.
24 MR. McMAINS: 299 little a.
25 It's not 299 sub (a).

1 CHAIRMAN SOULES: Oh. Thank
2 you.
3 PROFESSOR DORSANEO: I added
4 "conclusions of law" after "findings of fact,"
5 and I changed it a little bit to say that they
6 should be "requested, prepared, and filed with
7 the court clerk as a document separate from
8 the judgment," okay, which I just think
9 clarifies findings of fact shall not be
10 recited in a judgment.
11 I changed the second sentence a tiny bit,
12 too, because it seemed to leave out some of
13 what it was trying to say. "If findings of
14 fact are recited in a judgment" rather than
15 "if there is a conflict between findings of
16 fact recited in a judgment in violation of
17 this rule." Okay. I don't think it changes
18 the meaning at all. "If they are recited in
19 the judgment in violation of this rule," and
20 probably I would prefer to say "and if there
21 is a conflict between the findings recited in
22 the judgment and the findings made pursuant
23 to," blah-blah, "the latter findings will
24 control for appellate purposes." I just tried
25 to make it a little more clear. I hope I

1 didn't make it less clear by trying to make it
2 clearer.
3 HONORABLE C. A. GUITTARD: Why
4 don't we want the findings recited in the
5 judgment?
6 CHAIRMAN SOULES: It's just not
7 the law.
8 HONORABLE C. A. GUITTARD:
9 Well, why couldn't that be the law?
10 MR. McMAINS: Well, basically
11 because it changes your time because if you
12 make a finding of fact in the trial court
13 judgment, then your times for making
14 additional requests is what starts as opposed
15 to your time for making the initial request.
16 I mean, your relegated into -- you're moving
17 up into the procedure, and that's -- we are
18 trying to make the procedure consistent in
19 terms of making it easy to know when you are
20 supposed to file a request for findings and a
21 request for amending findings.
22 PROFESSOR DORSANEO: If we ever
23 get to the point, Judge, and we make these
24 findings mandatory, I would vote to put them
25 in the judgment, but as long as they are done

1 after the judgment pursuant to a separate
2 request and all of this stuff which I totally
3 oppose in concept, let's do it like we have
4 been doing it.
5 HONORABLE C. A. GUITTARD: I
6 think you're right.
7 CHAIRMAN SOULES: Okay. So,
8 Bill, then you're saying in the third line "if
9 findings of fact are recited in a judgment in
10 violation of this rule."
11 PROFESSOR DORSANEO: And "if"
12 rather than, comma, "if."
13 CHAIRMAN SOULES: "There is a
14 conflict between the findings recited in the
15 judgment and made pursuant to --"
16 PROFESSOR DORSANEO: Sarah says
17 I can leave out the "if," and I agree.
18 HONORABLE SARAH DUNCAN: The
19 second "if" needs to go.
20 CHAIRMAN SOULES: And second
21 "if" goes.
22 MR. McMAINS: Didn't we have a
23 thing in there which said that the findings of
24 fact are of no effect?
25 PROFESSOR DORSANEO: No. It

1 never said that.

2 MR. McMAINS: In the other one?

3 PROFESSOR DORSANEO: No. It

4 never said that.

5 MR. McMAINS: In the judgment?

6 PROFESSOR DORSANEO: It never

7 said that and that would be something that we

8 might want to say and I almost put it in this

9 draft, but that's either unknown or not true

10 everywhere.

11 MR. McMAINS: Well, the problem

12 I have with it is that it's one thing to say,

13 "Okay, you are violating the rule," but if you

14 don't have a conflict and especially if -- I

15 mean, unless -- I mean, the notion of what is

16 a conflict between two findings is a fairly

17 narrow concern, and it may well be that as

18 long as it's, you know, the one specific

19 finding of fact doesn't expressly conflict

20 with the other, even though they might be a

21 little bit inconsistent, you give legal effect

22 to both of them, then you are going to

23 encourage people to do it.

24 PROFESSOR DORSANEO: This rule

25 suggests that those findings in the judgment

1 are not made pursuant to these rules, and
2 these rules don't help those findings in any
3 way, shape, or form, and it doesn't quite
4 completely say that. It merely suggests it.
5 So I would personally accept an amendment, and
6 I think it would be helpful to say that
7 findings in the judgment don't mean anything.
8 Okay. I think that would help judges
9 because they would be better off without
10 findings in the judgment. They would be
11 better if there are no findings with the
12 comprehensive presumption. I think it would
13 help parties who win for the same reason, and
14 parties who lose have these rules to protect
15 themselves. So I would personally accept that
16 and recommend to Don Hunt's committee to add
17 such a statement in the rule that is not
18 addressed in the rule now.
19 CHAIRMAN SOULES: Justice
20 Duncan.
21 HONORABLE SARAH DUNCAN: To
22 clarify what you're saying, are you saying
23 that if there are findings in a judgment when
24 there shouldn't be that they are of no effect,
25 and we are basically going to have to reverse

1 a case just because they are in the wrong
2 place?
3 PROFESSOR DORSANEO: No. I'm
4 saying they are of no effect, that is to say,
5 they are unnecessary. There is a
6 comprehensive presumption if there are no
7 findings made pursuant to these rules that
8 there was each factual controversy resolved in
9 favor of the judgment winner. I mean, that's
10 stated --
11 HONORABLE SARAH DUNCAN: Well,
12 then let me flip my question. You're saying
13 that if there are findings in the judgment
14 that conflict with the judgment then we have
15 to reform the judgment because the findings in
16 the judgment are of no effect; is that
17 correct?
18 PROFESSOR DORSANEO: Well, it
19 could --
20 CHAIRMAN SOULES: No. It goes
21 like this, I think. You have a judgment. It
22 doesn't make any difference whether there is
23 findings of fact or not in the judgment. If
24 no findings of fact are requested, then all
25 necessary findings of fact are deemed in

1 support of the judgment. Even if it has
2 findings of fact in it, you just ignore it.
3 It still has the same consequence.
4 MR. McMAINS: Right.
5 Absolutely.
6 CHAIRMAN SOULES: If you
7 request findings of fact and the judge doesn't
8 act or denies them and it's a harmless error,
9 then you still have the presumption, same
10 presumption in support of all the facts that
11 have been found in support of the judgment.
12 If it's harmful error, then it's got to be
13 remanded for findings of fact. But you could
14 just redact the findings of fact right out of
15 the judgment and then you apply the law to
16 that judgment redacted, with the findings of
17 fact redacted.
18 That's what this says and probably is the
19 current state of the law. Regardless of the
20 latter part, that's what this says. That's
21 what it would say if we say -- actually, it
22 would say there was a nullity. Any findings
23 of fact recited in the judgment are a nullity.
24 MR. ORSINGER: Well, doesn't
25 that hurt you on default judgments where you

1 have to have recitals of due service and
2 jurisdiction and things like that?
3 PROFESSOR DORSANEO: Yeah.
4 That's part of the reason why I didn't address
5 this. That and I'm not sure about how that --
6 CHAIRMAN SOULES: That's true.
7 PROFESSOR DORSANEO: What that
8 has to do with and how that relates to
9 collateral attacks on judgments, and we have
10 this separate law of judgment recitals
11 counting for something in the context of
12 collateral attacks. Otherwise, they don't
13 really count unless we make them count.
14 CHAIRMAN SOULES: It's better
15 the way it is for what you're talking about
16 because there wouldn't be any conflict of
17 findings of fact.
18 MR. ORSINGER: That's true.
19 CHAIRMAN SOULES: And so then
20 the findings of fact in a judgment would mean
21 something.
22 MR. ORSINGER: But I think that
23 the law of judgments says that a recital of
24 jurisdiction is not subject to collateral
25 attack, but if the judgment doesn't recite a

1 finding of jurisdiction, then I'm not sure
2 that you haven't opened yourself up to a
3 collateral attack. So we don't want to make
4 recitals worthless.
5 CHAIRMAN SOULES: That's right.
6 MR. ORSINGER: We just want to
7 eliminate conflicts with the proper procedure.
8 CHAIRMAN SOULES: Okay. Okay.
9 Then we have discussed 299a. Is there any
10 opposition to 299a?
11 Okay. It's unanimously approved.
12 PROFESSOR DORSANEO: My watch
13 says it's about 11:55, and my first year class
14 that I am going to teach will expire and write
15 all kinds of nasty letters if I don't get
16 there to teach my class at 2:00 o'clock. They
17 are not capable of adjusting at their age to
18 changes in schedule. I'm going to exercise a
19 personal privilege and go to page 16 to talk
20 about premature filing of motions for new
21 trial.
22 We have already voted with respect to
23 premature filings of request for findings that
24 current Rule 306(c) will be retained in
25 substance and moved into the findings of fact

1 rule. At the last meeting late in the session
2 in the afternoon we definitely and clearly
3 voted -- and, Mr. Chairman, you tell me if I
4 am out of order -- that a premature motion for
5 new trial and, in fact, all premature
6 postjudgment motions will have no effect on
7 plenary power and timetables.
8 Now, that was clearly voted up. If it
9 wasn't unanimous, it was close to unanimous.
10 I drafted it that way. "A motion for new
11 trial is effective to preserve the complaints
12 made in the motion," which we did conclude
13 would still be the law, "and is deemed to have
14 been overruled by operation of law on the date
15 of but subsequent to the signing of the
16 judgment the motion sales," borrowing from
17 306(c) some of the same language but changing
18 the concept.
19 "No motion for new trial filed prior to
20 judgment extends the trial court's plenary
21 powers provided in Rule 305," which we haven't
22 talked about yet, "or any timetable prescribed
23 in the Texas Rules of Appellate Procedure."
24 Maybe it should say, "or any timetable
25 prescribed in the Texas Rules of Civil or

1 Appellate Procedure." Now, I personally do
2 not think that that is necessary to the other
3 changes that we decided with respect to
4 motions for new trial and would personally
5 suggest that you talk about that some more
6 this afternoon if you want to.
7 I don't see that it's necessary to
8 anything else that we did that a premature
9 motion for new trial, okay, one that's filed
10 before the judgment is signed, doesn't do what
11 it does now, and that is preserve the
12 complaints that are properly stated and get
13 overruled by operation -- it would be treated
14 as it's filed after the judgment, can overrule
15 by operation of law on the 75th day. I don't
16 see how that screws up anything.
17 The vote and the discussion last time was
18 partly pragmatic, partly conceptual, and in
19 revising all of this, that is something that
20 came to me as something that maybe ought to be
21 considered again. If we want to do it like
22 that, it doesn't hurt, either. Okay. And
23 that's my only comment, except for when you
24 get to plenary power remember that we did not
25 decide for sure, I don't think, that a request

1 for findings of fact extends plenary power,
2 and this draft does that.
3 This draft assumes when we were
4 considering that issue that we actually
5 decided that the request extends plenary
6 power. We didn't do that the last discussion.
7 In fact, voting down the sentence that was
8 voted out of 297(b) may be leaning a little
9 bit the other direction.
10 All right. The sentence that was in
11 297(b) that we voted down the last meeting
12 says, "The judge's authority and duty to file
13 findings, whether original, additional, or
14 amended, are not affected by expiration of the
15 court's plenary power over the judgment," and
16 we had a lot of discussion about, well, why
17 not have the plenary power extended by the
18 request. That issue is still a live issue
19 that's not finished being debated. We
20 talked -- if you will recall, Richard said,
21 "Well, let's count up the days, how far off
22 are we," and we came close to it and we said
23 we will get to that when we get to that, and
24 this is where it is, in 305. I apologize for
25 having to go catch a plane, but I need to.

1 CHAIRMAN SOULES: Thank you
2 very much. Appreciate it, Bill.
3 PROFESSOR DORSANEO: And I
4 really did try faithfully to do everything
5 else that people voted on or suggested, you
6 know, as carefully as I could, and if I didn't
7 do something it was not, as best I can recall
8 right now, to fudge a little bit, intentional.
9 CHAIRMAN SOULES: Okay. Don,
10 pick up wherever you choose on this, wherever
11 you think is logically the next item. Just go
12 ahead and chair this aspect of it yourself.
13 MR. HUNT: First let me express
14 my appreciation to Bill Dorsaneo for assisting
15 last time for the rewrite and for the effort
16 to go through his rewrite on this occasion.
17 We are down to the point, as I understood
18 it -- and the Chair will correct me I hope if
19 I haven't read the minutes faithfully -- that
20 we have moved through the Rule 301 as
21 proposed, 302, and we are down almost to the
22 point where Professor Dorsaneo had to leave
23 us, considering the plenary power and the
24 suggestion that we rethink the business that
25 he was talking about there right before we get

1 to 305. Now, if that's not correct, someone
2 help me.
3 CHAIRMAN SOULES: So you're
4 saying that we have already covered 300.
5 MR. HUNT: That's what I
6 understand from the minutes last time and that
7 the rewrite faithfully covers it because most
8 of the things that are in these other rules
9 between 300 to 305 are matters that are either
10 covered in the TRAP rules and we don't want to
11 change those because those are before the
12 Court or we have considered them on the 17th.
13 CHAIRMAN SOULES: And 300 and
14 301, let's turn through these together.
15 HONORABLE SARAH DUNCAN: Luke?
16 CHAIRMAN SOULES: Justice
17 Duncan.
18 HONORABLE SARAH DUNCAN: On
19 300(b), and I have not read the minutes and
20 don't remember as clearly, but I'm confused
21 now about what a final judgment -- when a
22 final judgment is rendered for purposes of the
23 appellate timetable based on the first
24 sentence in subsection (b) of Rule 300. I
25 thought what we agreed was that the appellate

1 timetable would begin to run on the date that
2 the last order disposing of the last claim or
3 party is signed because the way it's written
4 here I don't think there is a beginning date
5 of the appellate timetable.
6 HONORABLE SCOTT BRISTER: No.
7 There is just several of them.
8 HONORABLE SARAH DUNCAN: Right.
9 CHAIRMAN SOULES: All right.
10 So and see if this helps. "The final judgment
11 for purposes of appeal and the trial and
12 appellate timetables is the order," that's
13 easy enough, "or the last of a series of
14 orders."
15 HONORABLE C. A. GUITTARD: That
16 will do it.
17 HONORABLE SCOTT BRISTER: Last
18 of any series or a series?
19 HONORABLE SARAH DUNCAN: What
20 about "the order or the last order disposing
21 of a party"?
22 CHAIRMAN SOULES: I guess, it
23 would be "the series of orders that disposes."
24 HONORABLE SARAH DUNCAN: You
25 can't -- a series of orders is not a specific

1 date in time on which the appellate timetable
2 can commence.
3 CHAIRMAN SOULES: Okay. I'm
4 sorry. I was just reading -- I was just
5 responding to Judge Brister. Or "the last of
6 the series of orders."
7 HONORABLE SARAH DUNCAN: Well,
8 but then you have left out -- it seems to me
9 that we have got two concepts going on, and we
10 are trying to put them both in one sentence.
11 CHAIRMAN SOULES: Okay.
12 HONORABLE SARAH DUNCAN: And we
13 are causing troubles. One is the definition
14 of a final judgment. "A final judgment is the
15 order or the series of orders that disposes of
16 all claims and parties." The second is when
17 the timetable commences to run, and the
18 timetable commences to run either upon the
19 entry of the order or the last in the series
20 of orders, but we are trying to put both of
21 those concepts into one sentence, and that's
22 what's causing at least my confusion.
23 CHAIRMAN SOULES: So what do we
24 do to fix it?
25 HONORABLE SARAH DUNCAN: What I

1 would say is leave out the "and appellate
2 timetables" in the second sentence, make the
3 first sentence simply, "a final judgment for
4 purposes of appeal and the trial is the order
5 or series of orders disposing of all parties
6 and issues in the case" and then have a second
7 sentence that says, "For purposes of the
8 appellate timetable the order or the last in
9 the series of orders disposing of the parties
10 and the claims," something like that, but I
11 think we need two different sentences.
12 CHAIRMAN SOULES: Okay. Let's
13 write it. "A final judgment for purposes of
14 appeal --"
15 HONORABLE SARAH DUNCAN: Could
16 we take out "for purposes of appeal and the
17 trial and appellate timetables" and say, "A
18 final judgment is the order or series of
19 orders disposing of all the parties and issues
20 in the case"?
21 HONORABLE SCOTT BRISTER:
22 Uh-huh.
23 MR. HUNT: You'd leave in
24 "expressly or impliedly"?
25 HONORABLE SARAH DUNCAN: Yes.

1 I think you have to, don't you, and then have
2 a second sentence --
3 HONORABLE SCOTT BRISTER:
4 "Trial and appellate timetables shall run from
5 the last of any such orders."
6 HONORABLE C. A. GUITTARD: I'm
7 not sure that it's wise to take "for purposes
8 of appeal" out of there because a judgment can
9 be final in one sense and still not be final
10 for the purpose of an appeal.
11 HONORABLE SARAH DUNCAN: Yeah.
12 True. So we are just going to take out "and
13 the trial and appellate timetables" from this
14 first sentence, right?
15 CHAIRMAN SOULES: "A final
16 judgment for purposes of appeal is the order
17 or series of orders disposing of all the
18 parties and issues in the case expressly or
19 impliedly."
20 HONORABLE SCOTT BRISTER:
21 That's fine.
22 HONORABLE SARAH DUNCAN:
23 Uh-huh.
24 MR. HUNT: Did we put in the
25 "last"?

1 HONORABLE SARAH DUNCAN: No.
2 HONORABLE SCOTT BRISTER: No.
3 For purposes of appeal you want them all put
4 together.
5 HONORABLE SARAH DUNCAN: "For
6 purposes of the appellate timetable" or just
7 say, "The appellate timetable commences."
8 MR. ORSINGER: Luke, I don't
9 think we better put the word "written" in here
10 in the context of this discussion because you
11 can have an order that's final in the sense
12 that it's not interlocutory, which is I think
13 one of the meanings that Judge Guittard was
14 using. It's noninterlocutory and yet it's
15 not -- it doesn't trigger the appellate
16 timetable. So if we put the word "written" in
17 there, that eliminates any dispute about
18 whether we differentiate noninterlocutory from
19 final.
20 CHAIRMAN SOULES: "Written
21 order or series of written orders." Okay.
22 "Appellate timetable commences --"
23 HONORABLE SARAH DUNCAN: Wait.
24 "The appellate timetable commences upon the
25 signing of the order disposing of the last

1 remaining party or issue."

2 HONORABLE SCOTT BRISTER: But

3 how about if it's impliedly?

4 MR. ORSINGER: Well, you have a

5 problem with that, Sarah, because you might

6 have a severance order that makes an

7 otherwise -- it makes a written

8 noninterlocutory judgment that's -- pardon me.

9 It's a written interlocutory judgment that's

10 actually going to be appealed from, so it's

11 really final in the sense that it's what we

12 are attacking, but it doesn't become final

13 until there is a severance order signed, and

14 all of the sudden you say the appellate

15 timetable --

16 HONORABLE SARAH DUNCAN: Right.

17 But that severance order has to either dispose

18 of the party or the issue or the claim or the

19 defense or the motion that made that previous

20 order interlocutory. If I have got a motion

21 for summary judgment --

22 MR. ORSINGER: But the

23 severance order is not appealable, or maybe

24 somebody tell me if it is. If Party A has

25 been severed from the rest of the lawsuit,

1 Party A's judgment goes up on appeal, but the
2 severance order is now an interlocutory order
3 in the case that's still pending. So I think
4 that Parties B and C can only complain about
5 the severance order when they take an appeal
6 up of their own judgment. I don't know if I'm
7 wrong about that or not.
8 CHAIRMAN SOULES: That's right.
9 MR. HUNT: I think that's
10 correct.
11 HONORABLE SARAH DUNCAN: No.
12 No. If I improperly severe a party or a
13 claim, that can be brought up in the appeal of
14 what was made final by that severance. You
15 don't have to wait to appeal whatever was
16 severed. Now, the question of what relief do
17 you get if you're right that it should have
18 been severed may be another question.
19 CHAIRMAN SOULES: David
20 Keltner.
21 MR. KELTNER: Let me ask this
22 to both Don and Sarah. Part of the problem I
23 think Richard is having and I'm having, too,
24 is we now know basically what a final judgment
25 is for the appellate timetable. It's got to

1 be not rendered 'til it's signed and then up
2 we go and there is always a question of
3 whether it was the last one or whether that
4 judgment was final and I understand to some
5 extent in 300 that's what we are trying to
6 fix, but it seems to me that by fixing that we
7 have caused another problem of what document
8 is, in fact, the final judgment, and that
9 seems to me to be a worse problem than the
10 series of law we have on finality now.
11 HONORABLE SARAH DUNCAN: But
12 that's why we initially got into this
13 discussion, is that the law now is that when
14 the order is signed that renders a previous
15 interlocutory order, noninterlocutory and
16 final, that's when the timetable commences.
17 And people outside this room, outside of a few
18 lawyers in the state, don't understand that,
19 and they are waiting for something called
20 final judgment to be signed to start appealing
21 things. So what I thought we were trying to
22 do here was tell those people in the rules
23 "Don't go waiting for something called final
24 judgment because you may never get one.
25 Here's what you need to look at."

1 Now, you know, I have some problems with
2 the way this is written, but as far as having
3 in the rules that warning and that definition,
4 I think we need to have it.
5 MR. KELTNER: That is a very
6 good point. In addition then to what Richard
7 was saying about it being written, obviously
8 in 300(a) we have an oral announcement is good
9 enough, and we had a big discussion, and I may
10 have been part of the problem here. I think
11 for an order that is true. For a judgment,
12 especially a judgment that is final, I want to
13 see it in writing, and it seems to me that is
14 a greater protection and a greater bright line
15 on rendition because, remember, we fought the
16 battle of changing the rules from "rendered as
17 blank date" to "signed."
18 I would like to have one thing of "signed
19 on the final judgment" so the judge has got to
20 sign something, and it may be the fifth
21 of -- the fifth motion for summary judgment
22 that finally gets rid of all the parties, but
23 I would sure like to see it be signed because
24 we do away with the appellate timetable
25 problem and then we can deal with the finality

1 issue the way you proposed, but I fear that
2 the current drafting here would allow an oral
3 judgment rendered in court with or without a
4 court reporter to start the appellate
5 timetable, and that seems to me to be
6 problematic.
7 CHAIRMAN SOULES: See, I'm
8 trying to -- I'm tinkering with this thing
9 here, just using Sarah's first sentence, "A
10 final judgment for purposes of appeal is the
11 written order or --"
12 HONORABLE C. A. GUITTARD: "Is
13 the signed order." Why not say "the signed
14 order"?
15 CHAIRMAN SOULES: "Is the
16 written order or series of written orders
17 disposing of all the parties and issued in the
18 case expressly or impliedly." That's the
19 definition of final judgment. We haven't
20 gotten yet to the when the appellate timetable
21 starts.
22 Now, sentence number two, "The appellate
23 timetable commences upon the signing of the
24 written order or the last of a series of
25 written orders disposing of all the parties

1 and issues in the case expressly or
2 impliedly."
3 MR. KELTNER: That works for
4 me. My only question would be this: The other
5 side of that would be is there a problem with
6 requiring a trial judge to sign a document
7 called "final order" so that the district
8 clerks and county clerks around the state
9 don't have problems? Because that's one of
10 the things under the rules they are told they
11 have got to have in. Is there a problem with
12 doing it that way? And quite frankly, that
13 may open another can of worms.
14 HONORABLE SARAH DUNCAN: Are
15 you asking whether we require something
16 called --
17 MR. KELTNER: Or should
18 require.
19 HONORABLE SARAH DUNCAN: Yeah.
20 Whether we should require something.
21 MR. KELTNER: Yes.
22 HONORABLE SARAH DUNCAN: I
23 thought we talked about that at the last
24 meeting because, I mean, I would be -- my only
25 problem here is that I don't like to see

1 people lose their appeal because they didn't
2 understand that all it took was an order to
3 commence the appellate -- severance order to
4 commence the appellate timetable, and I would
5 be in favor of a rule -- I don't know if the
6 majority is, but I would be in favor of a rule
7 that says you have got to have something.
8 It's got to be called "final judgment," and
9 it's got to wrap all of that up.
10 MR. KELTNER: I think that may
11 be a cleaner way to solve it, and personally I
12 think it would help the clerks tremendously as
13 well, but let's hear from them. I don't know.
14 I may be fighting a battle you don't want me
15 to fight.
16 CHAIRMAN SOULES: Richard
17 Orsinger.
18 MR. ORSINGER: I would suggest
19 in the context of the discussion that we not
20 use the word "final judgment" and that instead
21 we just say, "a judgment is appealable" or "an
22 appealable judgment is that written order or
23 series of orders that disposes of the parties
24 and issues in the case expressly and
25 impliedly" and not use the word "final"

1 because it irrevocably involves
2 noninterlocutory.
3 HONORABLE SARAH DUNCAN: That's
4 not true, though.
5 MR. ORSINGER: Why?
6 HONORABLE SARAH DUNCAN: There
7 are lots of appealable judgments or orders
8 that aren't -- that don't dispose either in
9 one order or in a series of orders with all
10 claims and all parties.
11 MR. ORSINGER: I didn't exclude
12 that. I just said that "an order is
13 appealable" or "an appealable order is."
14 HONORABLE SARAH DUNCAN: But an
15 appealable order is something other than what
16 you just defined, too. An appealable order is
17 an order denying a motion for summary judgment
18 on grounds of official capacity immunity, and
19 that appealable order is excluded by the
20 definition you just gave as an appealable
21 order.
22 MR. ORSINGER: Well, I didn't
23 mean to exclude it. What I am trying to do is
24 avoid the use of the word "final," which has a
25 dual meaning with a hundred years of

1 precedence behind each dual meaning, and the
2 inherent ambiguity of the difference between
3 noninterlocutory and written as which -- which
4 has also a dual function, one of which is to
5 say that the trial court is through
6 litigating, and the other one is to say that
7 that starts timetables.
8 So we are using ambiguous words to cause
9 two different things to happen, and we are
10 having a lot of problems as a result of that,
11 and surely there is a way for us to get away
12 from the word "final judgment" and to break up
13 the timetable from the declaration that this
14 is the last judicial relief and simplify it.
15 CHAIRMAN SOULES: Well, what do
16 you call it if it's not a final judgment?
17 MR. ORSINGER: You can call it
18 an appealable judgment.
19 CHAIRMAN SOULES: So what would
20 we say? "Order of dismissal and appealable
21 judgment"? "If the nonsuit of the remaining
22 claims that cause the order of severance and
23 appealable judgment." So we are going to come
24 up with a new idea that everybody has got to
25 put, and if it's not in the style or the

1 label, it doesn't start the appellate
2 timetables going?
3 So we are going to say to the Bench and
4 Bar you have got to put appealable something
5 in the label of your last act or the appellate
6 timetable never starts, or are we going to say
7 you have got to put up final something on the
8 label of your last act or the appellate
9 timetable never starts?
10 MR. ORSINGER: No. That
11 shouldn't control whether your --
12 CHAIRMAN SOULES: I think
13 that's what David is suggesting.
14 MR. KELTNER: No. I am
15 suggesting that we consider that.
16 CHAIRMAN SOULES: Right now an
17 order of dismissal, if somebody nonsuits the
18 rest of their claims --
19 MR. KELTNER: Absolutely, Luke.
20 I agree.
21 CHAIRMAN SOULES: -- it's
22 dismissal, final timetable starts.
23 MR. KELTNER: Most importantly
24 I think it should be if signed by the judge so
25 we are running nothing from an oral

1 announcing. Secondly, if it's signed it's got
2 to be in writing, and I don't think we need to
3 say "before the judge." That would be
4 protection enough, at least for me. I
5 understand Sarah's concern that you can get
6 into trouble about thinking that there is not
7 a final appealable taking it out of the final
8 judgment issue.
9 There are other obvious stuff, and I am
10 willing for practitioners to live with some
11 degree of apprehension there because they
12 ought to be apprehensive, but my question just
13 for the whole group is if the easiest cure for
14 Sarah's problem is to say in every case there
15 must be one final judgment, which the rule
16 already says, or one judgment, and here it is.
17 HONORABLE SARAH DUNCAN: We are
18 not --
19 CHAIRMAN SOULES: I don't know.
20 I mean, I realize that we have had appellate
21 litigation over severances and nonsuits even
22 recently, but at some point it seems to me
23 like the lawyers and the trial court ought to
24 realize, you know, in a quick sigh of relief,
25 it's over, nothing left. Doesn't that signal

1 that -- or I got nothing left to fight about
2 because the judge has taken it all away? And
3 you can't bring it up.
4 MR. KELTNER: I agree. And as
5 long as it's signed, that's fine with me, but
6 what I worry about what this rule does is this
7 rule doesn't do that. This one says an oral
8 announcement in court could be it, whether or
9 not taken by a court reporter, and then the
10 final judgment rule I think it further
11 bastardized a little bit in saying that
12 it's -- the concept of the separate for
13 appellate timetables is problematic. As long
14 as it's signed, I'm fine. People can take
15 their chances.
16 CHAIRMAN SOULES: Okay. Well,
17 I have written something that says it's got to
18 be written and signed.
19 MR. KELTNER: That's fine.
20 CHAIRMAN SOULES: Doris.
21 MS. LANGE: The appellate
22 timetable is in there. Why do we even go to
23 that, because you have got that someplace? So
24 why even get into that here? I mean, if you
25 have got a final judgment or a written

1 judgment, then why -- I mean, that puts you
2 into your appellate timetable, doesn't it, and
3 why even put it here at all?
4 And, yes, the clerks would like to see
5 the word "final" or "judgment" or something so
6 that we know when to start our timetables.
7 CHAIRMAN SOULES: So you know
8 when to give your 306a notices, and that can
9 be a problem, I know.
10 MS. WOLBRUECK: That is a major
11 issue, and I know I have mentioned it before
12 in our subcommittee that clerks have a real
13 difficult time in identifying an appealable
14 order under 306a, and we would really like
15 some assistance with that.
16 In the alternative, many times we will
17 give notice on every order, no matter if it's
18 an order for continuance or anything, not
19 really knowing what is appealable and what is
20 not, and that's very costly.
21 CHAIRMAN SOULES: Of course,
22 306a you're only required to give the -- I'm
23 not sure. I don't know what you have to give
24 notice of.
25 MS. WOLBRUECK: Notice of

1 judgment or other appealable order, is what
2 306a says.
3 CHAIRMAN SOULES: Okay.
4 Justice Guittard, and then I will come over
5 here.
6 HONORABLE C. A. GUITTARD: I'm
7 concerned about whether we are taking into
8 consideration the concept that a judgment is
9 final for the purpose of execution as well as
10 for appeal. In this -- should this rule take
11 that in consideration as well? In other
12 words, when a judgment is final but is
13 appealable, is that judgment then starts the
14 time running for an execution? Is there some
15 conflict there? Do we have a problem to work
16 out there?
17 HONORABLE SARAH DUNCAN: Can
18 we --
19 CHAIRMAN SOULES: Buddy Low,
20 and then I will get to you.
21 MR. LOW: I don't know and I
22 don't have the rules before me, but in the
23 current rules there are certain interlocutory
24 things like class action certification and,
25 you know, you can appeal from that. So

1 everything you appeal from is either a final
2 judgment or an appealable interlocutory
3 judgment. I mean, and so --
4 HONORABLE SARAH DUNCAN: Or,
5 Buddy, if you have four claims, you have sued
6 me on four claims, and I get a summary
7 judgment on three of them --
8 MR. LOW: That's simple.
9 HONORABLE SARAH DUNCAN: -- and
10 you nonsuit the fourth one, it's actually that
11 nonsuit order that commences the timetable,
12 and that's all I'm trying --
13 MR. LOW: No. I'm not
14 answering. I'm asking a question because I
15 don't have the answers. I'm just saying,
16 though, that there are certain like the
17 situation you mentioned, immunity and then a
18 certification of a class action, but I think
19 it might have its own timetables and things
20 and I'm not sure. I don't have the rules, but
21 every order is -- I mean, what we are really
22 looking at is when something -- what makes
23 something appealable, when a judgment is
24 signed for appellate purposes and not when it
25 becomes final.

1 CHAIRMAN SOULES: I don't think
2 probably collectively we could really fix
3 any -- write any rule that would cover 306a.
4 For example, Texas Arbitration Act, file an
5 arbitration, interlocutory appeal. Federal,
6 no. But Texas arbitration, there are a bunch
7 of statutes that have immunity. The statute
8 has kind of built in they like to appeal. The
9 rules don't cover that, and I don't know where
10 others are scattered in there. They are
11 interlocutory appeals, and if we are supposed
12 to give 306a notices on any appealable order,
13 that would include any interlocutory appeals,
14 as I am understanding it. But if we can, it
15 would be great. I don't know.
16 Richard, and then I will get to Sarah.
17 MR. ORSINGER: Given the
18 example Sarah used where you get a summary
19 judgment on three causes of action and then a
20 nonsuit on the fourth one that makes the
21 summary judgment order appealable, under this
22 scenario the final judgment consists of the
23 real judgment that adjudicates all the
24 important claims as well as the notice of
25 nonsuit because the order of nonsuit is not

1 required.

2 CHAIRMAN SOULES: No.

3 HONORABLE SARAH DUNCAN:

4 Huh-uh. No. The Supreme Court has held that

5 it requires an order of nonsuit to commence

6 the appellate timetable.

7 MR. ORSINGER: All right.

8 Well, then I will amend my statement then. So

9 then the final judgment is really two pieces

10 of paper, one of which actually adjudicates

11 relief and one of which is just an abandonment

12 of a pending claim, and that doesn't connote

13 to me -- the abandonment of a pending claim

14 doesn't really connote to me a pending

15 judgment.

16 And I think the reason we are having to

17 call maybe four or five different pieces of

18 paper -- only one or two of which might really

19 be judgment-like, and the other ones might be

20 more procedural. The reason we are calling

21 them all of these things one final judgment is

22 so that we can start the appellate timetable

23 running. And I agree with the initial

24 suggestion that the appellate timetable should

25 have its own sentence, that it starts running

1 when a certain event occurs, and then let's
2 not try to define final judgment to include a
3 series of orders that might be signed over a
4 period of months.
5 Because truly the judgment, the fact that
6 it leads to appealability is only one aspect
7 of the judgment. Another aspect is it leads
8 to the issuance of writ of execution. Another
9 aspect is it adjudicates parties' rights for
10 purposes of res judicata, for purposes of
11 showing it to banks or showing it to title
12 companies.
13 And when we define the concept of
14 judgment to use phraseology that's illogical
15 just so we can conveniently say when the
16 appellate timetable starts, I think we get
17 lost in our words, and I would rather call a
18 judgment the thing that actually adjudicates
19 relief and then say it's appealable if and
20 when that constitutes the last judicial act in
21 the trial court. To me that makes more sense,
22 and on David's point, I don't know how far
23 David is going, but if he's suggesting that he
24 doesn't want a rendition until signing, I have
25 a bad problem with that in family law cases

1 because we are not going to be able to settle
2 them anymore. I don't know if David was going
3 that far.
4 MR. KELTNER: No. I'm not
5 going that far.
6 MR. ORSINGER: Okay.
7 MR. KELTNER: I think you can
8 render, but rendition means something
9 different --
10 MR. ORSINGER: Okay.
11 MR. KELTNER: -- than signing.
12 MR. HUNT: Mr. Chairman, the
13 subcommittee certainly needs some assistance
14 here because, as you will recall from the
15 November draft, there was no rule attempting
16 to define final judgment, and I overlooked
17 this earlier, but we did vote last time to try
18 to have Bill draft something on what a final
19 judgment was. The discussion thus far today
20 suggests that perhaps we should revisit that.
21 Is that really where you want to go? Do we
22 want to have a rule that defines what a final
23 judgment is, defines what an appealable
24 judgment is? Because I don't know what
25 to -- where we are going on this. We have all

1 had our say, but once we have said it we
2 haven't reached much of a conclusion. Is
3 there any sort of consensus on which we could
4 vote here?
5 CHAIRMAN SOULES: Well, this
6 (b), 300(b), Rule 300, subdivision (b), is not
7 intended to talk about interlocutory orders.
8 It's just trying to define what is this thing
9 that is the end of the case. There was a
10 pretty good consensus that we should try to
11 put in the rules some language that defines
12 what is this thing that ends the case, you
13 know, other than execution, posttrial motions,
14 and postjudgment motions and that sort of
15 thing. It may be too hard. It may not be
16 wise or maybe after the effort has been made
17 to do it, we change our mind and decide not to
18 define. This doesn't look to me to be very
19 far off of a definition of what is the thing
20 that ends the trial.
21 MR. LOW: I mean, when relief
22 is either granted or denied by the court,
23 that's appealable by the rules of the law.
24 Then appellate timetables will be sustained
25 by, you know, the instrument signed, as far as

1 the last of the series.

2 MR. YELENOSKY: We can't hear

3 you.

4 MR. LOW: I'm just saying, you

5 know, when a relief, not just -- you don't

6 call it a judgment. When relief is granted or

7 denied by the court it's appealable by law,

8 and now you have to decide when something is

9 appealable. Then appellate timetables will be

10 established as the last instrument signed by

11 the court or the last of a series, I guess.

12 Would that -- I mean, it would be novel. I'm

13 not suggesting that. I'm just throwing it

14 out.

15 CHAIRMAN SOULES: The effort is

16 to pick up the case law of jurisprudence that

17 says that you can't take an appeal of a case,

18 unless there is some interlocutory -- some

19 authority to take an interlocutory appeal, you

20 can't take an appeal from a case except on

21 final judgment.

22 MR. LOW: I understand.

23 CHAIRMAN SOULES: So we have

24 got that jurisprudence out there. What is

25 that thing?

1 HONORABLE SARAH DUNCAN: Luke,
2 I think I may have it.
3 CHAIRMAN SOULES: Justice
4 Duncan.
5 HONORABLE SARAH DUNCAN: What
6 about if we said, as we said earlier, "Final
7 judgment for purposes of appeal is the written
8 order or series of written orders disposing of
9 all the parties and issues in the case,
10 whether expressly or impliedly. When the
11 final judgment consists of a series of orders,
12 the appellate timetable commences upon the
13 signing of the order disposing of the last
14 remaining party or issue, whether by order of
15 severance or nonsuit or otherwise." And at
16 least that way we are giving notice to the
17 people that that can commence the timetable,
18 but we are recognizing that there are all
19 sorts of ways that previously interlocutory
20 orders can be made final.
21 MR. HUNT: Read that again.
22 HONORABLE SARAH DUNCAN: You
23 got the first sentence?
24 MR. HUNT: Yes. It's already
25 altered. Yes.

1 HONORABLE SARAH DUNCAN: Okay.
2 "When the final judgment consists of a series
3 of orders the appellate timetable commences
4 upon the signing of the order disposing of the
5 last remaining party or issue, whether by
6 order of severance or nonsuit or otherwise."
7 And I would suggest that since the purpose of
8 this is to try to codify the law in a way that
9 people are given notice in the rule of the
10 commencement of the timetable, that subsection
11 (b) be titled something like "Final Judgments
12 in the Appellate Timetable."
13 MR. HUNT: Well, we have a
14 separate Rule 305 that we will be considering
15 later that is entitled "Timetables."
16 HONORABLE SARAH DUNCAN: And
17 maybe it goes there.
18 MR. HUNT: Well, we have it
19 referenced back, as it is now drafted, to Rule
20 300(b) about triggering things from final
21 judgment as defined in Rule 300(b), and we
22 have to keep that in mind for purposes of what
23 we are doing here.
24 CHAIRMAN SOULES: The comment
25 that I have to that, Justice Duncan, is that

1 sort of to me it's -- it doesn't pick up the
2 most common way that a final judgment occurs.
3 More commonly than a severance or a nonsuit
4 would be a series of summary judgments
5 followed by a judgment after trial.
6 HONORABLE SARAH DUNCAN: Well,
7 stick that in. I'm just saying use that as a
8 beginning, that what we want to try to do is
9 explain to people that it's the order that
10 disposes of the last party, claim, whatever,
11 that renders the previous orders part of a
12 final judgment. I mean, you could say whether
13 by summary judgment, severance -- by order
14 granting summary judgment, severance, or
15 nonsuit or otherwise.
16 HONORABLE F. SCOTT McCOWN:
17 Luke?
18 CHAIRMAN SOULES: Judge McCown.
19 HONORABLE F. SCOTT McCOWN: If
20 one were just kind of starting from scratch,
21 to be practical about it you would just have a
22 rule about a closing memorandum, that when a
23 case was over the judge would have to say who
24 the parties were, what the issues were, what
25 the outcome was, sign it, date it, and that

1 would start the appeal; and if we could come
2 up with a rule like that, I think it would
3 serve so many purposes administratively.
4 I mean, you ought not have to pull a
5 file, many of which are going to be at least
6 three or four years old, trace through all of
7 the pleadings and all of the orders and pull
8 multiple documents to piece together what is
9 the operative law out of that case. There
10 ought to be one document at the end that tells
11 you what happened and what's the operative
12 law. That would help on res judicata. It
13 would help on the clerk, and it would prevent
14 the serious problem of winding up signing a
15 dismissal and bringing to life a bunch of
16 orders and ending a case that you didn't even
17 know you were ending.
18 CHAIRMAN SOULES: I think I
19 agree with that as a practical matter. I
20 don't think it's workable.
21 HONORABLE F. SCOTT McCOWN:
22 Well, I think you could do that.
23 CHAIRMAN SOULES: Okay.
24 MS. BARON: Uh-huh.
25 MR. ORSINGER: Can I make a

1 suggestion?
2 CHAIRMAN SOULES: Just bumping
3 around the state I'm not sure that I see
4 people that will always do that without a
5 staff. I mean, I don't want to criticize
6 anybody, but there is some -- the harder we
7 make it, the more complications that we put
8 into it, the less workable it's going to be
9 for some people wearing robes and some people
10 standing in front of them.
11 HONORABLE F. SCOTT McCOWN: I
12 just think it would be a lot easier to develop
13 a rule where you had one document at the end
14 that was the final document and that you
15 didn't have to go back and pull half a dozen
16 different ones and --
17 CHAIRMAN SOULES: Well, it's
18 easy to do. I mean, you have done it and I
19 have done it and probably everybody in this
20 room has done it where you go, you say final
21 judgment, and you refer back to the earlier
22 orders as a part of the final judgment so that
23 it's pretty clear what's happened, but that's
24 the narrative of this.
25 HONORABLE SARAH DUNCAN: Aren't

1 all of the trial courts now on case
2 management?
3 CHAIRMAN SOULES: Say that
4 again.
5 HONORABLE SARAH DUNCAN: Are
6 all of the trial courts now on case
7 management?
8 MS. SWEENEY: Huh-uh.
9 HONORABLE SARAH DUNCAN: No? I
10 was thinking that with if we had a form that
11 the lawyers could just submit to the judge or
12 the judge could do on their own, maybe it
13 would simplify things.
14 CHAIRMAN SOULES: Okay. I'm
15 going to have to leave. I will be back at no
16 later than 2:30. Don is going to finish this,
17 and if he gets done, I mean, of course, lunch
18 is here for you at your convenience. Don is
19 going to finish this. If he gets done, then I
20 think Buddy wants to go over some of the rules
21 of evidence and at least give you a
22 disposition chart and some comments on the
23 materials that are in the original agenda, the
24 first and second supplements, and we are going
25 to make a disposition table, and he can refer

1 you to those.

2 The disposition table refers you to the

3 pages. He's also got some drafting done. We

4 can discuss that orally and get some guidance

5 from you on your feelings. It looks like most

6 of the changes are pretty straightforward, not

7 complicated, something you can articulate

8 orally. And if you have this, what I think

9 was once mailed sometime since mid-November,

10 then you have his drafting, but again, it's

11 not particularly complicated, the changes to

12 the Rules of Civil Evidence, but we will have

13 the disposition table. It's only three pages.

14 We made a copy of that.

15 And I will be back as soon as I can, and

16 I apologize for the short break. I have got a

17 speech scheduled at 1:30, and it was today.

18 Don, if you would go ahead and proceed

19 and take your lunch break whenever you-all

20 wish.

21 MR. HUNT: Thank you. The

22 first order of business is to determine if you

23 wish to take the lunch break now. Is there

24 any opposition to taking the lunch break now?

25 HONORABLE DAVID PEEPLES: I

1 like this chairman.

2 MR. HUNT: We will take it

3 shortly and be back and work.

4 (At this time a recess was

5 taken, after which time the proceedings

6 continued as reflected in the subsequent

7 volume.)

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2 CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand

6 Reporter, State of Texas, hereby certify that

7 I reported the above hearing of the Supreme

8 Court Advisory Committee on January 19, 1996,

9 and the same were thereafter reduced to

10 computer transcription by me.

11 I further certify that the costs for my

12 services in this matter are $ 1,083.00.

13 CHARGED TO: Luther H. Soules, III.

14

15 Given under my hand and seal of office on

16 this the 6th day of February, 1996.

17

18

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Cert. Expires 12/31/96

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