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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 20, 1996

(SATURDAY SESSION)

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Taken before D'Lois L. Jones, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 20th day of
January, A.D., 1996, between the hours of 8:10
o'clock a.m. and 12:00 noon at the Texas Law
Center, 1414 Colorado, Room 101, Austin, Texas
78701.

COPY

JANUARY 20, 1996

MEMBERS PRESENT:

Pamela Stanton Baron
Honorable Scott A. Brister
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Tommy Jacks
Joseph Latting
John H. Marks Jr.
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon William Cornelius
David B. Jackson
Michael Prince
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta Jr.
Prof. Alex Albright
Charles L. Babcock
David J. Beck
Prof. Elaine Carlson
Hon. Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring, Jr.
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
Hon. F. Scott McCown
Harriet E. Miers
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

Hon Sam Houston Clinton
Paul N. Gold
O.C. Hamilton Jr.
Doris Lange
W. Kenneth Law

JANUARY 20, 1996

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1 CHAIRMAN SOULES: We are on the
2 record. It's about ten after 8:00. I
3 appreciate everybody being here so promptly.
4 I will pass a sign-in list, and we are going
5 to start this morning with Richard Orsinger.
6 We are going to give that about two hours and
7 then get with Paula Sweeney's group and give
8 her a couple of hours, if it takes that long.

9 MS. SWEENEY: Well, it won't.
10 We don't have Xeroxed copies of all of this
11 stuff.

12 CHAIRMAN SOULES: We can get
13 that done, can we not?

14 MS. SWEENEY: Can we do that?
15 Okay.

16 CHAIRMAN SOULES: Okay. We can
17 get the Xeroxing done at a break.

18 MS. SWEENEY: We are going to
19 go copy these and then I will get with you.

20 CHAIRMAN SOULES: Okay.
21 Richard Orsinger, and then you have the floor.

22 MR. ORSINGER: Thank you, Luke.
23 Everyone should have the disposition chart for
24 Rules 15 through 165a, which is on the corner
25 of that table there. If you don't have it,

1 that's what we are going to go through, and
2 then we have the agenda of letters that have
3 been sent in over the years, and that's what
4 the disposition chart will relate to.

5 The first item is Rule 18a, which is in
6 the first volume of the agenda, Volume 1, on
7 page 113, 112 and 113, and this was a
8 communication from Judge Charles Bleil, who I
9 believe if I am not mistaken is a judge on the
10 Texarkana Court of Appeals, and he was
11 concerned about the recusal process which
12 required that a motion to recuse be filed ten
13 days prior to the trial, and I have
14 subsequently realized that they had handled a
15 case up there at the Texarkana Court of
16 Appeals that raised this issue, and I believe
17 he had written the opinion on it or at least
18 was on -- I don't know if you recall that,
19 Judge, but at any rate, apparently this issue
20 was presented to the Texarkana court.

21 JUSTICE CORNELIUS: Right. I
22 think that was the issue we had in CNA vs.
23 Sheffie.

24 MR. ORSINGER: Okay.

25 JUSTICE CORNELIUS: But it

1 involves the timing of a motion to recuse,
2 doesn't it?

3 MR. ORSINGER: Yes. And
4 something that -- I think in this situation
5 the case had already started to trial and then
6 one of the law firms hired the son-in-law of
7 the judge.

8 JUSTICE CORNELIUS: Oh, that's
9 different from Sheffie. That's right. That's
10 a case out of Dallas. Yeah. We had that one,
11 too, though.

12 MR. ORSINGER: Well, at any
13 rate, the judge's letter was that they would
14 suggest or he would suggest -- well, actually
15 he says "our court," so maybe he was talking
16 about a consensus of all three of you. But at
17 any rate, his first suggestion was that 18a be
18 amended to allow the late filing of a motion
19 to recuse if it is grounded on reasons not
20 known or with due diligence knowable until
21 after the time for filing the motion to recuse
22 has passed, and he styled this a good cause
23 exception for late filing of the motion to
24 recuse.

25 The second question was Rule 166b

1 regarding expert witnesses, which was not
2 within the province of our subcommittee, so we
3 didn't address that. Now, the subcommittee
4 kicked this around a whole lot, and you can
5 see I have referred here, the judge actually
6 wrote a LAW REVIEW article on this subject
7 that probably was a spin-off of the case, and
8 the subcommittee uniformly agreed that
9 disqualification based on constitutional
10 grounds, we had to allow it to be raised at
11 any time, that we felt that there was no way
12 by rule to preclude someone from asserting a
13 constitutional right to disqualification.

14 However, recusal as distinguished from
15 disqualification did not disable the judge
16 from acting, and it was our view -- and if
17 anyone knows differently, let us know -- that
18 if a judge is disqualified under the
19 Constitution that his acts are a nullity
20 whether you admit to it or not, and you can
21 raise it for the first time on appeal, and
22 apparently there is a consensus to that.

23 MR. LATTING: Not only that,
24 you can waive the disqualification in open
25 court, and his acts are still a nullity.

1 HONORABLE C. A. GUITTARD:

2 Well, even if you don't raise it.

3 MR. ORSINGER: Could it be
4 collaterally attacked?

5 CHAIRMAN SOULES: Yes.

6 MR. ORSINGER: It can be
7 collaterally attacked. Okay. Well, then
8 there is no point in us doing anything but
9 letting people raise a disqualification
10 whenever they want to, obviously, so we agreed
11 that that should happen. Then we had a very
12 difficult split vote that you could file a
13 recusal up to ten days prior to the first
14 hearing or trial and after that could only
15 raise matters that arose subsequently. In
16 other words, if you filed a motion to recuse
17 after the tenth day before the first hearing
18 or trial, when the grounds for recusal arose,
19 it could only be for matters that arose after
20 that deadline. It could not be that you found
21 something out and you slept on your right and
22 allowed it to go by.

23 JUSTICE CORNELIUS: Arose or
24 discovered?

25 MR. ORSINGER: Well, I guess

1 discovered is more accurate, isn't it?

2 JUSTICE CORNELIUS: Yes.

3 Because they wouldn't have any way to raise
4 it --

5 HONORABLE SCOTT BRISTER: Yeah.

6 JUSTICE CORNELIUS: -- if it
7 existed but they didn't know about it.

8 MR. ORSINGER: Subsequently
9 arising. I think I chose poor language.

10 MR. JACKS: You know, it's
11 frequently not until after not only the first
12 but the second or third hearing before you
13 realize the --

14 MR. LATTING: How bad it is.

15 MR. JACKS: -- just how badly
16 you're getting screwed and you start to try to
17 figure out why.

18 MR. ORSINGER: Well, the reason
19 that it was a split vote --

20 MR. JACKS: Am I right, Brother
21 Soules?

22 CHAIRMAN SOULES: I think so,
23 Brother Jacks.

24 MR. ORSINGER: The reason there
25 was a split vote was because there was some

1 people that said that if we permitted this
2 motion to be filed within ten days that people
3 would file it with a dilatory motive that had
4 no basis in fact merely to disable the trial
5 judge from going to trial, even though they
6 knew their motion was not meritorious and that
7 the fear of sanctions would not be enough to
8 discourage that practice.

9 And so several people on the subcommittee
10 felt strongly that even if you didn't even
11 know about the ground of recusal until within
12 ten days, that the ability to file a frivolous
13 motion and disable the trial judge from going
14 to trial was so negative that it outweighed
15 the right to raise the recusal that you
16 weren't aware about.

17 Now, as a kind of a compromise we came up
18 with a suggestion that if it is filed within
19 ten days of a motion for hearing -- a trial or
20 a hearing, that we would not disable the trial
21 judge from going forward with the proceeding,
22 but we would require the trial judge who
23 decided not to recuse, we would require a
24 referral to the administrative judge and the
25 appointment of another judge to sit on the

1 recusal proceeding, but the recusal proceeding
2 would be held in parallel to the other
3 judicial event so that if it was filed within
4 ten days of trial, the trial judge could go
5 ahead and start into the trial and then if he
6 was recused, it would negate that trial
7 process probably.

8 But the suggestion is made then basically
9 that if it's an issue, and we probably -- it
10 says here "subsequently arising," but we
11 probably need to change that, as Judge
12 Cornelius suggested, to if you discovered it
13 for the first time.

14 HONORABLE SARAH DUNCAN: With
15 due diligence.

16 MR. ORSINGER: With this
17 concept of diligence or reasonably knew or
18 reasonably could have known.

19 JUSTICE CORNELIUS: Right.
20 Right.

21 MR. ORSINGER: That you can go
22 ahead and file your recusal motion, but the
23 judge can go ahead with the trial and if the
24 recusal motion is denied, the trial, it will
25 go on and then during a recess or during the

1 evening or early in the morning or whatever,
2 if it's denied, the trial has gone on
3 unimpeded. And if the recusal is granted,
4 then you have to bring in a new judge and have
5 a new trial. And while that's --

6 JUSTICE CORNELIUS: Start over
7 again or --

8 MR. ORSINGER: I think so. I
9 mean, if the judge is reduced, well, that's up
10 to debate. The committee didn't really
11 suggest.

12 MR. LATTING: Well, why should
13 you need to have a new trial if nothing has
14 happened at the beginning to be prejudicial?
15 Why have to have a new panel?

16 MR. ORSINGER: Well, maybe we
17 don't have to.

18 CHAIRMAN SOULES: Maybe the
19 trial is over.

20 MR. LATTING: Well --

21 JUSTICE CORNELIUS: Or nearly
22 over. I mean, critical issues may have been
23 decided by the recused judge.

24 MR. ORSINGER: Jury selection,
25 what you're permitted to say, rulings on

1 motions in limine.

2 JUSTICE CORNELIUS: Yeah. I
3 guess you would have to start over.

4 HONORABLE DAVID PEEPLES: Did
5 you-all check with people to find out how this
6 is really working with people across the
7 state?

8 MR. ORSINGER: No.

9 HONORABLE DAVID PEEPLES: Okay.
10 In San Antonio, and I will bet in the other
11 big areas, when you get one of these that's on
12 the eve of trial and the judge doesn't recuse
13 voluntarily, you fax that motion to the
14 administrative judge. He immediately assigns
15 somebody to hear it, and this wouldn't work
16 out in the country. They go next door or to
17 the next door or something and it's heard and
18 if the recusal motion is denied, they come
19 back up and you pick up where you left off and
20 it might delay it an hour.

21 HONORABLE SCOTT BRISTER: It
22 takes us longer than that because we just
23 don't have the courtrooms and the visiting
24 judges to hear them. It's a big -- and maybe
25 I need to ask, that the ones that are the

1 problem are where you get into the pretrial
2 conference and you're admitting the exhibits,
3 the attorney doesn't like the way things are
4 going and files a motion to disqualify because
5 the judge is biased. I don't have any problem
6 with any time if it's your investments or your
7 family or anything, but this, you know, the
8 judge is biased because you got ruled against
9 three times --

10 HONORABLE DAVID PEEPLES: That
11 happened to me two days ago.

12 HONORABLE SCOTT BRISTER: That
13 happens constantly.

14 HONORABLE DAVID PEEPLES: I had
15 granted a partial summary judgment a month
16 before and the case was assigned back to me
17 and he wanted to recuse me because I had
18 already granted a partial summary judgment on
19 a different part of the case.

20 MR. ORSINGER: Well, I think
21 our view, I think the view that we had
22 initially -- as I told you, the vote was
23 split -- was that if you cannot gain a
24 continuance by this process then we will
25 discourage anyone from making a frivolous

1 filing because it won't gain them anything,
2 but if there is a bona fide reason to consider
3 recusal, the procedure is still there. It's
4 just that we have taken away the incentive of
5 delay. Joe.

6 MR. LATTING: Richard, what do
7 you do about a situation like we have in
8 Travis County concerning before whom the case
9 is pending? We don't know before whom the
10 case is pending until Monday morning when the
11 case goes to trial. We have a central docket
12 here.

13 CHAIRMAN SOULES: Paragraph
14 (e).

15 MR. LATTING: Oh, is that going
16 to tell me what it says?

17 CHAIRMAN SOULES: That's why
18 San Antonio is subject to very late filed
19 motions for recusal.

20 MR. ORSINGER: Paragraph (e)
21 says, "If within ten days of the date set for
22 trial or other hearing the judge is assigned
23 to the case, the motion shall be filed at the
24 earliest practicable time prior to
25 commencement of the hearing."

1 MR. LATTING: Okay. All right.
2 Thank you.

3 MR. ORSINGER: So we are
4 concerned now with the judge who's identity is
5 known but the issue doesn't arise, as in this
6 triggering case that I have mentioned, where
7 the parties actually went out and changed the
8 circumstances after it was too late to file
9 the motion to recuse.

10 MR. LATTING: I understand.

11 CHAIRMAN SOULES: Here's the
12 history on this rule. Okay. Before there was
13 an 18a -- and I guess that was in 1980. It
14 doesn't seem like that long ago, but I guess
15 it is. There was no way to -- and there was a
16 decision on this and a LAW REVIEW article and
17 a TEXAS BAR JOURNAL article on it, that there
18 was no way to have a judge excused unless the
19 judge was constitutionally disqualified.

20 In the Code of Judicial Conduct, though,
21 were these provisions that a judge shouldn't
22 sit in certain circumstances, and those
23 circumstances were far broader than the
24 Constitution. So a subcommittee of this group
25 drafted 18a and the procedures here. At that

1 time the grounds were -- 18b and 18a were put
2 together and they were later separated and
3 picked up the Code of Judicial Conduct as
4 grounds for recusal and actually also included
5 disqualification as grounds for recusal. That
6 was also later separated in 18b.

7 18b came out of 18a and was broken into
8 two pieces. Probably the lengthiest and
9 hottest discussion that the committee had at
10 the time was how this rule would be misused in
11 order to gain continuances at the last minute.
12 So the committee decided that since this is a
13 new procedure authorizing recusal of a trial
14 judge and before you couldn't even do it at
15 all, that if you knew the trial judge was
16 going to be sitting in the case more than ten
17 days ahead of the hearing or the trial, you
18 had to get your motion on file. And if you
19 didn't, then you just had to suffer through
20 that trial judge as though there were no 18a.

21 So it was fixed arbitrary and not with
22 any slippage. Maybe we need to change that,
23 but that's why it was done, and then (e) was
24 put in for the situation where you had no idea
25 that you were going to be confronted with this

1 judge until within the ten days, and in those
2 circumstances that's another pretty objective
3 fact and then you could go ahead and pursue a
4 motion to recuse, but if you knew who the
5 trial judge was going to be more than ten days
6 ahead of time and didn't file a motion on it
7 prior to ten days ahead of time, you just were
8 under the old law and you couldn't get rid of
9 the judge.

10 MR. ORSINGER: Well, you can
11 see how someone could take advantage of that
12 by waiting until within ten days to do some
13 event that might call the judge's impartiality
14 into question and then stand behind this rule.

15 CHAIRMAN SOULES: All right.
16 Now, disqualification as you pointed out is
17 good any time because a judge does not have
18 the power to sit if he's disqualified, or the
19 power to rule, whatever.

20 JUSTICE CORNELIUS: These
21 reasons for recusal, both of those cases we
22 decided, Sheffie and I have forgotten the name
23 of the other one, we held that the late filed
24 motion was timely.

25 MR. ORSINGER: Even though the

1 rule didn't appear --

2 JUSTICE CORNELIUS: Even though
3 the rule didn't allow it.

4 HONORABLE SCOTT BRISTER: And
5 the Houston court has done the same. So I
6 don't think it's a -- if it looks like
7 something other than the judge has been ruling
8 against me, all the cases I have seen they go
9 ahead and consider it anyway, and I guess my
10 question is it seems a world of difference
11 between hiring the judge's kids versus "I
12 think the judge is impartial."

13 Does the committee feel that "I think the
14 judge is partial or biased or mean" or
15 whatever is a thing that should be raised
16 right before the trial or during the trial?
17 If not, it seems like the, you know, one
18 possible distinction is to say the objective
19 kinds of facts can be raised late but this,
20 you know, personal bias, if the judge does
21 that, of course, you can raise it on appeal.
22 I'm wondering if that might not be something
23 to have a bright line on those things and say,
24 "Sorry. You got to appeal that one."

25 MR. ORSINGER: Excuse me just a

1 second, Sarah. We --

2 CHAIRMAN SOULES: In response
3 to that, you probably need to look at 18b as
4 well as 18a because it's broken into
5 disqualification and recusal. The first
6 items, (a), (b), and (c) under paragraph (1),
7 disqualification, can be raised any time the
8 judge has no power to sit. Those under
9 paragraph (2), (a) through, whatever it is,
10 (g) --

11 HONORABLE SCOTT BRISTER: But
12 (a) and (b) are kind of, in my opinion, he or
13 she is biased.

14 CHAIRMAN SOULES: Right.

15 HONORABLE SCOTT BRISTER: (C)
16 through (g) is objective facts, either they
17 are true or they are not.

18 CHAIRMAN SOULES: That's right.

19 MR. ORSINGER: Let me respond
20 first before Sarah speaks. The subcommittee
21 did not address the question of whether you
22 could use the ruling, a ruling in the trial of
23 the hearing, as a basis of evidence of
24 disqualification because we were just
25 addressing this proposal, but our general

1 committee here has discussed this issue about
2 a year, a year and a half ago, and I remember
3 that there were some people that felt
4 like -- I think I recall Luke saying that
5 sometimes the ruling is the only evidence you
6 have and others that felt like the ruling
7 should not be available as evidence. We
8 didn't attempt to resolve that, and maybe we
9 ought to base a decision on that today. All
10 we were attempting to resolve was to permit
11 the procedure and to set up a parallel
12 procedure so that it wouldn't delay. Sarah.

13 HONORABLE SARAH DUNCAN: The
14 only point I was going to make is that what
15 Scott is -- the delineation that Scott made in
16 his example is the difference between
17 disqualification and recusal, and it may be
18 that we want to enlarge the grounds for
19 disqualification, not constitutional
20 disqualification, but we could have sort of a
21 statutory disqualification. Maybe we don't,
22 but I think you're really asking for a lot of
23 hearings if we are going to start talking
24 about whether a particular party or lawyer
25 exercised due diligence in discovering this

1 basis for recusal, and I think you are going
2 to end up with a lot of parallel proceedings
3 and a lot of wasted time when, as has been
4 pointed out, you can raise that on appeal, and
5 if it's there, it's there. Most of the times
6 it's not there, and I think we need to keep
7 that disqualification/recusal distinction
8 pretty clear in discussing this.

9 CHAIRMAN SOULES: I do not
10 think we can change disqualification.

11 JUSTICE CORNELIUS: No.

12 CHAIRMAN SOULES: Because
13 that's a constitutional level issue. Even the
14 legislature can't do that.

15 JUSTICE CORNELIUS: And the
16 problem with raising it on appeal is that you
17 are going to be faced with rulings that say,
18 well, you waived it because you didn't file
19 your motion in time. See, that's the reason
20 why we need a change in this rule.

21 CHAIRMAN SOULES: Either that
22 or recognize that if it's a paragraph (2)
23 recusal situation, not raised earlier than ten
24 days, you're out of luck, as you were before
25 1980 anyway.

1 HONORABLE SARAH DUNCAN: Are
2 you saying --

3 CHAIRMAN SOULES: This is
4 relief in 1980 afforded parties that wasn't
5 there before, and it's a lot of help.

6 JUSTICE CORNELIUS: We have got
7 the rule now. All --

8 CHAIRMAN SOULES: But it needs
9 to be defined so that we don't get trial
10 delays.

11 JUSTICE CORNELIUS: All this
12 proposal would do would be to allow an
13 exception for cases where you didn't discover
14 it until after the ten days.

15 CHAIRMAN SOULES: Okay. Tommy
16 Jacks.

17 MR. JACKS: I'm bothered by,
18 one, the spirit and, two, the letter of the
19 subcommittee's proposal. My concern about the
20 spirit of it is that while I recognize that
21 there certainly are these cases where there is
22 this last ditch effort to recuse the judge
23 that may be motivated by a desire just to
24 delay the case rather than a genuine concern
25 about the judge's character, but there are a

1 few rules in the rule book that we work with
2 that go more directly to our citizens who
3 participate in this process, their perception
4 of the fairness of our system.

5 All of us have been in front of a judge
6 that we knew thoroughly well was not going to
7 give us a fair hearing or a fair trial for one
8 reason or another, and it may have been a
9 reason based upon which we could get recusal
10 or maybe we couldn't, but in those cases the
11 litigants who come before our courts walk away
12 with the bitterest possible taste in their
13 mouth about the fairness of our system, and
14 that's not right.

15 My concern about the letter is much more
16 specific, and that is, we have made a change
17 here instead of saying "a hearing" as the
18 current rule changes, saying "the first
19 hearing" so that if one fails within the
20 prescribed time period to file the recusal
21 motion before the very first hearing in the
22 case, then presumably any later filed motion
23 is too late. I think the concerns we have
24 about trials being delayed, however much
25 weight you want to place on those, have to be

1 far less weighty about other types of
2 hearings, and particularly the first hearing
3 in the case.

4 I'll admit to being -- having my views
5 colored by a recent experience in which I
6 ended up hiring Luke to represent me and my
7 clients, and in that case we actually
8 eventually were able to get the judge not only
9 held -- not only did the court hold that he
10 should have recused himself but held that he
11 was disqualified as a matter of law. It was a
12 very close question whether he was
13 disqualified as a matter of law or not.

14 We didn't discover that until, as I
15 mentioned earlier, we had been pretty
16 thoroughly screwed in probably three hearings,
17 the last of which was far enough ahead of
18 trial that we were more than ten days out but
19 it was fortuitous. I mean, it could have well
20 been within the ten days, and yet, it was a
21 case that any of us knowing the facts would
22 agree that judge shouldn't hear that case.

23 I guess I would urge that we revert to
24 the current language instead of using the
25 language "the first hearing" because I believe

1 the law is that even if you have been through
2 a hearing with the judge you can still more
3 than ten days before trial file your motion
4 and be timely because the recusal is directed
5 to a proceeding, in that case the trial, not
6 to the cause as a whole.

7 CHAIRMAN SOULES: That's right.

8 MR. ORSINGER: Can I ask you
9 this, Tommy? Is there really a problem with
10 this if you can file after the first hearing
11 for any matters that either arise or come to
12 your knowledge after the first hearing?

13 MR. JACKS: The problem,
14 Richard, I think is you get into this --

15 HONORABLE SCOTT BRISTER:
16 Should you have known.

17 MR. JACKS: -- this what should
18 you have known business. And again, I
19 am -- you know, all of us base a lot of what
20 we believe based on our last case and what
21 happened to us in our last lawsuit. In this
22 case I probably had the only lawyer in this
23 small county who did not know that I had sued
24 the judge's former law partner and who was a
25 defendant in my case. I'm sure every other

1 lawyer in the county knew it, but the poor
2 dumb son of a gun that was my referring lawyer
3 didn't know it, and there were on record once
4 we got to wondering why are we getting screwed
5 so bad and we started looking into things, we
6 found the judge had been recused involuntarily
7 in a prior case involving a similar suit
8 against the same defendant and had recused
9 himself in still another case involving a
10 similar suit against the same defendant.

11 Those were matters of record, I guess
12 we -- you know, one certainly could argue we
13 were charged with knowledge that everything
14 was on file in the courthouse in that county,
15 but it came as like a thunder bolt to us in
16 terms of being news to us.

17 MR. ORSINGER: So then your
18 view under the current rule you could have had
19 15 hearings but as long as you have one
20 hearing -- as long as you file at least ten
21 days before the next hearing you can raise
22 any --

23 MR. JACKS: I believe that to
24 be the current law.

25 JUSTICE CORNELIUS: I think

1 that's what we held in Sheffie.

2 CHAIRMAN SOULES: And Judge
3 Bleil doesn't even ask us to do anything about
4 first hearing or any hearing. That's in the
5 subcommittee.

6 MR. JACKS: Yeah. I know this
7 was a matter of controversy within your
8 subcommittee.

9 MR. ORSINGER: Surely, it was.
10 Although I'm not sure that the fight focused
11 extensively on that aspect of it.

12 MR. JACKS: I understand.

13 MR. ORSINGER: But this entire
14 change was very controversial.

15 CHAIRMAN SOULES: Why don't we
16 just, if we can, address Judge Bleil's issue,
17 which is should there be a safety valve or
18 escape valve which he calls good cause for
19 late filing if it is grounded on reasons not
20 known or with due diligence knowable until
21 after the time for filing motion to recuse has
22 passed.

23 JUSTICE CORNELIUS: I would
24 move the adoption of the subcommittee's
25 recommendation on that point.

1 CHAIRMAN SOULES: Judge

2 Peeples.

3 HONORABLE DAVID PEEPLES: If
4 what we are trying to avoid is to have to
5 delay things to have a hearing, it seems to me
6 if someone alleges and I have got good cause
7 to delay the trial, then you have got to have
8 a hearing on that.

9 CHAIRMAN SOULES: Yes, you do.
10 Sure.

11 JUSTICE CORNELIUS: But they
12 have got the parallel hearing. It doesn't
13 stop the trial under the subcommittee's
14 recommendation, does it?

15 HONORABLE DAVID PEEPLES: Scott
16 Brister, have you had some of these where they
17 didn't like your rulings a few minutes ago and
18 they recuse you?

19 HONORABLE SCOTT BRISTER: Only
20 when I went to San Antonio on a disciplinary
21 hearing, and I mean, disciplinary hearings it
22 is a problem because the judge comes from
23 another city, travels in, and of course, you
24 know, you have got according to the State Bar
25 a bad guy to start with, and boy, you start

1 ruling against them and you -- hands up to me
2 as we are admitting exhibits, and it took me
3 ten seconds because I said, "It's not ten days
4 before the hearing, denied. Next exhibit."

5 And those are the people that I
6 understand from my colleagues that use this.
7 This is not that much used by the people in
8 this room. This is the bad guys use this, and
9 the bad guys would love to have a hearing on
10 good cause and on and on because he's just
11 trying to hold on to his law license a little
12 longer.

13 MS. SWEENEY: That strikes me
14 as possibly the cost of the freedom to have
15 the rule that is a safety valve for the good
16 guys, is that you have to put up with abuses
17 sometimes from the bad guys.

18 HONORABLE SCOTT BRISTER: It's
19 not me. I mean, I'm happy to stay in a hotel
20 in San Antonio as long as the thing lasts, but
21 with trial, if you have it at a trial, you
22 have got the State Bar brings their people,
23 especially in that circumstance. You have got
24 people that have come from other parts of the
25 state because you can't hold it where

1 everybody lives.

2 So everybody has come in and everybody
3 else -- I've closed down my docket in Houston
4 and so, I mean, you know, I try this case or
5 don't try this case or take a vacation, it's
6 not going to make a difference in my salary,
7 et cetera, but we are shifting the burden of
8 bearing this off of the bad guy onto other
9 litigants who would or might have had a day in
10 court and cannot get it because we are tied up
11 in satellite litigation. The problem with all
12 satellite litigation is not that it's not
13 important issues. It's that it delays other
14 people getting their day in court.

15 CHAIRMAN SOULES: Just for,
16 Tommy, for your recall on this, the plaintiffs
17 were the strongest advocates of the ten-day
18 rule, because they felt that there would be
19 abuse to get delays.

20 MR. JACKS: And there clearly
21 is potential for abuse. I don't dispute that.

22 CHAIRMAN SOULES: It's pretty
23 much not usable today for a continuance unless
24 there is a disqualification because you can
25 get a hearing within that ten days and go on

1 with your trial setting.

2 MR. JACKS: That's right.

3 Yeah. I mean, I know in Travis County and, in
4 fact, throughout this supreme judicial
5 district the practice is that the court clerk
6 for the judge against whom the motion is filed
7 gets on the phone and lines up another judge
8 and then calls the judge over in Seguin --

9 CHAIRMAN SOULES: Goes to
10 trial.

11 MR. JACKS: -- and says, "We
12 have got a motion and we have got a judge to
13 hear it," and he says, "Sick 'em" and it's
14 pretty well --

15 HONORABLE DAVID PEEPLES: And
16 it's overruled very quickly.

17 MR. JACKS: It's streamlined.
18 Yeah.

19 CHAIRMAN SOULES: Justice
20 Duncan.

21 HONORABLE SARAH DUNCAN: We had
22 this happen in Metzger vs. Sebick by Brock,
23 and it caused unbelievable problems for Judge
24 West and about 15 lawyers and it was a big
25 problem. From what I'm hearing, this is being

1 handled expeditiously when a good guy like
2 Tommy Jacks raises it with good grounds, and
3 the courts of appeals are recognizing the good
4 motions and saying, "Yeah. There is going to
5 be an exception for late filing." If we
6 codify it in the rule, I think we are inviting
7 some not good guys to abuse the process, and I
8 would be in favor of leaving the rule alone.

9 HONORABLE SCOTT BRISTER: I can
10 say from talking to my colleagues in Houston
11 it is a big problem in Houston. I haven't had
12 it happen, but I know it happens frequently,
13 and you know, it's added onto the problem. We
14 are having these on -- you know, where you are
15 bumping visiting judges and, you know, we are
16 trying to use visiting judges for extra cases
17 and so we also try to get them to hear these
18 things and we are running out of courtrooms
19 and it's -- you know, we have a lot more
20 recusals and strikes of visiting judges, I
21 think, than other areas do.

22 HONORABLE DAVID PEEPLES: This
23 wouldn't affect the statutory right to recuse
24 a visiting judge.

25 HONORABLE SCOTT BRISTER: No.

1 JUSTICE CORNELIUS: No, no.

2 That's different.

3 HONORABLE DAVID PEEPLES: Are
4 you talking about something else?

5 HONORABLE SCOTT BRISTER: No.
6 I'm just saying that is folded into we have a
7 limited number of visiting judges and that's
8 the Ping-Pong that's being bounced around with
9 these guys. We don't have visiting judges
10 that are just sitting around with nothing to
11 do and we just call up and it's done. That is
12 not the way -- that is not my understanding of
13 the way it's working.

14 HONORABLE C. A. GUITTARD:
15 Richard, is it practicable to write into the
16 rule something to the effect that adverse
17 rulings are not in themselves grounds for
18 recusal?

19 CHAIRMAN SOULES: Let's just
20 stay on the complaints that we have got. We
21 have got four books. If somebody wants to
22 send that one in, send it in, but it's not in
23 yet.

24 MR. JACKS: It's actually in
25 the subcommittee's draft here, as I read the

1 last sentence of that.

2 CHAIRMAN SOULES: I know, but
3 we need to fix the things -- we need to
4 address these things that are on our agenda or
5 we will never get done. If we open up to
6 rewrite these rules from A to Z, we will never
7 get through.

8 So let's try to fix what -- either let's
9 address what Judge Bleil is complaining about.
10 If somebody wants to submit something else, we
11 will put it on the agenda for another day.
12 Okay. Anything else on this suggestion that
13 the subcommittee has then that there be a good
14 cause exception? This is the Keen Corporation
15 vs. Rogers is the Texarkana case.

16 JUSTICE CORNELIUS: Yeah.
17 That's it. Right.

18 MR. LATTING: Luke, I have a
19 question.

20 CHAIRMAN SOULES: Joe Latting.

21 MR. LATTING: What does the
22 subcommittee now recommend about the issue of
23 "a hearing" or "the first hearing"?

24 CHAIRMAN SOULES: That's not
25 even on the table. We are not discussing

1 that.

2 MR. LATTING: We are not
3 worried about that?

4 CHAIRMAN SOULES: We are not
5 going to talk about it. We are going to leave
6 the rule the way it is on that.

7 MR. LATTING: Okay.

8 CHAIRMAN SOULES: We are only
9 talking about what Judge Bleil wants done,
10 which is -- it says, "The court suggests that
11 18a be amended to allow the late filing of a
12 motion to recuse if it is grounded on reasons
13 not known or with due diligence knowable until
14 after the time to file a motion to recuse has
15 passed. This would allow for a good cause for
16 late filing exception in the trial courts just
17 as exists in the appellate court currently.
18 See appellate procedure Rule 15a."

19 MR. LATTING: Well, it would be
20 different then from what we have on this sheet
21 because they have asserted here "the first
22 hearing."

23 CHAIRMAN SOULES: Yeah. We are
24 not -- that's not going to be done. We are
25 not going to pass on that.

1 MR. JACKS: Are we really
2 looking at (f)? Is that what we are -- are we
3 focusing on (f) of the subcommittee's proposal
4 on late motions?

5 CHAIRMAN SOULES: (F), let me
6 see.

7 HONORABLE SCOTT BRISTER: (F)
8 obviously takes care completely of the delay
9 problem if it doesn't create another problem
10 with the solo practitioner. What does the
11 single guy or gal that's in trial do, Richard?

12 MR. ORSINGER: You're talking
13 about the parallel proceeding?

14 MS. SWEENEY: Yeah.

15 MR. ORSINGER: You have it
16 either over the lunch hour, you have it in the
17 evening after the first day of trial, or you
18 have it early in the morning, or you recess
19 for two hours and let the other judge do it.

20 CHAIRMAN SOULES: Well, the
21 trial judge except for good cause stated in
22 the order can't move.

23 MS. SWEENEY: Right.

24 HONORABLE SCOTT BRISTER: I'm
25 sorry?

1 CHAIRMAN SOULES: The trial
2 judge except for good cause stated in the
3 order -- oh, wait. You're saying that under
4 this proposal the trial judge could continue
5 trial.

6 MR. ORSINGER: That's the whole
7 point. I mean, we are in a box. If they do
8 something to you within the last ten days
9 before trial, the rules say you have no
10 remedy, although apparently two courts of
11 appeals said, "I don't care what the rules
12 say. You do have a remedy just out of
13 fairness."

14 Okay. So we are in a box. If they do it
15 within the last ten days, there is nothing you
16 can do about it. Now then, if you want to
17 provide the remedy, the problem is there is
18 going to be some people to take advantage of
19 that to secure unilateral delays, and it may
20 be in Judge Peeples' county that you can kill
21 that within an hour of when it happens, but in
22 other instances, it's going to delay the start
23 of the trial, push you to another trial week,
24 and then maybe you're off four, six months.

25 And so as a way to take away the

1 incentive to someone to misuse the rule we
2 tell them, "It isn't going to buy you a delay
3 anyway." You are still going to have the
4 ability to recuse if your grounds are there,
5 bring in another judge, impartial, let him
6 decide, but in the meantime it isn't going to
7 buy you a continuance. And if there is no
8 incentive to buying a continuance, that should
9 eliminate the abuse so that by creating the
10 remedy we don't create the harm.

11 Now, it does create this dual proceeding,
12 but so what if it's a one-hour dual
13 proceeding, it didn't cost anything. If it's
14 a day and a half, you know, at least they
15 didn't buy themselves a continuance by doing
16 it, and the point is, is that there probably
17 won't be very many of these dual proceedings
18 except when there is a real valid basis for it
19 because people are not going to use it for a
20 continuance because it won't get them one.
21 That's the theory. It's a psychological game.
22 It won't be abused because there is no
23 incentive to abuse it. That's the thought, I
24 think.

25 CHAIRMAN SOULES: Okay. Any

1 further discussion? Okay.

2 MR. JACKS: Luke, could you
3 read once more the judge's request and the
4 language he uses in what he's asking us to do?

5 CHAIRMAN SOULES: All right.
6 It says, "See 15a of the appellate rules." So
7 I'm going to start with that and try to lace
8 it together. "The court shall allow the
9 filing of a motion after the expiration of ten
10 days," 30 in the appellate rules. "If the
11 motion is grounded for reasons not known
12 within the 30-day -- within the ten-day
13 period."

14 MR. JACKS: Or before the
15 ten-day period?

16 CHAIRMAN SOULES: Or, no,
17 "before." This says "within" in the appellate
18 rules. "Before the 30-day," the ten-day,
19 "period and upon a showing of good cause."

20 And then the committee has
21 apparently -- says that after ten days a party
22 can only raise matters subsequently arising,
23 is what their draft says.

24 MR. ORSINGER: Yeah. And we
25 are changing that now to either "subsequently

1 arising" or --

2 JUSTICE CORNELIUS:

3 "Discovered."

4 CHAIRMAN SOULES: "Known or
5 should have known."

6 MR. ORSINGER: That's right.
7 It's "known or should have known."

8 CHAIRMAN SOULES: And they will
9 be handling a parallel proceeding while the
10 trial judge proceeds with the case. So it's a
11 good cause exception based on know or should
12 have known before the ten-day period with the
13 trial judge authorized to proceed with the
14 trial of the case.

15 MR. ORSINGER: It should be
16 pointed out that the appellate rule does not
17 contain the concept of "should have known."
18 It only contains the concept of "not known and
19 upon a showing of good cause." Now, maybe, I
20 mean, I think "not known" means --

21 JUSTICE CORNELIUS: I think
22 "good cause" probably would require --

23 MR. ORSINGER: An excuse for
24 not knowing.

25 JUSTICE CORNELIUS: -- they show

1 an excuse for not knowing. Yeah.

2 HONORABLE C. A. GUITTARD:
3 Should the two rules be parallel within
4 reasonable difference?

5 MR. ORSINGER: I think they
6 should read the same, but I'm not sure the
7 appellate rule reads all that well.

8 CHAIRMAN SOULES: Well, it
9 doesn't. It's got its own problems because it
10 says "not known within the 30 days," and it
11 should be "before the 30 days."

12 Okay. So the subcommittee on Judge
13 Bleil's point is recommending a know or should
14 have known standard coupled with good cause to
15 file within ten days a motion to recuse and
16 that the trial judge can proceed to trial or
17 to dispose of a hearing even in the face of a
18 motion to recuse filed within ten days.

19 Okay. Those in favor show by hands.
20 Six.

21 Those opposed? Nine. Fails by a vote of
22 nine to six.

23 MR. ORSINGER: Okay. The next
24 item is Rule 20, which is in this agenda page
25 114, and it has to do with the fact that a

1 special judge must sign the minutes of
2 proceedings before him. I have a letter in
3 here from a special judge that says, "I've
4 never even been asked to sign the minutes when
5 they close out the year," and nobody even
6 knows -- you know, minutes don't even really
7 exist anymore anyway. So we have decided to
8 delete the whole Rule 20 not just for special
9 judges but also this quasi-religious ceremony
10 at the end of the year where you have to read
11 and sign the minutes, and we are just
12 proposing we dispense with the entire Rule 20.

13 CHAIRMAN SOULES: Judge Brister
14 was telling me that on the last day of his
15 session that he likes to get on the bench and
16 read the minutes.

17 HONORABLE SCOTT BRISTER: The
18 last day of the year I'm not anywhere near the
19 courthouse.

20 CHAIRMAN SOULES: In open court
21 and sign them. Judge Peeples, I think he
22 seconds that.

23 MR. ORSINGER: I would move
24 that we unanimously agree to eliminate
25 Rule 20.

1 CHAIRMAN SOULES: Any
2 opposition? No opposition. That's
3 unanimously approved to repeal Rule of Civil
4 Procedure 20.

5 MR. ORSINGER: Okay. The next
6 item is Rule 21, in the agenda page 117, and
7 this was a suggestion that 21 and 21a be
8 altered to show to whom the service was made
9 and the address, date, and manner of service,
10 whereas the present requirement, I believe, is
11 just that service was made with no explanation
12 upon whom or the manner. And the manner,
13 obviously if it's hand delivery, can affect
14 your response deadline, whether it's certified
15 mail or fax, and this suggestion was that the
16 certificate of service should contain enough
17 information for you to figure out what your
18 deadlines are.

19 The subcommittee liked this suggestion
20 but wanted to include a proviso that the
21 receiving party could rebut the recital of the
22 manner of service if it says it was
23 hand-delivered on a certain day and, in fact,
24 you got it the next day or you received it by
25 certified mail, then you can overcome it, but

1 at least the party is required to include in
2 the service. Tommy.

3 MR. JACKS: How big a problem
4 is this?

5 MR. ORSINGER: I don't consider
6 it to be a problem at all, but it didn't seem
7 like a harmful idea. If you can think of some
8 negative consequences --

9 MR. JACKS: It's just a pain in
10 the butt to -- because it puts -- I mean, I
11 grant it's important to see that the stuff
12 gets to the right place, but it exhausts the
13 last page of every piece of paper we file at
14 the courthouse and makes me read it, which I'd
15 prefer not to have to do with every single
16 thing I sign. You know, ours routinely say
17 that it was sent by certified mail or fax or
18 one of those other ways to all counsel of
19 record.

20 I sign the thing, and I give it to the
21 person in my office who's expected to know who
22 those people are and see that it gets to them
23 and it gets done. And maybe once every seven
24 or eight years there will be some problem come
25 up with some case with somebody saying they

1 didn't get service, and we sort it out, get
2 out your green cards or your fax proof or
3 whatever, but if you do this, well, then I
4 guess I am going to be obliged to make sure we
5 are complying with this rule every time I sign
6 my name, and I really don't see a lot of point
7 in it.

8 CHAIRMAN SOULES: Well, there
9 are different practices. Our practice is we
10 don't think the presumption of service applies
11 unless the recitations are in the certificate
12 of service that you want to have presumed your
13 way. I mean, we have got this arcane language
14 about it was placed in a postage prepaid
15 wrapper properly addressed to -- and just
16 track the language because then we feel
17 comfortable that the presumption is going to
18 be met. Probably more than half of what we
19 get incoming it says, "I certify that --"

20 HONORABLE SCOTT BRISTER: It
21 was served on everybody.

22 CHAIRMAN SOULES: "-- it was
23 served on all counsel of record." Now, that
24 really doesn't help much, doesn't have much
25 information for a trial judge to dispute it.

1 MR. JACKS: The point is when
2 you get down to where somebody is challenging
3 your service you are going to have to prove
4 they got served, whatever your certificate of
5 service said.

6 CHAIRMAN SOULES: Well, no.
7 They have to prove they didn't, but I mean,
8 that's a technicality problem.

9 MR. JACKS: As a practical
10 matter, every one of those hearings I have had
11 after the judge hears the guy say, "I didn't
12 get it, Judge," he says, "Lawyer, what have
13 you got showing you got it to them?" And I
14 don't care what you write in the rule that's
15 how it happens in my experience, and I have to
16 dig out my green card or my fax deal showing
17 the little date and time or something to
18 satisfy the judge of the fact that he did get
19 it and then the judge rules based on what he's
20 heard. I don't know. It's not that big a
21 deal.

22 HONORABLE SCOTT BRISTER: A lot
23 of lawyers are already doing it.

24 MR. JACKSON: Tommy, that
25 certificate of service sure helps our comfort

1 level as court reporters when we are asked to
2 serve a subpoena on someone for deposition.
3 We look at that every time to make sure
4 everybody got the proper notice. Without
5 that, we start serving subpoenas on people
6 that a lawyer just wrote us a letter and told
7 us that he was going to do that, but if there
8 is no certificate of service to tell us who
9 all has notice and we start subpoenaing people
10 to show up for depositions, we are in trouble.

11 MR. JACKS: Okay. I mean, I --

12 CHAIRMAN SOULES: Joe.

13 MR. LATTING: I would just like
14 to second what Tommy says. Let's not change
15 something and create new jobs for the lawyers
16 in regards to filing. Let's not give us more
17 to do unless there is some convincing evidence
18 that this is a problem in the state, and there
19 is one letter -- we say all the stuff you say
20 anyway. Let's not put it in the rule and
21 change the service rule. Now we will have to
22 start doing this and this and this and just
23 make work.

24 CHAIRMAN SOULES: Robert
25 Meadows.

1 MR. MEADOWS: I was just going
2 to chime in. I suppose I would like to hear
3 what Scott and the other trial judges have to
4 say about whether it's a big problem. I
5 remember early on having fights about service,
6 but I haven't had a fight about service in ten
7 years. It doesn't seem to happen routinely.
8 I wouldn't change it.

9 HONORABLE DAVID PEEPLES: I'm
10 for leaving it as-is, leave it alone.

11 CHAIRMAN SOULES: As-is. Okay.
12 Those in favor of changing Rule 21 to require
13 additional -- to require specific detail as
14 suggested by Larry Wise show by hands. Four.

15 Those opposed? Eleven to four it fails.
16 No change. Eleven to four, no change.

17 MR. ORSINGER: Page two of this
18 disposition chart moves into Rule 21a. I had
19 a number of suggestions on it. The first one
20 has to do with an apparent gap in the rule
21 where it is not absolutely locked down that
22 once a party has a lawyer that the service
23 must be upon the lawyer and not the party.
24 The rule as written permits service upon the
25 party or his attorney, and there may be an

1 ethical rule that keeps you from communicating
2 directly, but that's not a rule of procedure.
3 That's an ethical rule, and so the
4 subcommittee felt we should change the rule to
5 make it clear that once a lawyer learns that
6 the opposing party is represented by counsel
7 then service in the lawsuit should be upon
8 counsel and not the party directly.

9 HONORABLE C. A. GUITTARD: I'd
10 like to point out that the appellate rules do
11 so provide, as this committee has recommended.

12 CHAIRMAN SOULES: But that's
13 only if there is counsel of record, right?

14 MR. ORSINGER: Counsel of
15 record, right.

16 CHAIRMAN SOULES: Okay. This
17 says, "Once received notice opposing party is
18 represented by counsel."

19 MR. ORSINGER: We better change
20 that because we are talking about notices for
21 purposes of litigation here, and you can't
22 serve a trial notice on a lawyer that's never
23 made an appearance and have that binding on
24 the litigant.

25 CHAIRMAN SOULES: Right. And

1 would you serve the original petition on a
2 lawyer just because you know that --

3 MR. ORSINGER: No.

4 HONORABLE C. A. GUITTARD: No.

5 MR. ORSINGER: That's not
6 intended. So we have got to write this
7 language so that it's clear that this has to
8 do with a pending lawsuit and that the service
9 is on an attorney of record once one appears
10 rather than on a litigant.

11 CHAIRMAN SOULES: Okay. Any
12 opposition to that as Richard has amended it?
13 No opposition. That will be done.

14 MR. ORSINGER: Page 130, there
15 was a suggestion by the Honorable Chair that
16 we eliminate the provision that fax filing
17 after 5:00 p.m. is effective the next day, and
18 I believe that a justification for that is, is
19 that we already add three days if there is a
20 fax filing and so why do we need to add a
21 fourth day if the fax is received after 5:00
22 p.m.?

23 And the subcommittee -- was not a
24 unanimous vote -- rejected the suggestion
25 saying that some lawyers close their office at

1 5:00 or turn off their fax -- well, turns off
2 their fax machine, that doesn't matter, but
3 that fax delivery after 5:00 or hand delivery
4 after 5:00 is really effectively tantamount to
5 delivery the next day and should be treated as
6 that, notwithstanding the fact that faxes have
7 this three days added on already so that that
8 really boils down to four days added to the
9 fax.

10 HONORABLE C. A. GUITTARD: I'd
11 like to suggest there that we make sure that
12 these are parallel with the appellate rules
13 because there is no reason at all for any
14 differences there, and it's just confusing if
15 it is.

16 CHAIRMAN SOULES: This was
17 voted down in the appellate rules.

18 HONORABLE C. A. GUITTARD:
19 Yeah. Right.

20 CHAIRMAN SOULES: So those in
21 favor of a change show by hands.

22 Those opposed? Okay. Unanimously
23 opposed. No change.

24 HONORABLE C. A. GUITTARD: But
25 does that make them parallel?

1 CHAIRMAN SOULES: Yes.

2 HONORABLE C. A. GUITTARD: I'm
3 not sure. I think we better look into that.

4 CHAIRMAN SOULES: Well, if I
5 remember, it was voted down.

6 HONORABLE C. A. GUITTARD:
7 Well, in that respect, but I don't recall that
8 there is any provision for fax filing or fax
9 in the appellate rules.

10 MR. ORSINGER: We are talking
11 here about service rather than filing.

12 HONORABLE C. A. GUITTARD: Or
13 fax service, either.

14 MR. LATTING: Well, I have a
15 question.

16 CHAIRMAN SOULES: Joe Latting.

17 MR. LATTING: Are we left now
18 with the situation that if it's ten after 5:00
19 and I fax it to you that it's effective the
20 next day, but if I happen to have a runner
21 take it to you, it's effective today?

22 MR. ORSINGER: Yes. If they
23 slip it under your door after you're gone and
24 it's before midnight, it's service that day.

25 MR. LATTING: Well, that's

1 nonsense, isn't it, to say that you have to
2 get somebody in a car and burn up gasoline to
3 take a paper and that makes it effective
4 today, but if you fax it to them it's
5 effective tomorrow?

6 MR. JACKS: Is that an
7 environmental vote? Are you leading the
8 environmental vote?

9 MR. LATTING: No. It's just a
10 nonsense exception. I mean, it's nutty.

11 MR. JACKS: It is nutty.

12 CHAIRMAN SOULES: Well, there
13 is some other things about it, too, which we
14 have already debated. If I go down the street
15 from my house and drop a letter in the mail
16 today before midnight, you get -- whenever you
17 get that letter, you only add three days from
18 today. If I fax it to you and you actually
19 get it today, you get four extra days.

20 MR. LATTING: Yeah. I know it,
21 and I know we are not --

22 CHAIRMAN SOULES: So you
23 probably don't get it in the mail. It
24 probably consumes the three days that they add
25 for mail to get the piece. So you really get

1 it in your hand only about 30 days before your
2 response is due, whereas if they fax it, you
3 get it in hand 34 days before your response is
4 due, but we debated all of that and the
5 committee voted and they wanted to leave this
6 as-is for the appellate rules. So I think
7 that's probably decided.

8 MR. ORSINGER: I would even
9 though -- I don't know if I'm bound by my
10 committee's recommendation, but I'd like to
11 vote in favor of this change so that it's not
12 unanimous. There is one vote. I think it's
13 dumb, but I know that the majority --

14 MR. LATTING: And I would join
15 you just on the grounds of sanity.

16 CHAIRMAN SOULES: Well, it's
17 the one place where suddenly you have got four
18 days instead of three, counts differently, but
19 anyway. Okay. So it's the house to two, or
20 do you want to take a vote?

21 MR. ORSINGER: House to two.

22 HONORABLE SARAH DUNCAN: Well,
23 could you go ahead and take a vote?

24 CHAIRMAN SOULES: Okay. Those
25 in favor of deleting the provision that fax

1 service after 5:00 is deemed served the
2 following day show by hands. Nine.

3 Okay. Those in favor of preserving that
4 provision. Five. So by a vote of nine to
5 five it will be deleted.

6 MR. MARKS: I thought we
7 just -- is this the second time we voted on
8 the same thing?

9 MR. JACKS: It is, but Latting
10 turned us around.

11 CHAIRMAN SOULES: Okay. Page
12 133.

13 MR. ORSINGER: The next
14 suggestion was that we eliminate service by
15 telefax altogether, and the subcommittee for
16 obvious reasons rejects that suggestion.

17 CHAIRMAN SOULES: Any
18 opposition to leaving it the way it is? I
19 mean, with that change we just voted on. No
20 opposition. There will be no change.
21 Unanimously no change.

22 MR. ORSINGER: The next item is
23 requiring lawyers to include on the pleading a
24 telefax number for service, and if no telefax
25 number is given, then you cannot serve by

1 telefax, unless you have a Rule 11 agreement,
2 and we reject that suggestion. Having the
3 option to serve by telefax has been official,
4 and telefax numbers should continue to be
5 required on the pleadings to permit telefax
6 service, and if someone truly doesn't want
7 telefax service, then they need to just not
8 have a telefax machine.

9 MS. SWEENEY: So what is this,
10 a goose/gander rule? If you won't accept
11 faxes, then you can't send things. Is that
12 what you are saying?

13 MR. ORSINGER: Well, the
14 current rule I believe requires lawyers to put
15 a fax number or a telefax number on their
16 pleadings. So this is a change that would
17 obviate that requirement and say that it's
18 optional whether to put a fax number on your
19 pleading. If you do put it on, you're open to
20 service by fax, and if you don't put it on,
21 then you are not open to service by fax, and
22 the only way to change that is to have a Rule
23 11 agreement on the record or in writing. So
24 this makes the receipt of fax service optional
25 rather than obligatory for those who have a

1 machine, and we think that that's retrograde.

2 CHAIRMAN SOULES: There is one
3 real problem here, and I had some calls from
4 some large law firms when this fax service
5 first came out. I don't know whether there is
6 still this gamesmanship going on, but in a lot
7 of law firms they have faxes at the lawyer's
8 desk and many lawyers will have their own fax
9 and their own fax number. And so a trial
10 adversary lawyer would send the pleadings to a
11 fax number, say, at Vinson & Elkins that's a
12 securities lawyer and, you know, it comes in
13 and they have got to figure out what to do
14 with it. And it might be helpful as a
15 compromise to this to say that if there is a
16 fax number on the pleading, that the fax
17 service can only be to that number.

18 MR. ORSINGER: I think I would
19 have no problem with that.

20 CHAIRMAN SOULES: Any
21 opposition to that?

22 MR. JACKS: To what?

23 CHAIRMAN SOULES: That if you
24 give me a fax number on your pleading --

25 MR. JACKS: Yeah.

1 CHAIRMAN SOULES: -- I have to
2 serve you at that fax number. I can't serve
3 you at Dalton Tommy's fax number. If Harry
4 Reasoner puts --

5 MR. JACKS: That's fine with
6 me. We have only got one fax number.

7 CHAIRMAN SOULES: Well, that's
8 why we only have one fax at our office, for
9 this very reason, because we don't know
10 whether Mark Schnall, a real estate lawyer, is
11 going to get a fax in at 6:00 o'clock and we
12 won't hear about it because he will be out of
13 town at a closing.

14 HONORABLE SCOTT BRISTER: Where
15 is the rule that says about putting a fax
16 number on your pleading?

17 PROFESSOR DORSANEO: It's 57.

18 CHAIRMAN SOULES: 57.

19 MR. ORSINGER: It says, "if
20 available, telecopier number."

21 HONORABLE SCOTT BRISTER: Thank
22 you.

23 CHAIRMAN SOULES: Now, we are
24 not saying that -- understand we are not
25 saying that if there is no telecopier

1 number --

2 MR. ORSINGER: "If available."
3 "If available" means if you don't have one,
4 you don't put it on there, but it also means
5 if you do have one, you're obliged to put it
6 on there.

7 CHAIRMAN SOULES: Okay. But in
8 the absence of a telecopier number if I know
9 your number, I can serve you by fax.

10 MR. ORSINGER: That's true.

11 CHAIRMAN SOULES: But if you
12 put a number on there, I can only serve you by
13 fax at that number.

14 MR. ORSINGER: That's according
15 to this new rule we are about to vote on.

16 CHAIRMAN SOULES: What we are
17 about to vote on, that's what we are saying.
18 Sarah.

19 HONORABLE SARAH DUNCAN: I
20 don't understand why we need a new rule. If I
21 put that my address is 1301 McKinney, Houston,
22 Texas 77010, you can't serve me at some other
23 address legitimately, I don't think, and Rule
24 21(a) now says that if you are going to serve
25 by fax, it's got -- to party's last known

1 address or by telephonic document transfer to
2 the recipient's current telecopier number.

3 Now, that doesn't seem to me to authorize
4 fax to a number that is not the recipient's
5 number, and I would think the only way you
6 would be safe in serving by fax is to serve to
7 the recipient's number that the recipient puts
8 on his pleadings.

9 CHAIRMAN SOULES: John Marks.

10 MR. MARKS: Well, a lot of
11 firms answer pleadings at Vinson & Elkins, and
12 I don't know what that means in terms of who
13 you can serve, but that tells me that you
14 might be able to serve anybody within Vinson &
15 Elkins with that unless we have some kind of a
16 rule like Luke is talking about.

17 CHAIRMAN SOULES: Pam.

18 MS. BARON: I'm not sure this
19 is that much of a problem that we need to fix
20 it. There is also the issue that large firms
21 have a main telecopier number to which most of
22 their faxes are sent and that if by some
23 chance you make a mistake on your cover sheet
24 and send service to the main number instead of
25 the specific number for the lawyer you are

1 dealing with, I'm not sure that service should
2 necessarily be ineffective for that reason. I
3 think we are going too far to cure something
4 that's not a giant problem.

5 MR. JACKS: Yeah. You do have
6 the problem, too, as John points out, I mean,
7 you know, the initial pleading in the case may
8 be signed by some lawyer who's not really
9 going to be working on the case or at least
10 play a minor role in the case. You really are
11 going to be dealing with somebody else in the
12 law firm all along, and you get the -- you
13 know, and I think frequently in our office we
14 probably get their fax number off the last
15 letter they sent us by looking at their
16 letterhead and seeing what the fax number is,
17 and that's the fax number it goes out to.

18 CHAIRMAN SOULES: Okay. I am
19 remembering right. I was just turning the
20 page here, and Dalton Tommy is the one that
21 wrote me this letter on May 9th, 1990. I
22 haven't heard much about it since.

23 MR. LATTING: Seems to have
24 quietened down some.

25 CHAIRMAN SOULES: All right.

1 Anyway, those who --

2 MR. ORSINGER: Well, the first
3 thing we have to do is to decide to accept or
4 reject Ken Fuller's suggestion and then take
5 up your proposal.

6 CHAIRMAN SOULES: Okay. Those
7 in favor of eliminating fax service altogether
8 show by hands.

9 Okay. There is no support for that. I'm
10 assuming then unless I hear otherwise that all
11 members choose to retain fax service. Okay.
12 No opposition to that, so fax service will be
13 retained. Unanimously no change.

14 MR. ORSINGER: How about we
15 take up your proposal?

16 CHAIRMAN SOULES: That's
17 actually Dalton Tommy's proposal. Those in
18 favor of requiring fax service to be made on
19 the -- to the fax designated in the pleadings.
20 I don't care one way or the other. Show by
21 hands.

22 HONORABLE DAVID PEEPLES: If
23 you're going to fax it, it's got to go to that
24 number?

25 CHAIRMAN SOULES: Has to go to

1 the number on the pleadings.

2 Six. Those opposed? Six. Vote again.
3 Everybody vote. Take a position one way or
4 the other. Those in favor show by hands.

5 HONORABLE SARAH DUNCAN: Those
6 in favor of amending the rule?

7 CHAIRMAN SOULES: To require
8 fax service to the fax designated on the
9 pleadings. Show by hands. Everybody please
10 vote. Take a position. Ten.

11 Those opposed? Eight. So ten to eight
12 it will be the fax number as given on the
13 pleadings, it will have to go to that number.

14 MS. SWEENEY: So even if they
15 send you a letter with the writer's fax number
16 and that's the thing you are responding to,
17 you have got to go find the pleading and make
18 sure they don't have a different fax number on
19 the pleadings?

20 That is the silliest vote we have ever
21 taken, with all due respect. It really is. I
22 mean, you have got to go root around --

23 MR. LATTING: I'm changing my
24 vote.

25 MS. SWEENEY: You have got to

1 go root around and see what the original fax
2 on the original pleading was even if it's a
3 different lawyer in the firm that's now
4 handling the case and you know better.

5 MR. JACKS: Yeah. What if they
6 move offices but don't go back and amend their
7 pleadings?

8 MS. SWEENEY: I mean, come on.

9 MR. ORSINGER: I'd like to call
10 for a new vote. I'm going to change my vote.

11 CHAIRMAN SOULES: All right.
12 You want a --

13 MR. ORSINGER: I want to call
14 for a new vote.

15 CHAIRMAN SOULES:
16 -- reconsideration? Okay. And you were in
17 the majority?

18 MR. ORSINGER: I'm in the
19 majority, so I can call for a new vote.

20 CHAIRMAN SOULES: All right.
21 New vote. Those in favor shows by hands.
22 Four.

23 Those opposed? Fails by a vote of 13 to
24 4.

25 MR. ORSINGER: Now, Paula, you

1 can't use that technique too often.

2 MS. SWEENEY: I realize that.
3 I'm saving it for the big stuff.

4 CHAIRMAN SOULES: Okay. Next
5 is 21(b) at page 159.

6 MR. ORSINGER: The letter was
7 assigned to Rule 21(b), but I don't believe it
8 relates to Rule 21(b), and 21(b) is sanctions
9 for failure to serve or deliver copies of
10 pleadings and motions. And it says if any
11 party fails to serve or deliver a pleading or
12 whatever, the court may in its discretion
13 impose an appropriate sanction under Rule 215.
14 And we would suggest that this rule go away
15 and be folded into the general sanction rule
16 rather than existing as its own esoteric
17 sanction. Or perhaps fold it into a service
18 rule.

19 HONORABLE SCOTT BRISTER: We
20 have already sent the sanction rule to the
21 Court.

22 MR. ORSINGER: Forget it.
23 Let's fold it into a new consolidated service
24 rule where there is a little proviso in here
25 about punishment for not obeying the rule.

1 CHAIRMAN SOULES: Okay. Well,
2 let's see. Actually 159 and 160, we have
3 voted in favor of that already. "Pleadings,
4 notice, and documents must be served upon all
5 counsel of record, but if there is no counsel,
6 then upon the party." We already did that.

7 MR. ORSINGER: Yes. But you'll
8 see it's been assigned in the upper right-hand
9 corner to 21(b). So we're saying the letter
10 doesn't relate to 21(b), but it does raise
11 21(b) and the idea maybe is 21(b) shouldn't
12 exist as a separate rule. Why don't we fold
13 it into a rule on service?

14 CHAIRMAN SOULES: You are
15 looking at Kinsey's letter, right, as opposed
16 to Loomis' letter?

17 MR. ORSINGER: No. Loomis'
18 letter on page 159 is -- see, in the upper
19 right-hand corner of Loomis' letter, it's been
20 assigned to 21(b).

21 CHAIRMAN SOULES: Right. And
22 that just deals with serving on the lawyer as
23 opposed to the party if there is a lawyer.

24 MR. ORSINGER: See, in his
25 letter he says this is the change I want on

1 Rule 21, 21(a), 21(b), or 21(c).

2 CHAIRMAN SOULES: Okay.

3 MR. ORSINGER: But now --

4 CHAIRMAN SOULES: And we have
5 fixed that someplace already.

6 MR. ORSINGER: Then if you look
7 at Kinsey's letter on 162.

8 CHAIRMAN SOULES: Different
9 question.

10 MR. ORSINGER: Well, he talks
11 about 21(b) on the second page of his letter.

12 CHAIRMAN SOULES: Okay. What
13 do you recommend on this?

14 MR. ORSINGER: Well, on the
15 21(b) part of it we are recommending that we
16 fold 21(b) into a consolidated rule on
17 service, but then I see that we didn't
18 expressly comment on the suggestion on 21(a).
19 I believe that that reference goes back to the
20 question of whether you can serve a party
21 after the lawyer has already made an
22 appearance, and I think we have already solved
23 that problem.

24 CHAIRMAN SOULES: We have
25 solved that.

1 MR. ORSINGER: On 21(a). So
2 basically the part of Kinsey's letter that
3 relates to 21(b), we are responding to him by
4 saying why don't we fold that into a
5 consolidated rule on service and put that
6 sanction just as a sentence at the end of the
7 rule.

8 HONORABLE SARAH DUNCAN: Excuse
9 me. I think he's -- I thought he was talking
10 about a different problem, which is that 21(a)
11 is a little confusing in saying that you
12 can -- you serve the lawyer, but they talk
13 about the party's last known address, not the
14 lawyer's last known address and it's just a
15 wording kind of thing; whereas on fax service
16 he notes that it's to the recipient's current
17 fax number. So I think what he's suggesting,
18 perhaps, is that we say "the recipient's last
19 known address," like we say "the recipient's
20 fax number."

21 CHAIRMAN SOULES: Okay. Any
22 opposition to that? There is none, so that
23 will be done. You see where it says "party's
24 last known address"?

25 MR. ORSINGER: I sure do. We

1 will do that.

2 CHAIRMAN SOULES: Change that
3 to "recipient's last known address." Okay.
4 That takes care of that paragraph, second
5 paragraph of Kinsey, and the third. Next he
6 talks -- Rule 21(a) says "attorney of record,"
7 and he wants that changed to "attorney in
8 charge."

9 Any opposition to that? There is none,
10 so that will be done. You see where that is,
11 Richard?

12 MR. ORSINGER: I sure do.

13 CHAIRMAN SOULES: Okay.

14 MR. JACKS: What was that
15 change, Luke? I'm not with you for some
16 reason.

17 CHAIRMAN SOULES: "Attorney in
18 charge" as opposed to "attorney of record," to
19 be served on attorney of record.

20 MR. JACKS: For what purpose?

21 CHAIRMAN SOULES: "Serving all
22 communications from the court or other
23 counsel" -- well, this is talking about "every
24 notice required by this rule and any pleading,
25 motion, or other form of request required to

1 be served under 21 other than the citation may
2 be served by delivering a copy to the party to
3 be served," and we are going to say, but if
4 they have a lawyer, it has to be on the lawyer
5 or "the party's duly authorized agent or
6 attorney of record."

7 MR. JACKS: And the proposal is
8 to say that service in order to be effective
9 must be on the attorney in charge, not the
10 attorney of record?

11 CHAIRMAN SOULES: Right.

12 HONORABLE C. A. GUITTARD: Does
13 that assume that attorney of record, there is
14 always some attorney in charge designated?

15 CHAIRMAN SOULES: There is.
16 There is under the rules. There is a default
17 on that where there is an attorney in charge,
18 no matter what.

19 MR. ORSINGER: The first
20 signature I think to appear on the pleading is
21 the attorney in charge, if it's not specified.

22 MR. MARKS: First signature or
23 first attorney?

24 MR. ORSINGER: I thought it was
25 the first signature.

1 MR. JACKS: Again, we get into
2 this business -- I mean, the first pleading
3 may be signed by the guy who was in the office
4 and his partner wasn't the day they had to get
5 the answer on file and that lawyer never again
6 makes another --

7 MR. ORSINGER: It's Rule 8,
8 Tommy, and it says --

9 MR. JACKS: -- appearance in
10 the case.

11 MR. ORSINGER: -- on the
12 occasion of --

13 MR. JACKS: And I served the
14 guy with whom I had been dealing all along
15 who's really in charge of the case, but he's
16 never filed anything saying he's in charge and
17 the pleadings would say he's not the one in
18 charge and I serve him and yet I haven't
19 gotten effective service if you make this
20 change in the rule. Why do we need to do
21 this?

22 CHAIRMAN SOULES: Well, if
23 there is a flap about it, you have to get a
24 designated attorney in charge.

25 MR. JACKS: Why do we have to

1 do that?

2 MR. ORSINGER: Well, that's how
3 it is right now. That's the way the rule is
4 right now, Tommy, because it says now the
5 first -- the attorney whose signature first
6 appears on the initial proceeding is the
7 attorney in charge.

8 MR. JACKS: I know, but I just
9 have to serve an attorney of record, don't I?

10 MR. ORSINGER: No. All
11 communications from the court or other counsel
12 with respect to the suit shall be sent to the
13 attorney in charge. That's the present rule.
14 So you need to -- if you are going to change
15 the attorney in charge, you need to somehow
16 make a filing to that effect.

17 CHAIRMAN SOULES: It's
18 really -- one of the points is where there is
19 a whole string of lawyers.

20 MR. JACKS: Yeah.

21 CHAIRMAN SOULES: Maybe
22 everybody in your law firm and mine is on the
23 pleadings and somebody just picks the least
24 involved lawyer to send something to, or the
25 other problem was do you have to send multiple

1 copies? Do you have to send it to everybody
2 on the pleadings in order to have service?
3 This says you send it to the attorney in
4 charge, and you have service.

5 MR. ORSINGER: It appears that
6 we have a conflict between Rule 8 that
7 requires you to serve everything on the
8 attorney in charge, and Rule 21(a) just says
9 "served on the attorney of record," which is
10 not really defined if there is three or four
11 of them.

12 CHAIRMAN SOULES: That's right.

13 MR. JACKS: Well, it is
14 defined. I think we all know if an attorney
15 has made an appearance in the case an attorney
16 is an attorney of record in the case.

17 MR. ORSINGER: Well, then Rule
18 21(a) would permit service on anybody that's
19 on the pleadings, I guess; whereas Rule 8
20 would require notice and communications to be
21 sent only to the attorney in charge.

22 CHAIRMAN SOULES: Rule 8
23 already requires service on the attorney in
24 charge. This just conforms 21 to that.

25 MR. JACKS: What we are saying

1 is we have got two rules, and they are at odds
2 with one another, right?

3 CHAIRMAN SOULES: Right.

4 MR. JACKS: And we have a
5 choice about which way to go?

6 MS. SWEENEY: Because they
7 represent the reality, which is that you don't
8 always want to serve the person in charge. I
9 mean, the reality of practice is it may be the
10 least efficient way to do it, and you may
11 actually be hiding the ball by serving the
12 lawyer in charge instead of the one you're
13 having the discussion with.

14 MR. JACKS: I mean --

15 HONORABLE C. A. GUITTARD:
16 Well, we have already crossed that bridge on
17 the appellate rules. Why don't we make them
18 the same?

19 CHAIRMAN SOULES: What did we
20 do with the appellate rules?

21 HONORABLE C. A. GUITTARD:
22 Serve the attorney in charge.

23 MR. MARKS: Eliminate Rule 8.

24 CHAIRMAN SOULES: Okay.
25 Kinsey's recommendation is that we serve on

1 the attorney in charge, and 21(b) -- is it
2 Rule 21? No. 21(a) be amended to say
3 "attorney in charge" as opposed to "attorney
4 of record." Those in favor show by hands.
5 Five.

6 Those opposed? Four. Passes by a vote
7 of five to four.

8 MS. SWEENEY: No. You had
9 another hand come up after you passed here.

10 HONORABLE SCOTT BRISTER: I
11 came up late.

12 CHAIRMAN SOULES: Well --

13 MR. ORSINGER: May I speak up?
14 I'm troubled by the prospect that if you have
15 multiple lawyers, that someone may selectively
16 send an important notice to a junior lawyer,
17 even though they know the junior lawyer is
18 only assisting the senior lawyer, and to me
19 that's a really important possible problem, a
20 greater problem than the fact that you will be
21 dealing with a junior lawyer who won't get the
22 mail handed down from the senior lawyer.

23 PROFESSOR DORSANEO:

24 Mr. Chairman?

25 CHAIRMAN SOULES: Bill

1 Dorsaneo.

2 PROFESSOR DORSANEO: And on
3 occasion there will be more than one firm,
4 like in my cases very frequently more than one
5 firm involved, and you know, I have had people
6 send things to me knowing full well that I'm
7 not in that part of the loop, and they do it
8 just to be jerks. So I think there are enough
9 jerks out there that we need to be protected
10 from them, and in your situation, Tommy, if
11 you send it to the right person, even though
12 there is a technical problem in the paperwork,
13 that person is not going to complain or care.
14 That just is going to be fine with them. It's
15 not going to create a problem. The larger
16 problem it seems to me is the one of somebody
17 intentionally sending it to a person who's not
18 really meant to be getting it or the only one
19 meant to be getting it.

20 CHAIRMAN SOULES: Okay.
21 Apparently there was a tie vote. Everybody
22 vote on this, please. Those in favor of
23 changing -- in 21(a) changing "attorney of
24 record" to "attorney in charge" show by hands,
25 in favor. 16 in favor.

1 Those opposed? One. Any other hands?
2 16 to 1 it passes.

3 Okay. What's next, Richard?

4 MR. ORSINGER: We have a letter
5 from a district clerk of Jefferson County
6 concerned about Rule 21(3) that you assign
7 consecutive case numbers to cases, and he was
8 just about to introduce a system of random
9 case assignment between trial courts, and we
10 analyzed this that he misunderstood the
11 instruction of the rule of consecutive
12 numbers, that the random case assignment he
13 wants has to do with which court it's assigned
14 to, not the cause number that's stamped on the
15 pleading and that, in fact, he didn't have a
16 problem.

17 He was concerned that the idea of
18 sequential assigning of consecutive numbers to
19 lawsuits would interfere with this proposed
20 random case assignment, but the random case
21 assignment has to do with the court it's
22 assigned to, not the cause number that it's
23 given. So we don't think he really has a
24 problem, and we recommend no change.

25 CHAIRMAN SOULES: Anyone

1 opposed to the committee on this?

2 PROFESSOR DORSANEO: I'm not
3 opposed, but I just have a question. Do some
4 of the courts or clerks number per court?
5 Like in Dallas County does each court have
6 it's own numbering scheme?

7 JUSTICE HECHT: No.

8 PROFESSOR DORSANEO: No. That
9 may be true some places. They may number in
10 the clerk's office.

11 MR. ORSINGER: Well, they
12 shouldn't be. Because Rule 23 is directed to
13 the clerk and there is only one district clerk
14 in every county, no matter how many district
15 courts there are, and they are required to
16 assign case numbers sequentially. So if they
17 are doing it for different courts, I think
18 they are in violation of the rule.

19 CHAIRMAN SOULES: Okay.
20 Anything else on this?

21 JUSTICE HECHT: Let me make one
22 other point. This has just come up recently,
23 and I hadn't had a chance to write you about
24 it, Luke. It just came up in the last couple
25 of days, but we have gotten a couple of

1 requests for a rule that would direct the
2 district clerks to file cases in counties
3 where there is more than one district court
4 randomly rather than by any other means and
5 take appropriate steps to prevent forum
6 shopping, because every time there is one of
7 these things it hits the newspapers about how
8 somebody filed a case a whole bunch of times
9 to try to get a particular court. And maybe
10 at some point the committee wants to look at
11 that. I don't have a specific proposal for
12 you. I can't even remember who called about
13 it, but a couple of people have called about
14 it.

15 CHAIRMAN SOULES: That's easy
16 enough to write. When I get that from you I
17 will --

18 JUSTICE HECHT: If it's a
19 general rule, it could be pretty easy to write
20 and then just leave it up to the judges and
21 the clerks to enforce it. I know it's very
22 difficult to -- it's not difficult to
23 implement random assignments. It's very
24 difficult to enforce it.

25 HONORABLE C. A. GUITTARD:

1 Dallas County has a particular rule on it
2 that's in the published --

3 JUSTICE HECHT: So does -- I
4 think Harris County does.

5 MR. JACKS: Harris County had
6 the problem of an attorney filing, say in a
7 plane crash where there were five passengers,
8 filing one case then the next case then the
9 next and then nonsuiting all the ones that
10 weren't in the court of choice amongst the
11 ones available in Harris County, and they
12 adopted a local rule saying that it would
13 revert to the first assigned court and all the
14 cases would be consolidated in the first
15 assigned court to defeat the practice. And
16 the problem was not one of random assignment
17 because the clerk was making random
18 assignments of each case. It was just a way
19 that an attorney was trying to figure out how
20 to circumvent the random assignments.

21 MR. LATTING: In Dallas -- you
22 can correct me about this, you Dallas folks,
23 but there is a rule there that you cannot file
24 a case and then nonsuit it and refile it, or
25 there was one to prevent this very thing. And

1 in the latest Bum Steer Awards in TEXAS
2 MONTHLY, if I am not mistaken, there is a
3 story about some guys that filed a case 18
4 times in the Valley.

5 MS. SWEENEY: In the Valley.

6 MR. LATTING: I thought any
7 place in the Valley would be good.

8 CHAIRMAN SOULES: Or bad.

9 MR. ORSINGER: Good for the
10 plaintiff.

11 MR. HATCHELL: Some are better.

12 MR. LATTING: They filed it 18
13 times and dismissed 17 of them and then kept
14 the 18th one they got. So the Court really,
15 it seems to me, ought to prohibit that. Of
16 course, it won't stop it, but they can
17 prohibit it.

18 MR. ORSINGER: Our subcommittee
19 would be happy to draft some sample language
20 after we look at some of the local rules and
21 come back with a proposal.

22 PROFESSOR DORSANEO: Look at
23 the eminent domain statute.

24 MR. JACKS: I mean, there
25 really are a lot of local peculiarities of how

1 various courts run their dockets, and whatever
2 rule we try to craft it seems to me has to be
3 broad enough to allow them local -- I mean,
4 basically what you're saying is no shenanigans
5 to pick a particular court or judge, and how
6 that's implemented from place to place has got
7 to vary depending on local practice.

8 MR. LATTING: Just say that.

9 "No shenanigans."

10 MR. JACKS: Well, I mean,
11 that's really what it boils down to.

12 MR. LATTING: Yeah.

13 MR. JACKS: In Austin it's of
14 no consequence to what court the case is
15 assigned by the clerk because that doesn't
16 mean anything anyway because you have a
17 central docket and that judge may never see
18 the case.

19 JUSTICE HECHT: Right.

20 MR. JACKS: And if we have
21 problems with forum shopping, it's somebody
22 trying to get a hearing and the local judges
23 are very sensitive to that and they have
24 developed their own ways informally of dealing
25 with it and it's -- well, not entirely

1 informally, some formal under our local rules
2 and some informally because it's a small
3 enough courthouse that there is a very
4 efficient grapevine, and there is a need to
5 allow that kind of local adaptation.

6 JUSTICE HECHT: Right.

7 MR. JACKS: All in the same
8 spirit of trying to keep the complaint of
9 that.

10 CHAIRMAN SOULES: Well,
11 actually John Appleman, the district clerk in
12 Jefferson County, in this April 30, 1993,
13 letter says they urge us not to amend the
14 rules.

15 MR. LATTING: Urge us not to?

16 CHAIRMAN SOULES: Yeah.

17 MR. LATTING: In Jefferson
18 County, well --

19 CHAIRMAN SOULES: Because --

20 MR. LATTING: I would think
21 not.

22 CHAIRMAN SOULES: To eliminate
23 random case assignments, and I think that's
24 what we are agreeing to, right?

25 JUSTICE HECHT: Right.

1 PROFESSOR DORSANEO: Uh-huh.

2 CHAIRMAN SOULES: Okay. So
3 with regard to 164 then does anyone recommend
4 any change? The committee says "no." Anyone
5 who disagrees with the committee? Unanimously
6 no change.

7 MR. ORSINGER: Okay. The next
8 is Rule 26.

9 HONORABLE DAVID PEEPLES:
10 Before we go on, is it understood that his
11 committee is going to draft something in
12 response to what Justice Hecht said?

13 MR. ORSINGER: Yes. It is
14 understood.

15 CHAIRMAN SOULES: Was that an
16 oral inquiry, or is this something in writing?

17 JUSTICE HECHT: One of the
18 other -- Judge Abbott mentioned it to me and
19 then someone else, but I don't remember who
20 and I think it was oral.

21 MR. ORSINGER: Is there a
22 protocol reason why we shouldn't respond to an
23 idea that's orally submitted?

24 CHAIRMAN SOULES: No. No, not
25 at all. I was just wondering if we would be

1 able to get something specific in writing that
2 we could work with.

3 JUSTICE HECHT: One of the
4 problems has come up recently in Nueces
5 County, as I understand it, and I am not fully
6 apprised on this, so I may not be right about
7 this, but I think the district judges in
8 Nueces County have a system of random filing,
9 but in the last legislative session the
10 legislature gave the county courts at law
11 basically concurrent jurisdiction with the
12 district courts, and they don't have random
13 filing, and they like it that way and the
14 district judges like it their way.

15 And now they can't agree on how the cases
16 are going to get filed as between the county
17 clerk and the district clerk and all of the
18 courts that they can now be assigned to, which
19 is a similar problem that you have in El Paso,
20 but El Paso has worked it out. So they don't
21 have a disagreement, but my understanding of
22 the disagreement in Nueces County is that they
23 can't agree on how the case assignment is
24 going to work. So I think it was somebody
25 down there that called me about this, but I

1 can't remember who it was.

2 CHAIRMAN SOULES: Okay. So,
3 Richard, if you will, probably at Rule 23
4 consider a change that would say "suits to be
5 numbered consecutively and assigned at random
6 to courts" or something like that. You-all
7 work on the language.

8 MR. ORSINGER: So that's as
9 opposed to trying to consolidate the local
10 rules into a more comprehensive scheme. You
11 are just talking about a very general
12 direction to implement some scheme that leads
13 to random assignment.

14 CHAIRMAN SOULES: Right.

15 MR. ORSINGER: And the details
16 of it is local option.

17 CHAIRMAN SOULES: Right.

18 JUSTICE HECHT: And to prohibit
19 people from trying to circumvent the system
20 because, again, it would -- how you did that
21 would depend upon what the filing system is in
22 the first place. Dallas has one system, but I
23 think Houston has another, and it would just
24 depend.

25 HONORABLE C. A. GUITTARD:

1 Richard, you may want to look at Dallas Rule
2 1.1(f).

3 MR. ORSINGER: What page is
4 that on, Judge?

5 HONORABLE C. A. GUITTARD: 362,
6 subdivision (4).

7 CHAIRMAN SOULES: Okay. I
8 mean, some of the rural counties east of San
9 Antonio have two judges, and the way it works
10 is one judge gets the odd numbered cases and
11 the other judge gets the even numbered cases.
12 That's just their deal.

13 MR. ORSINGER: Often it depends
14 on what week you are set in what county.

15 CHAIRMAN SOULES: That country
16 is about as opposite to the Valley as anybody,
17 but some people think you can't get a fair
18 trial over on that side for different reasons
19 but anyway. Okay. That's done. Now we go to
20 167.

21 MR. ORSINGER: The suggestion
22 there was Rule 26 that requires the clerk to
23 keep the court's docket in a permanent record
24 with the names of the parties and what have
25 you, and this particular inquiry is, are JP's

1 required to do this?

2 The inquiry came from the state library,
3 which under the local government code I think
4 has been given administrative authority to
5 promulgate rules about the preservation of
6 records and when they can be destroyed, and
7 apparently the inquiry from the JP was, "Am I
8 required to do this"? And it was our view
9 that the JP's are required to do this.
10 However, I will tell you that on many of these
11 JP issues we have recommended referring it to
12 Judge Till's committee because I believe he's
13 working up a set of consolidated rules for
14 JP's, but this is the rule that requires
15 clerks to keep permanent indexes of
16 litigation.

17 CHAIRMAN SOULES: Well, why
18 shouldn't that apply to everybody?

19 MR. ORSINGER: It should, but
20 then on the other hand, I don't know if we
21 are -- I mean, are any of these rules going to
22 apply to JP's after Judge Till comes with his
23 committee recommendations, or are they all
24 going to be consolidated under his set of
25 rules?

1 CHAIRMAN SOULES: I think after
2 the Court gets his task force report then we
3 are going to get some input from the Court
4 what they want us to do with it.

5 MR. ORSINGER: Well, our view
6 is that it's working fine. We need to keep
7 permanent records. No one is suggesting a
8 change. This gentleman is just asking to
9 corroborate his view that JP's are covered by
10 the rule, and we think they are. And so,
11 therefore, we don't suggest any change to make
12 it clear that JP's are not included.

13 CHAIRMAN SOULES: This is in
14 Rule 2?

15 MR. ORSINGER: Well, Rule 2 is
16 the one that says that the rules generally
17 apply to JP's, and Rule 26 is the one that
18 requires a well-bound book and what have you.
19 It's now a permanent record.

20 CHAIRMAN SOULES: Okay. So we
21 are recommending no change to Rule 26, and a
22 response to Bill Willis that 26 includes JP's.

23 MR. ORSINGER: Actually it's
24 just an advisory opinion. I mean, we don't
25 need to change anything. Rule 2 says all of

1 the rules apply to JP's. Rule 26 requires
2 them to keep a litigation record. So nothing
3 needs to be done.

4 HONORABLE C. A. GUITTARD: And
5 Judge Till doesn't want any of them to apply
6 to JP's. He wants their own rules.

7 CHAIRMAN SOULES: Well, let's
8 don't get to Judge Till yet.

9 MR. ORSINGER: I'm not clear
10 about that, but I can tell you that we are
11 punting some of these JP rules to him but not
12 this one.

13 CHAIRMAN SOULES: Okay. Anyone
14 want to change Rule 26? Unanimously no
15 change.

16 MR. ORSINGER: The next one is
17 Rule 41 on page 168.

18 CHAIRMAN SOULES: Let me get a
19 sense of the committee. Does anyone on the
20 committee disagree that Rule 26 includes and
21 covers JP courts? No one disagrees. Everyone
22 agrees that it does. All right.

23 MR. JACKS: Some are and some
24 don't have an opinion.

25 CHAIRMAN SOULES: That they

1 keep a permanent record of the cases in their
2 courts?

3 MR. JACKS: I mean, I have no
4 opinion. I don't fall in either one of your
5 categories.

6 CHAIRMAN SOULES: Okay. One no
7 opinion. The others agree it covers JP's.
8 Rule 41.

9 MR. ORSINGER: Okay. The next
10 item here is criticism about the
11 joinder/parties language as being too
12 confusing, and it is our view that, in fact,
13 it is difficult to understand these, and we
14 are undertaking to rewrite the joinder rules.
15 And do you want to say -- I mean, Bill
16 Dorsaneo's view, if I am repeating it
17 correctly is, is that our joinder rules were
18 originally borrowed from the Federal rules,
19 but the Federal rules have been amended, and
20 the state rules have never been amended. So
21 we are operating under very old Federal rules.

22 PROFESSOR DORSANEO: Well,
23 that's partially the problem, although we have
24 caught up in many respects now, and some of
25 our recent legislation may mean that our rules

1 need to be different from the Federal rules
2 because of statutes, but I think the original
3 difficulty is that when we mainly adopted the
4 Federal rules we also re-adopted some Texas
5 rules that are really incompatible with the
6 scheme that was embraced when the Federal
7 rules were adopted, and the people who did the
8 original work didn't notice the difference
9 that has become obvious over the years.

10 So if we are going to have the same
11 approach where we have this essentially the
12 same joinder of claims and parties rules as
13 exists in the Federal system, which is, you
14 know, a matter that could be debated, and I
15 would be in favor of that. If we are going to
16 do it the way the Federal system does it, it's
17 a pretty nice scheme, pretty sensible scheme,
18 then we need to make sure that we do it
19 properly and not build in any inconsistencies
20 that maybe haven't caused any difficulty over
21 the years because we have been able to work
22 with the current system, but just for the sake
23 of neatness we ought to do it properly.

24 I don't think this thing that Jack points
25 out is a particular problem because really 174

1 and 41 and the companion Rule 40 were almost
2 verbatim taken from the Federal provisions.
3 There is a little tiny difficulty at the
4 Federal level about misjoinder of parties and
5 misjoinder of claims, but this particular
6 issue I don't think is really a problem.

7 MR. ORSINGER: Mr. Chairman, I
8 don't think we really need to vote here
9 because I think the subcommittee has decided
10 to undertake to rewrite the rules and then
11 bring them specific rules back.

12 CHAIRMAN SOULES: Okay.

13 MR. ORSINGER: And I think if
14 this is a problem, it will probably go way,
15 but I don't know that we need to vote on the
16 problem he presents since we will be
17 discussing this later with real rules.

18 CHAIRMAN SOULES: Okay. 41 is
19 postponed, and I don't know whether it needs
20 to be postponed until after we hear from the
21 Court on discovery rules because of the
22 discovery window and how that may affect
23 joinder. That may be something you need to
24 keep in mind.

25 HONORABLE SARAH DUNCAN: Luke,

1 can I also suggest that the subcommittee
2 consider Rule 40 as part of that process
3 because 40 and 41 are sort of flip sides of
4 one another, and I don't think you can do one
5 without the other.

6 PROFESSOR DORSANEO: I think we
7 were planning on considering all of the
8 joinder of claims and parties rules, and the
9 one that I particularly don't like that I
10 would point out that I am talking about is
11 Rule 37, which says, "Before a case is called
12 for trial additional parties necessary and
13 proper may be brought in upon such terms as
14 the court may prescribe," and that original
15 Texas rule gives a very large amount of
16 discretion to the trial judge if you read it
17 literally, and it really would possibly be
18 incompatible with Rule 40 and Rule 51, which
19 have some more requirements than do whatever
20 you like.

21 CHAIRMAN SOULES: There may be
22 some problem with the discovery window on
23 that, too. It says, "Before the case is
24 called for trial" all of this can go on. So
25 you are going to look at 37, 40, 41, 39.

1 PROFESSOR DORSANEO: I think
2 probably really it starts at -- it's the
3 entire party section and some of the rules
4 that are in the pleading section that probably
5 should be in the party section.

6 CHAIRMAN SOULES: Okay. So we
7 will hear from you in the future then on the
8 joinder/party rules including 41 and others
9 around 41. Next is 46b at pages 170 and 172.

10 MR. ORSINGER: This was a
11 complaint about a problem about posting a cash
12 bond on appeal from a JP court, but it doesn't
13 relate to Rule 46. It really -- 46b. It
14 really relates to Rule 146, and we have
15 suggested that we refer this to Judge Till's
16 committee because this is a procedure
17 involving appeal from a JP court, posting a
18 bond in the JP court, and I think it would be
19 better addressed by him.

20 HONORABLE SARAH DUNCAN: Luke?

21 CHAIRMAN SOULES: All right.
22 Justice Duncan.

23 HONORABLE SARAH DUNCAN: I also
24 have a note from, I guess, when we first got
25 these things a couple of years ago, and we

1 might ask Judge Till's committee to look at
2 this, too. Rule 571 seems to require a bond
3 that's in double the amount of the judgment
4 and double the amount of incurred costs, and I
5 think there might a Dillingham vs. Putnam
6 problem with doing that that just didn't get
7 fixed when the appeal bond rules got fixed,
8 the district court appeal bond rules.

9 CHAIRMAN SOULES: That's what
10 rule, again?

11 HONORABLE SARAH DUNCAN: Well,
12 my notes say 571, but I haven't looked at this
13 in years. Yeah.

14 MR. ORSINGER: That is appeal
15 bond.

16 HONORABLE SARAH DUNCAN: Right.
17 And it is double the amount of the judgment.

18 PROFESSOR DORSANEO: Very
19 naughty.

20 HONORABLE SARAH DUNCAN: And
21 double the amount of costs, which I think is
22 unconstitutional.

23 CHAIRMAN SOULES: For the
24 record, then and, Lee, maybe you could advise
25 Judge Till for me since Holly is not here,

1 that this agenda item on page 172, it says
2 "46b," but it's really 146b.

3 MR. ORSINGER: And Rule 48,
4 Luke, is pleading alternative claims for
5 relief, and I don't know what the writer meant
6 by Rule 48 because it really doesn't involve
7 appeals at all.

8 CHAIRMAN SOULES: Do they mean
9 148 on that?

10 MR. ORSINGER: Possibly.
11 Secured by other bond. That's what it is. It
12 should be 148.

13 CHAIRMAN SOULES: Okay. And so
14 the writer refers to 46b and 48, Rules of
15 Civil Procedure. It's really 146b and 148,
16 and then the double amount bond in 571 needs
17 to be reviewed by Judge Till's subcommittee of
18 this committee and bring us a recommendation.
19 So that's transferred to the JP subcommittee.

20 MR. ORSINGER: Okay. The next
21 one is Rule 47, top of page 4 of this
22 disposition table, a letter from Broadus
23 Spivey, and he has pointed out that the
24 current ban against stating the unliquidated
25 damages you're seeking can affect the question

1 of county court jurisdiction. And on that
2 point in this letter the subcommittee suggests
3 that the rule stay as it is because we don't
4 see this as being a practical problem, even
5 though it's a theoretical problem.

6 I would also point out that we are
7 revising this rule and intend to bring you a
8 rule that permits parties to say that they are
9 seeking only monetary damages of 50,000 or
10 less in their original pleading, which would
11 then put them in Discovery Tier 1, if I have
12 the tiers correctly. I think Tier 1 is the
13 only monetary relief for 50,000 or less, I
14 believe, and so we were going to maintain the
15 view that you don't state your unliquidated
16 damages, but you are permitted to say that you
17 are seeking only monetary damages of 50,000 or
18 less so that you can tell from the original
19 petition what discovery tier you're in. Now,
20 we don't have to vote on that proposal. I'm
21 just telling you about it. It will come
22 later.

23 CHAIRMAN SOULES: Okay. So you
24 are recommending that Broadus' suggestion
25 about 47 not be adopted?

1 MR. ORSINGER: That's what we
2 are suggesting, and then there is a companion
3 letter -- well, I mean, a similar letter,
4 related letter, on page 177 that is concerned
5 about forum shopping.

6 MR. YELENOSKY: It says
7 "fortunate shopping."

8 MR. ORSINGER: I know and I --

9 MR. YELENOSKY: I wondered what
10 that was.

11 MR. JACKS: Well, if you get
12 the right forum it's fortunate.

13 MR. YELENOSKY: I thought maybe
14 it was one of those cable TV things.

15 CHAIRMAN SOULES: QVC.

16 MR. ORSINGER: Mr. McMurray is
17 suggesting that you could file an unspecified
18 pleading in both county jurisdiction and then
19 amend and seek a judgment that's beyond what
20 you could have put in your original petition,
21 and we don't, again, see that as a practical
22 problem, even though it's a theoretical
23 problem and recommend no change for either one
24 of those approaches to the same issue.

25 CHAIRMAN SOULES: Okay. Any

1 opposition? Okay. And in those respects
2 there will be no change. No one is opposed to
3 that. Unanimously no change.

4 MR. ORSINGER: Okay. Rule 48
5 brings us around to the same letter we had
6 previously about JP court appeals, only now
7 it's circling around under Rule 48 instead of
8 Rule 46, and we established that that's really
9 Rule 148 and that it's going to be referred to
10 Judge Till's committee.

11 HONORABLE SCOTT BRISTER:
12 Somebody needs to send them a rule book.

13 CHAIRMAN SOULES: Okay. With
14 that, let's take a ten-minute break and then
15 we will do Paula's report and we will get back
16 to this.

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

20 MR. ORSINGER: Okay. The next
21 item is Rule 63, which is at agenda page 622.
22 Rule 63 relates to amendments of pleadings,
23 and the letter here --

24 CHAIRMAN SOULES: It's actually
25 181. I don't know. It's got a couple of

1 pages here.

2 MR. ORSINGER: 181, I'm sorry.
3 I had the wrong page number.

4 CHAIRMAN SOULES: It's got two
5 page numbers on it.

6 MR. ORSINGER: Page 181. I
7 read the wrong one.

8 CHAIRMAN SOULES: Okay. 63.

9 MR. ORSINGER: Okay. This
10 gentleman would like to change the deadline
11 for amending pleadings from seven days prior
12 to trial to 30 days prior to trial, and
13 coincidentally, I believe the State Bar rules
14 committee has also made that same suggestion,
15 and our subcommittee thought that it would be
16 a better idea, that we should, in fact, move
17 the pleadings deadline back but that we ought
18 to refer it to the discovery period because
19 amending pleadings can cause people to need to
20 do additional discovery, and that if pleadings
21 are amended after the discovery window closes,
22 no matter how close that is to trial, then you
23 have a problem about re-opening the discovery
24 window, and if pleadings are amended more than
25 once after the discovery window is closed,

1 having to re-open discovery more than once.

2 So it was our view that we should count
3 backwards from the close of the discovery
4 window, and our subcommittee is making a
5 recommendation that the deadline for amending
6 pleadings be 45 days before the discovery date
7 cut-off.

8 HONORABLE SCOTT BRISTER:

9 Didn't we do this in the --

10 MR. HUNT: Yeah. We have
11 already done it.

12 HONORABLE SCOTT BRISTER:

13 -- discovery?

14 CHAIRMAN SOULES: Yeah. We
15 talked about this during discovery, but the
16 Rule 63 is in their bailiwick, and we talked
17 generally about it. There was even some
18 resolution about or at least positions taken
19 about how people felt it should be resolved,
20 but since this was in the subcommittee,
21 Richard's subcommittee --

22 HONORABLE SCOTT BRISTER: We
23 didn't vote on anything?

24 CHAIRMAN SOULES: We didn't
25 vote on it other than to take maybe an

1 advisory vote while working with the discovery
2 rules, knowing that this had to be fixed if
3 there is a discovery window, but it was under
4 Richard's authority to handle this rule. So
5 here we are. What do we do?

6 MR. JACKS: What was our
7 advisory vote?

8 CHAIRMAN SOULES: As I recall
9 it, it was to put it inside the discovery
10 window, but I don't remember the days. If the
11 discovery window was going to really have the
12 effect intended by the subcommittee that it
13 needed to be -- and I think it was 45 days.

14 MR. ORSINGER: Luke, I cannot
15 remember, and I apologize.

16 CHAIRMAN SOULES: There was
17 some reason why 30 was too short because of,
18 as I remember, there are a lot of response
19 times that are 30 days, discovery response
20 times that are 30 days, and the idea was to
21 get it towards the end of the discovery period
22 so that as much discovery could be done as
23 possible to get enough information about
24 pleadings, maximize the available information
25 about pleadings, but to back it -- that forced

1 it to be late, pushed it to be late, but to
2 how late had to be governed by response times.

3 And I believe the consensus or at least
4 some articulation from certain members of the
5 committee, maybe a consensus, was that 45 days
6 would be sensible because that would give
7 somebody 15 days to get additional discovery
8 out, noticed, what have you, and the response
9 is back before the discovery window closes.

10 MR. LATTING: My recollection
11 is it was 60 days that we voted on.

12 CHAIRMAN SOULES: It may have
13 been 60.

14 HONORABLE SCOTT BRISTER: Could
15 I recommend we table this and look back at it?
16 I just notice looking around the room not a
17 single member, I don't believe, of Steve
18 Susman's committee --

19 MR. JACKSON: I'm here.

20 HONORABLE SCOTT BRISTER: -- is
21 here today, and I know they talked about it a
22 long time and have some --

23 MR. ORSINGER: Let me tell you,
24 Judge, that Alex Albright who was on -- was,
25 if you will, the reporter for that

1 subcommittee is on our subcommittee as well,
2 and this was cleared with her as being
3 consistent with the discovery rule, if that
4 gives you any comfort level.

5 HONORABLE SCOTT BRISTER: Well,
6 and I'd also like someone to look back and see
7 what -- I know we have discussed this and
8 voted and I'd like to know what that --
9 somebody to at least be able to tell us what
10 that was and what we --

11 CHAIRMAN SOULES: Justice
12 Duncan.

13 HONORABLE SARAH DUNCAN: To tag
14 on to that my question, when are experts going
15 to be designated, and how is that going to tie
16 into this?

17 JUSTICE HECHT: The proposal is
18 75/45, isn't it?

19 HONORABLE SCOTT BRISTER: I
20 mean, I'd like to compare this to the
21 discovery report that I don't have with me.

22 MR. ORSINGER: Anybody have it?

23 HONORABLE SARAH DUNCAN: I have
24 it in the car.

25 JUSTICE HECHT: I think the

1 report was 75/45.

2 MR. JACKSON: I may have it on
3 here if I have got those pages loaded.

4 MR. ORSINGER: There is
5 certainly no reason that we have to vote on
6 this right now, Mr. Chairman, because we are
7 going to be bringing back a rule that says
8 this, and we can debate the exact language
9 then, if you'd like. We have resolved to do
10 it this way, and we can write it and amend the
11 date as needed.

12 MR. JACKS: Richard, I assume
13 you also have a provision that scheduling
14 orders can provide different deadlines in the
15 case being governed by a scheduling order
16 where the parties have --

17 CHAIRMAN SOULES: Now, 166
18 covers that.

19 MR. ORSINGER: That would be in
20 the scheduling order rule that would preempt
21 our rule, probably would be the way to do
22 that.

23 MR. JACKS: Okay. It seems to
24 me there is no reason not to put in your rule
25 while you are drafting it, is all I'm saying.

1 HONORABLE SCOTT BRISTER: You
2 probably need to make some reference to
3 discovery plan.

4 MR. JACKS: Yeah. Discovery
5 plan or whatever we are calling it.

6 MR. ORSINGER: We could do
7 that. On the other hand, if we are going to
8 do that, we probably ought to do that in every
9 area where the scheduling order can change the
10 default rules, and perhaps what we ought to do
11 is just have it tacitly understood that all
12 rules that are discussed -- pardon me, all
13 deadlines that are in the power of the court
14 under Rule 166 preempt the default rules.

15 MR. MARKS: Tacitly?

16 MR. ORSINGER: Well, I mean,
17 should we go through everything that the court
18 can do in a pretrial order? Should we go find
19 each --

20 MR. MARKS: Maybe one statement
21 someplace that says it.

22 MR. JACKS: Yeah.

23 MR. ORSINGER: We are going to
24 be putting it in here all of these different
25 places, "subject to Rule 166."

1 MR. MARKS: Well, why don't we
2 say it in Rule 166, put something in there
3 about it?

4 MR. ORSINGER: And refer back
5 to the rules that are preempted?

6 MR. MARKS: Yeah.

7 MR. JACKS: Or refer to them
8 categorically, any rules in conflict.

9 MR. ORSINGER: I would much
10 prefer to do that rather than put them in all
11 the individual rules.

12 MR. JACKS: Yeah. That's fine.

13 HONORABLE SARAH DUNCAN:
14 Richard, has your subcommittee been advised
15 that the Court is going to adopt some version
16 of the discovery cut-off?

17 JUSTICE HECHT: We haven't
18 looked at it.

19 CHAIRMAN SOULES: That process
20 has not begun.

21 HONORABLE SARAH DUNCAN: Well,
22 if it's rejected, it doesn't do anybody much
23 good to spend a whole lot of time figuring out
24 what the pleading amendment date should be,
25 and if it's accepted and modified, those

1 modifications may have a great deal to do with
2 what the pleading amendment deadline may be.

3 MR. ORSINGER: We can go ahead
4 with our intention of drafting a rule that
5 says that, and then if the discovery proposals
6 are rejected, we can easily change it to 30
7 days before trial, 45 days before trial, or
8 just leave it at seven. We can react to that.
9 I would propose that the subcommittee just
10 continue to have a rule that says this, and we
11 will bring it to the table for vote when we
12 bring our actual rules, and maybe by then we
13 will know where we are on the discovery.

14 CHAIRMAN SOULES: Okay. So we
15 are going to postpone 63.

16 Okay. We have Paula's report now before
17 us, and let's go to that.

18 JUSTICE HECHT: Luke, let me
19 say that the Court intends to start
20 considering the discovery rules on February
21 20th. We are going to have a meeting between
22 3:00 and 5:00 to hear Steve Susman and a
23 representative of the State Bar court rules
24 committee present their opposing views and
25 answer questions, and you're welcome to come.

1 MR. JACKS: And when is that
2 again?

3 JUSTICE HECHT: February the
4 20th at 3:00 in the courtroom.

5 HONORABLE SCOTT BRISTER: Is
6 that open to --

7 JUSTICE HECHT: Open to the
8 public.

9 CHAIRMAN SOULES: In the
10 courtroom?

11 JUSTICE HECHT: Yes.

12 MR. ORSINGER: Will the
13 questions be only the from the Court?

14 JUSTICE HECHT: Right.

15 MR. ORSINGER: Not from the
16 audience?

17 JUSTICE HECHT: Yes.

18 MR. JACKS: One hour to decide?

19 JUSTICE HECHT: More or less.

20 CHAIRMAN SOULES: Okay. Paula,
21 you have the floor, and let's see, we need to
22 get the right book out here, which is I think
23 the next volume.

24 MS. SWEENEY: Well, it's all
25 the volumes, but what you-all have is a

1 disposition chart that was sent to everybody
2 for Rules 260 to 299.

3 CHAIRMAN SOULES: Okay. The
4 first is at 756.

5 MS. SWEENEY: Yes.

6 CHAIRMAN SOULES: That's in
7 Volume 2 of the original agenda.

8 MS. SWEENEY: And we have
9 merged them in the chart by rule as opposed to
10 by volume because there were comments
11 that -- it seems like all the volumes for each
12 rule by the time all was said and done.

13 CHAIRMAN SOULES: Okay. I see
14 what you're saying. Okay. So as far as Rule
15 216 is concerned we need Volume 2 of the
16 original agenda and first supplement page 410.

17 MS. SWEENEY: And, Luke, the
18 subcommittee is at the Chair's disposal, but
19 we do have a suggestion for how to go through
20 this. A lot of -- one option is to proceed as
21 Richard was just doing, which is to go rule by
22 rule, suggestion by suggestion, but an awful
23 lot of these are -- well, we think it would be
24 more profitable for us in our work to hit some
25 of the ones that we were divided on that we

1 think really need discussion by the committee,
2 and I'd like to, if it's all right with you,
3 kind of skip to those as opposed to --

4 CHAIRMAN SOULES: Okay.

5 MS. SWEENEY: I mean, you know,
6 we have a suggestion here that we vote on
7 whether the word "nonjury" be hyphenated or
8 not, those kind of things. I'd rather kind of
9 gloss over those and get to some of the meat,
10 if we could do that.

11 CHAIRMAN SOULES: Okay. Take
12 it.

13 MS. SWEENEY: The first rule I
14 would direct you-all's attention to is Rule
15 223, which is highlighted. It's on your
16 disposition chart on the first page, but the
17 issue there is what are we going to do with
18 the jury shuffle procedure as it currently
19 exists? And the discussion is this, that we
20 are amongst ourselves divided on what to do
21 with the jury shuffle. Alex made a suggestion
22 having to do with the jury shuffle, which
23 prompted the discussion.

24 Some of us on the committee believe that
25 it is important when a panel is brought in and

1 the litigants look at the panel and for some
2 reason, you know, you get your list, you scan
3 it, you look at the panel, and the first 24
4 people on there are all, you know, accountants
5 or it's a disproportionate, nonrepresentative
6 grouping and then the other 24 people if they
7 were mixed in with them would make it
8 representative. Some of us believe it's very
9 important to preserve the ability of the
10 parties as it currently exists to be able to
11 ask the court to ask the clerk to shuffle the
12 panel so that that vagary and happenstance
13 isn't fatally prejudicial to the parties, and
14 so at least there is an opportunity to correct
15 an imbalance by having a shuffle.

16 Others, including Judge Peeples, on the
17 group feel that that should go by the wayside
18 because it's time consuming and because it's,
19 as he put it, peer advocacy and not
20 really -- you know, you either have a random
21 selection process, and it doesn't go to
22 challenging the process, it just goes to the
23 challenging the result. And it's sort of a
24 luck of the draw thing, and you should be
25 bound by it, and we need the committee's input

1 on whether we should preserve the shuffle or
2 not preserve the shuffle. Anyway, that's
3 where we are.

4 CHAIRMAN SOULES: Don Hunt.

5 MR. HUNT: Tell us, Paula, why
6 this violates Batson, if it does.

7 HONORABLE SCOTT BRISTER: I can
8 answer that.

9 MS. SWEENEY: Yeah. Because a
10 lot of the reason for shuffles is you look up
11 and all you see is all of the black or brown
12 faces are either at the front or the back
13 where you want them or don't want them and,
14 therefore, you could make the shuffle move for
15 no reason other than racial motives, but in
16 many counties you also have a list that tells
17 you that the first 24 people are all insurance
18 adjusters, which is not yet a Batson protected
19 class.

20 CHAIRMAN SOULES: Judge
21 Brister.

22 HONORABLE SCOTT BRISTER: My
23 personal experience has been -- and I never
24 asked anybody why they wanted a shuffle,
25 though I think probably that Batson -- an

1 argument could be made that Batson hearing
2 ought to apply when somebody asks for a
3 shuffle.

4 MS. SWEENEY: Yeah.

5 HONORABLE SCOTT BRISTER: But
6 generally speaking it only occurs -- since it
7 has to occur when you just look at them and
8 maybe if you're fast, like Paula you can
9 actually flip through all the cards real fast
10 and see, but basically it's they came in and
11 they looked at them. And 100 percent of the
12 time in my experience when plaintiffs have
13 asked for a shuffle the majority of the
14 African-Americans were at the back of the jury
15 panel. 100 percent of the time when the
16 defendants asked for a jury shuffle the
17 majority of the African-Americans were at the
18 front of the jury panel.

19 Now, perhaps that is a 100 percent
20 coincidental effect, but I don't think so, and
21 if that's what's going on, number two, I think
22 we need to talk -- I don't know for sure. I'm
23 not a no probability expert, but since by
24 statute you have to have a random jury list,
25 when you take, as I understand it, a random

1 list and shuffle it a second time, what you
2 are getting is not random, especially if the
3 way you do it is by pulling the names out of a
4 hat, which in this day of computers is a very
5 odd way to try to get random results, but if
6 you take a long random and take one little
7 section and rescrumble it up, what you have
8 got left is not random anymore. And so I have
9 got big problems with a shuffle, and I think
10 probably it's got some constitutional
11 infirmities.

12 CHAIRMAN SOULES: Bill
13 Dorsaneo.

14 PROFESSOR DORSANEO: Well, I
15 think I disagree with all of that, and the
16 reason is -- the reasons are these, that
17 what's random in terms of the big list in the
18 central jury room doesn't seem necessarily to
19 end up being random and especially in terms of
20 order of seating once you get upstairs. And
21 regardless of whether when you look at the
22 panel you're asking for a shuffle because the
23 blacks are in the back or in the front, what
24 you're asking for when you are asking for a
25 shuffle is for this panel to be more random

1 than the seating that you can see with your
2 eyes is.

3 And that's very different from excluding,
4 let's get all of the black people or all of
5 the white people or all of the women out of
6 here. I think that's what the system is
7 really designed to do, and I would hope that
8 the shuffle doesn't get swallowed by this
9 Batson expansion to cover all kinds of things,
10 unless we are going to recommend to the
11 legislature or to somebody that we get an
12 allocation, a random allocation, cross-section
13 of the community in the selection process for
14 each jury, because you can't have it both
15 ways. You can't eliminate the protections
16 that were provided to people to guard against,
17 you know, the possibility of a skewed panel on
18 the one hand and not replace it with anything
19 else on the other hand, and I think the
20 shuffle is more helpful than harmful. Now, of
21 course, the Constitution may turn out as
22 interpreted by somebody to mean something
23 else, but I hope not.

24 MS. SWEENEY: Well, I think the
25 suggestion that Judge Brister made that we

1 incorporate Batson procedures into the shuffle
2 would solve the constitutional issues, or I
3 mean, if --

4 PROFESSOR DORSANEO: But if you
5 ask me, I will tell you, the answer will
6 always be, "This panel that I can see with my
7 eyes is not randomly organized by this or by
8 that or by that or by that, and that's what I
9 want," and I think that that's a good answer.
10 I don't see anything wrong with that answer.
11 So why even ask it?

12 MS. SWEENEY: That's true.

13 CHAIRMAN SOULES: Steve
14 Yelenosky.

15 MR. YELENOSKY: Well, I'm
16 certainly not a statistician, but it seems to
17 me -- and I don't know what the consequence of
18 this, whether I'd like it or not, but it does
19 seem to me that there is something less random
20 about a shuffle in the sense of if you think
21 about it in gambling terms. If you are going
22 in and throwing the dice or something and you
23 don't like it the first time, the house isn't
24 going to let you have a second time, even
25 though you argue that that's just as random as

1 the first time. You had a chance to look.
2 You're getting another chance, whether you are
3 shuffling the whole or a part of it. There is
4 a human decision based on how it came out the
5 first time that I think a statistician would
6 say because there is a human decision made,
7 that it's not simply numbers picked by a
8 computer, that there is less randomness, but
9 somebody else may know statistics better than
10 I.

11 CHAIRMAN SOULES: Let me ask a
12 question here. I'm sorry.

13 MR. YELENOSKY: That's all.

14 CHAIRMAN SOULES: Whenever the
15 panel of 30, say, is selected out of the
16 central jury room to be brought to Courtroom A
17 do the members of that panel of 30 have to
18 stay in any particular order --

19 HONORABLE SCOTT BRISTER: Oh,
20 sure.

21 CHAIRMAN SOULES: -- until
22 selected?

23 PROFESSOR DORSANEO: Yes.

24 HONORABLE SCOTT BRISTER: The
25 same order they went on the list two years ago

1 when we scrambled the whole county is the
2 order they come into my courtroom, but that's
3 not the order after the shuffle.

4 PROFESSOR DORSANEO: Right.

5 MS. SWEENEY: But what's
6 happened in the interim is a whole bunch of
7 folks have come out of the list. So you have
8 got -- you know, you really don't have juror
9 one, two, three, four. You have juror 1, 12,
10 16, 19, and 20, and the others are gone. So
11 you don't have the same random grouping that
12 you originally had. It's been derandomized by
13 the clerks or by the presiding judge down in
14 the jury room or by attrition.

15 MR. YELENOSKY: But that's
16 still random in the sense that it's not
17 governed by somebody's desire for a particular
18 end result. I mean, maybe people dropped out
19 by attrition or whatever, but that's also
20 random with respect to it's an end result.

21 CHAIRMAN SOULES: Well, when
22 you get to the tail end --

23 MR. JACKS: If the low income
24 people drop out because they don't get paid,
25 there is nothing random about it.

1 MR. YELENOSKY: That's a good
2 point. Yeah.

3 CHAIRMAN SOULES: When you get
4 to the end of the week or the end of the
5 period and you have got what -- I guess it's
6 kind of derogatory but what some lawyers call
7 culls, how are they random?

8 MR. JACKS: Yeah.

9 MS. SWEENEY: That's right.
10 They are not. They are just leftovers. They
11 are the people no one else liked.

12 HONORABLE SCOTT BRISTER: You
13 mean you pick through juries and keep sending
14 them back and forth?

15 CHAIRMAN SOULES: Right.

16 HONORABLE SCOTT BRISTER: Of
17 course, we don't do that, so I don't know. I
18 mean, in JP court that may be a problem.

19 MR. LATTING: It's a problem
20 here.

21 MR. JACKS: It is a problem
22 here in Travis County.

23 CHAIRMAN SOULES: So you really
24 don't have a random. This hypothetical random
25 that you start with, or I guess the real

1 random that you start with, gets reconfigured
2 as the week goes on or the days go on, and it
3 may turn out that --

4 MS. SWEENEY: And up in Wichita
5 Falls, of course, at the end of the week
6 that's what you get, is just who nobody else
7 wanted all week long, and if you are picking a
8 jury on a Wednesday or Thursday, you know,
9 it's bad.

10 CHAIRMAN SOULES: Richard
11 Orsinger.

12 MR. ORSINGER: I agree totally
13 that this idea that what's delivered to our
14 courtroom is random is really just a fiction,
15 and particularly in the rural counties you can
16 see the jury selection process. In San
17 Antonio you have to go down beforehand and
18 watch them do it, but in a rural county it
19 happens right in front of your eyes. And I
20 have picked a number of juries, and every
21 single businessman is let off, and he always
22 says it's because he can't be fair, but we all
23 know it's because he's got to go down to the
24 bank and make loans or he's got to go out and
25 sell real estate or whatever, and I think it's

1 just inherent that you are getting somebody's
2 slant, no matter what walks into the
3 courtroom.

4 Now, I can remember two instances where I
5 have done jury shuffles, requested them
6 myself, and in neither event were they based
7 on what -- based on a prohibited version. The
8 one time I did it in a rural county I did it
9 because several of the people that were
10 politically allied with my opposing party,
11 that were significantly allied, were in the
12 front part of the panel, and I wanted to mix
13 them up and change it. And the next time that
14 I did it, it was based more on the way the
15 people looked, the way they dressed, and
16 whether they were sloppy or clean and that
17 kind of thing, also not prohibited as far as I
18 know.

19 I also think that we are overreacting to
20 Batson. The Court of Criminal Appeals
21 recently ruled that you couldn't rely on
22 religion and then the election intervened, and
23 now the Court of Appeals has reversed itself
24 and I believe by a five-four vote says that
25 religion is not a forbidden basis on which to

1 exercise a peremptory challenge. In the
2 meantime the U.S. Supreme Court has decided
3 that a black man who was struck because he had
4 a goatee and the way that his hair was worn,
5 that that was a nonracially motivated strike
6 that was constitutionally permitted.

7 And it's my view that the U.S. Supreme
8 Court regrets having ever gotten into this
9 whole idea and that they are slowly backing
10 away from it and that I think we are going
11 against the stream to take this concept of
12 Batson and say that we are going to use this
13 to self-impose removing a traditional
14 procedure that we have here out of the fear
15 that it may be unconstitutional.

16 Additionally, Batson doesn't prohibit
17 peremptory challenges, and it certainly
18 doesn't prohibit shuffling the jury. It at
19 most would only prohibit doing that if it's
20 racially motivated or gender motivated and
21 then whatever suspect category they fall on.

22 So I don't see how Batson can ever be
23 used to eliminate the procedure. The most it
24 could be used for is to inquire into someone's
25 motive, but I think there is a valid

1 intellectual basis to say that if I
2 peremptorily strike an individual because they
3 are black or Hispanic or male, that I am doing
4 something that's specifically targeted, but if
5 I merely ask for the intervention of random
6 events, even if I have a motive that's based
7 on gender or race, that that doesn't have a
8 direct connection between my prejudice and
9 what's happening. So I'm not sure that the
10 courts would ever extend the Batson rationale
11 to this randomizing process.

12 And as far as the inconvenience to the
13 courts is concerned, I can understand why the
14 district courts don't like it, but I am a
15 litigator, not a district judge, and to me
16 when that panel walks in and I see that I am
17 going down the toilet, I really would like to
18 have this opportunity to do something to help
19 my client.

20 MR. JACKS: Absolutely.

21 CHAIRMAN SOULES: Rusty
22 McMains.

23 MR. MCMAINS: Well, Mike and I
24 were talking. He makes a point, which I think
25 is valid, that the notion of Batson anyway is

1 that you are protecting the rights of the
2 jurors to serve on the jury panel. I don't
3 think that there is anybody that's ever going
4 to recognize the right of a juror to sit next
5 to another in a particular order, and that's
6 the only thing the shuffling does, is redo the
7 order.

8 HONORABLE SCOTT BRISTER: No.
9 It moves people from No. 4 to No. 34.

10 MR. MCMAINS: It may or it --

11 HONORABLE SCOTT BRISTER: And
12 everybody --

13 MR. MCMAINS: It may or it may
14 not.

15 CHAIRMAN SOULES: One at a
16 time.

17 HONORABLE SCOTT BRISTER:
18 That's the idea. That's the whole idea.

19 MR. JACKS: It also moves
20 them --

21 HONORABLE SCOTT BRISTER: It
22 makes it much less likely for them to get on
23 the jury.

24 MR. JACKS: It makes it much
25 more likely for others --

1 CHAIRMAN SOULES: Okay. Court
2 reporter, you can just relax. You can't
3 possibly take this. Just relax, and when they
4 get through arguing and bickering then we will
5 get back on the record.

6 (At this time there was a
7 discussion off the record, after which the
8 proceedings continued as follows:)

9 CHAIRMAN SOULES: Does anybody
10 want to speak one at a time? Judge Peeples.

11 HONORABLE DAVID PEEPLES: I
12 want to ask a question of Bonnie that makes
13 the point, since I was on the subcommittee.
14 Do you know whether outside the urban areas
15 the smaller counties have the capacity to
16 computer shuffle?

17 MS. WOLBRUECK: Yes. Any
18 county has the availability to do so according
19 to the government code. You have to have an
20 electronic jury plan in order to do that.

21 HONORABLE DAVID PEEPLES: Even
22 in the smallest counties?

23 MS. WOLBRUECK: Even the small
24 counties may elect to have an electronic jury.

25 HONORABLE DAVID PEEPLES: Okay.

1 May elect, but I mean if they were told to do
2 it, could they do it?

3 MS. WOLBRUECK: No. Probably
4 not. I mean, yes, they could, if they had the
5 availability of computers. There is probably
6 about 100 counties yet that do not have
7 computers.

8 MS. SWEENEY: They still cut it
9 up.

10 HONORABLE DAVID PEEPLES: Okay.
11 Thank you.

12 Number one, we are not going to decide
13 this today, and what the subcommittee is
14 looking for is guidance. I want to say my
15 view, and I think -- Paula, correct me -- Ann
16 Cochran was on the phone call and I think she
17 and I were --

18 MS. SWEENEY: She agreed with
19 you.

20 HONORABLE DAVID PEEPLES: Yeah.
21 Number one, we ought to insure randomness in
22 the way people are brought to the courthouse
23 for jury duty. If we can, we ought to do
24 that. Then you have got excuses. People
25 come, they have got little kids, they are over

1 65, or whatever, they get excused and so that
2 changes things a little bit. In addition,
3 people are rescheduled all the time. You
4 know, they have got paid up tickets to Paris
5 or something or whatever, and you reschedule
6 them for a later time. That's going to
7 happen, but number one, when they are brought
8 to the courthouse it ought to be a random
9 process that does it.

10 Okay. Second, once the excuses and so
11 forth, resets have been done, we ought to be
12 sure that it's a random group that goes to the
13 courtrooms, and then once they get to the
14 courtroom I'm in favor of no shuffle because
15 all -- let's be honest about this. You look
16 at the first 24 and you compare them to the
17 spares and if you like the spares better than
18 you like the first 24, you ask for a shuffle
19 if it's a big difference. That's the only
20 reason people do it. It may be Batson, but I
21 think that's the reason people do it, and I
22 think that if it's a random process that sent
23 those 32 or 40 to the court, you know, it's
24 just the luck of the draw. If you like the
25 spares better or vice-versa, there just

1 shouldn't be a shuffle.

2 On the question of resets and so forth,
3 we have had the problem, you know, teachers,
4 you get some and then, say, February, March,
5 or April reset until the summer. It's
6 possible that you get too many teachers on a
7 panel, but if you make them scramble them
8 again once they have been reset to the summer
9 when they don't teach, that may be the best we
10 can do.

11 The problem of strikes or cutbacks and so
12 forth, you know, I think it's horrible if a
13 panel shows up in your room and this was 12
14 people that were rejected in a criminal case
15 or whatever the numbers are and you have got
16 nothing but, quote, "extremists," that's not
17 going to make up a good jury, and so we ought
18 to think about making -- I mean, if a county
19 or a district is going to use, quote,
20 "rejects" there ought to be some requirement
21 that they be shuffled again. Anyway, this is
22 kind of the way I see it, and I think our
23 subcommittee would like to have guidance from
24 the full body and then try to write something.

25 MS. SWEENEY: Because we are

1 diametrically opposed on this.

2 HONORABLE DAVID PEEPLES: Yeah.
3 The main thing that we disagree on is whether
4 there ought to be a shuffle of the panel that
5 comes to court, and you're for it, and Ann and
6 I are against it. Pam, I don't remember where
7 you came.

8 MS. BARON: I'm in the middle.

9 CHAIRMAN SOULES: Depends on
10 the day. Depends on the panel.

11 MS. BARON: Right. I see
12 merits on both positions.

13 CHAIRMAN SOULES: All right.
14 Judge Brister.

15 HONORABLE SCOTT BRISTER:
16 Interesting with -- of course, now we know you
17 can only do the shuffle once, too. So are you
18 reintroducing unfairness? You know, the best
19 thing then is to have the panel come over in a
20 way to be the side that doesn't like the way
21 the panel is set up because then you can
22 exercise the strike and get it set up in the
23 way or the odds -- try to redistribute like
24 you want, and the other side can't undo it.

25 You know, I mean, there is a -- I have

1 the same sense as David. Whether racial or
2 not, there is definitely, you know, the biases
3 of litigators work on, you know, this looks
4 like my juror and doesn't look like my juror,
5 and that's all fine, but to give one side and
6 only one side the power to change it and then
7 it's stuck seems fine if you're the side that
8 asked for it but not if you're the other side.

9 CHAIRMAN SOULES: Robert
10 Meadows.

11 MR. MEADOWS: That's the
12 problem I have with jury shuffle. I'm in
13 favor of it because I believe that no matter
14 how they are originally -- the jury is
15 originally constituted that comes to the jury
16 room or courtroom, if it's clustered in a way
17 that's going to be unfair, you ought to be
18 able to do something about making it a more
19 even distribution in the courtroom and pick a
20 jury from that redistribution, but it is
21 unfair if you like the way the jury looks and
22 the other side doesn't and it gets shuffled
23 and then all of the sudden you're the one who
24 doesn't like the cluster. You're stuck with
25 it. So I don't know, you know, what to do

1 about that. When it's happened to me what I
2 want to do is to shuffle it back.

3 MR. YELENOSKY: Yeah. Allow
4 two shuffles.

5 HONORABLE SCOTT BRISTER: Did I
6 speak in favor of that?

7 MR. MEADOWS: Well, I think if
8 you are going to let one -- if one side -- the
9 way it works is one side likes the way the
10 jury is clustered and the way it looks and the
11 other side doesn't and they are taking a
12 chance that they are going to be able to
13 improve it with the cluster. If they don't
14 improve it, you are not going to have a second
15 request, but it doesn't seem right, as Judge
16 Brister just observed -- and I know he's not
17 arguing for the second reshuffle, but I think
18 that, you know, if you like the jury and then
19 all of the sudden you don't because your
20 opposition got to shuffle it under this rule
21 and you're stuck with it, I mean, where is the
22 fairness in that?

23 CHAIRMAN SOULES: Paula
24 Sweeney.

25 MS. SWEENEY: You know, the

1 problem that the district judges seem to have
2 with it in part is that there is definitely an
3 advocacy component to shuffling, but you know,
4 I keep going back to my central theme on this
5 whole committee. Advocacy is not equal. It's
6 okay to recognize that there is something
7 wrong with this panel that is going to harm
8 your client, and you know, luck of the draw is
9 an extraordinarily unappealing concept when we
10 just flippantly say to somebody who's life
11 depends on the verdict, who will die if they
12 don't get the money they need for medical
13 care, or whatever, "Bummer. You got
14 adjusters," you know, and it is that
15 important. It is that important. Someone's
16 financial life, if they lose a significant
17 verdict, is at stake.

18 MR. MARKS: I'm on your side on
19 this.

20 MS. SWEENEY: I mean, to me it
21 is critical to be able to look at it and say,
22 "This is not fair. It is not representative."
23 Dallas County is not made up of 65 percent
24 accountants, I don't think.

25 HONORABLE SCOTT BRISTER: Close

1 to it.

2 MS. SWEENEY: It seems that
3 way. And therefore, you know, this row of 12
4 people here or the first 24 people that is,
5 you know, all of one or the other is not
6 representative. I recognize that, and on
7 behalf of my client I should be able to fix
8 that by shuffling. If the solution, as Bobby
9 says, is that each side ought to be able
10 allowed to shuffle, frankly, I'd rather take
11 the extra however many minutes and have a fair
12 jury and let's not rush headlong into judicial
13 efficiency and say, "It takes too long. We
14 don't want to do it."

15 CHAIRMAN SOULES: Okay. I'm
16 going to go around the table one more time.
17 Everybody speak their piece as we go, and
18 start here with Orsinger, if he's got anything
19 to say, and then we will take a vote on
20 whether to eliminate the jury shuffle. Okay.
21 Starting down here. Judge Peeples.

22 HONORABLE DAVID PEEPLES: I
23 just want to ask again if you grant the
24 premise that it's a random process that
25 brought them to the courthouse and sent them

1 to the courtroom, okay, if you grant that,
2 what other reason is there for wanting the
3 shuffle other than the luck of the draw tilts
4 the spares in your favor a little bit more
5 than the first one? I mean, is there another
6 reason than that? No.

7 HONORABLE SCOTT BRISTER: No.

8 HONORABLE DAVID PEEPLES:

9 That's all there is to it, and I think that's
10 not enough. You know, luck of the draw if you
11 have got too many accountants, you know, or
12 unemployed or whatever it is, one side doesn't
13 like it, that's tough.

14 MR. YELENOSKY: Well, after
15 listening to this -- and my experience with
16 juries is very limited, but after listening to
17 everyone else, it seems to me that how we vote
18 on whether to shuffle or not is not the real
19 issue. This would be a great article for some
20 law professor because there is some
21 assumptions here about what is a random jury
22 and whether randomness means that the jury
23 comes out with a population that's
24 representative of the regional population.

25 I mean, that's a question, I think, but

1 beyond that then you have got questions about
2 how the peremptory challenges and how the fact
3 that, as Tommy Jacks points out, people may
4 drop out from certain socioeconomic groups
5 because of certain factors that, to me, all of
6 those things become much more important than
7 the shuffling because if they have all dropped
8 out, you are just shuffling what's left
9 anyway. So I don't know that my vote on the
10 shuffling matters as much as all of these
11 other questions about how we pick juries.

12 CHAIRMAN SOULES: Next. Yes,
13 sir.

14 MR. PRINCE: I think we ought
15 to keep the shuffle. I am going to agree with
16 my friends on the plaintiff's Bar on this. I
17 think it's important. Like Richard, I have
18 been in enough rural counties getting enough
19 people where I have seen that it's critical.
20 If I could feel comfort that it was random,
21 which I am not persuaded --

22 HONORABLE DAVID PEEPLES: Not
23 right now.

24 MR. PRINCE: -- in all the
25 courts I have been in that you end up with

1 that. If there was some way to draft a rule
2 that made it random, then I would reconsider
3 that. I think the shuffle is valuable, even
4 though sometimes the other side does it to me
5 and I don't like the result.

6 CHAIRMAN SOULES: Joe Latting.

7 MR. LATTING: I'm for the
8 shuffle because even though it's supposed to
9 be random, random selection -- and it may be
10 random -- it can produce some very skewed
11 results, and I think the important thing in
12 this discussion is that it seems like all the
13 plaintiff's lawyers and the defendant's
14 lawyers are all for the shuffle. The people
15 who have to live and die by this are for it.

16 The judges want to get the trials over
17 faster and they are against it, but what the
18 shuffle does, David, is when you come into the
19 courtroom you see that what was supposed to be
20 a random procedure has, in fact, produced a
21 very aberrant result. If you think it's
22 aberrant enough, you can exercise your right
23 to a shuffle. I don't do that unless things
24 are really one-sided one way or another. If I
25 see a panel I don't particularly like I think,

1 well, it might get worse if we shuffle it.

2 The only time anybody uses it who has
3 good sense is when the panel has come out in a
4 screwy way and the best you can hope for in
5 that is to mix them up again, but I think just
6 all of the lawyers who try cases seem to be
7 for this. And the reason is we know that this
8 random selection process doesn't work the
9 first time even if the hearts are in the right
10 place, and this gives you the chance to
11 correct what is an aberrant result.

12 CHAIRMAN SOULES: Anyone else?
13 Tommy Jacks.

14 MR. JACKS: I do want to say
15 that in my experience both in terms of my own
16 use of it and my opponents' use of it, A, it's
17 rare; and B, contrary to Scott's experience,
18 it is not based on the appearance of the panel
19 racially. In every case where I have seen it
20 done it's because the lawyers have the jury
21 list long enough in advance with the jury
22 information sheets to see that, in my case,
23 the first 24 look like the convention of the
24 local accountancy society or in John's case,
25 you know, looks like the laborers of the world

1 unite on the first row, and it's -- I also
2 don't believe we have a random process, even
3 in counties where the original mailing was
4 random.

5 I know if you go down, as I do, in Austin
6 to the coliseum where the panels are first
7 screened, in Austin the line for those who are
8 sent their way is mainly lower income people
9 who won't get paid for sitting on juries, and
10 they come up with -- the people who make those
11 decisions are pretty liberal about letting
12 them go here.

13 CHAIRMAN SOULES: Anyone else?
14 Okay. Those in favor of abolishing the
15 shuffle show by hands. Two.

16 Those in favor of keeping the shuffle
17 show hands.

18 HONORABLE SCOTT BRISTER: We
19 need more judges on this committee.

20 MR. JACKS: It was randomly
21 picked.

22 CHAIRMAN SOULES: 17 to 2 we
23 keep the shuffle.

24 MR. ORSINGER: Should the
25 record reflect that the two were district

1 judges?

2 MR. LATTING: This shows why we
3 need to have some kind of election for judges.

4 HONORABLE DAVID PEEPLES: I
5 will give you a little trade secret here. If
6 you guys abuse this, you know, if I just bring
7 in a very few spares, you're not going to want
8 a shuffle because it won't make a difference.
9 You guys who want a great, big panel, lot of
10 extras, I'm not going to do that as often
11 because it's going to make you think, gosh,
12 I've got 16 spares. Let's mix them up a
13 little bit. So we will call smaller panels.

14 MR. ORSINGER: That ought to
15 move things along faster.

16 MR. JACKS: Yeah. That really
17 helps a lot. Then you have to call that
18 second panel in.

19 HONORABLE DAVID PEEPLES: You
20 are not going to dismiss many for cause.

21 MR. LATTING: Don't pout now.

22 CHAIRMAN SOULES: All right.
23 Paula.

24 MS. SWEENEY: Let me next
25 direct your attention to Rule 230, and again,

1 I can summarize this pretty easily. Rule 230
2 forbids anyone from asking jurors if they have
3 been convicted of a felony. Felony conviction
4 is a disqualification to jury service. There
5 is clearly an inconsistency there and a
6 problem and, Luke, in fact, this was your
7 suggestion. You wrote to yourself about this.

8 CHAIRMAN SOULES: Yeah. The
9 case came up.

10 MS. SWEENEY: Yeah. There is a
11 case that speaks to that, and it seems to me
12 anyway subject -- but I think the committee
13 needs to talk about it. I don't think we are
14 really divided about it amongst ourselves, but
15 correct me if I'm wrong, you guys, but I think
16 we agreed the rule needs to be deleted or
17 something needs to be done because you have
18 got to be able to find that out. You don't
19 want to go halfway through a trial and find
20 out or after the fact find out that you had a
21 disqualified juror.

22 MR. PRINCE: Can I ask a
23 question? This looks like, looking at the top
24 of the next page, the source of this was some
25 article. Do you know what the history of that

1 is?

2 PROFESSOR DORSANEO: I can't
3 hear you, Mike.

4 MR. PRINCE: At the top of page
5 79 in the rule book it says "Source: Article
6 2145, unchanged." I don't know what Article
7 2145 says.

8 HONORABLE C. A. GUITTARD: It
9 says just this, I expect.

10 PROFESSOR DORSANEO: It says
11 that. It said that when it existed.

12 MR. PRINCE: This. But that
13 article is gone? It doesn't exist anymore?
14 Okay.

15 MS. SWEENEY: What about
16 Article 16, Section 2 of the Constitution?

17 Okay. And it's the one that says you
18 can't have felons on the jury. So we have the
19 constitutional prohibition against felons on
20 juries but an inability to ask them the
21 question.

22 CHAIRMAN SOULES: Don Hunt.
23 And then I will get to Bill.

24 MR. HUNT: Isn't the problem
25 here that this is supposed to be taken care of

1 at the jury pool?

2 MS. SWEENEY: Yeah.

3 MR. HUNT: That they go over
4 the qualifications with them and have some
5 sort of a way to indicate privately before
6 they get to the courtroom that they are
7 disqualified? Well, what more are we going to
8 get from them if we let them ask the question
9 in voir dire?

10 MS. SWEENEY: Well, they still
11 show up.

12 MR. HUNT: Well, I understand,
13 but I don't know that I know what the problem
14 is because I'm not taking a position on it.
15 How does it happen when you have a felon on
16 the jury? How do they get on there? Why
17 aren't they excluded in the screening process?

18 MS. SWEENEY: Well, in the
19 occurrence that I am aware of that happened,
20 the juror showed up late to the central jury
21 room and he missed the speech and he just came
22 and checked in and he came up and was on a
23 jury. And somehow later on way on down the
24 road -- I think it was after the verdict -- it
25 was learned that he was a convicted felon, but

1 no one had asked him the question because he
2 showed up late. So it sort of seems like a
3 safety valve that, you know, you're not going
4 to offend the ones who haven't been convicted
5 of a felony by asking the question in voir
6 dire, and the ones you offend are not going to
7 be on your jury.

8 MR. ORSINGER: Unless they lie.

9 MS. SWEENEY: This is true.

10 CHAIRMAN SOULES: Chief Justice
11 Cornelius.

12 JUSTICE CORNELIUS: I have had
13 this happen several times in my experience,
14 and just recently a case in our court involved
15 it. I think the reason for this rule is that
16 they simply didn't want to embarrass the panel
17 members, but it does put the lawyers in a box.
18 The only way they can find out is to do
19 independent private investigation of the list
20 of jurors before voir dire, and even then
21 sometimes it's not revealed.

22 Like the case we had recently in our
23 court, there was a juror who served and years
24 previously he had been convicted of something
25 that was a felony then but is considered a

1 relatively minor offense now, and of course,
2 when that happens I believe you have to
3 challenge in a criminal case the qualification
4 of the juror. Well, let's see. Maybe what
5 I'm talking about, maybe he was on the grand
6 jury, but anyway that happens, and it's not
7 too rare and --

8 HONORABLE SCOTT BRISTER:
9 Cheerleader mom case is going to have to be
10 tried over again.

11 MS. SWEENEY: Is it?

12 JUSTICE CORNELIUS: But it
13 seems to me that the initial qualification of
14 the panel by the trial judge takes care of
15 this in most cases.

16 PROFESSOR DORSANEO: Mr.
17 Chairman?

18 CHAIRMAN SOULES: Bill
19 Dorsaneo.

20 PROFESSOR DORSANEO: First,
21 both the disqualification in Rule 230 are
22 considerably broader than someone who is a
23 convicted felon. This will reach misdemeanor
24 theft and someone charged by some legal
25 accusation with theft. Now, that always just

1 kind of struck me as odd that it was so broad
2 to begin with, but I think the operative
3 effect of letting counsel ask this question
4 will be that counsel will be required to ask
5 the question all the time, otherwise the
6 disqualification will likely be waived.

7 The case that says it's not waivable
8 probably depends upon the continued existence
9 of this rule which precludes someone from
10 asking. In other contexts where there is a
11 disqualification and you don't ask, you waive
12 it, as I understand the current state of the
13 law. Notwithstanding all of that, this is
14 quite a curious provision, and I doubt that we
15 will ever discover what caused the legislature
16 to pass Article 2145 when they did once upon a
17 time. I would probably be with the people who
18 question why we have such a strange item, the
19 only bit of information about voir dire
20 examination in this rule book altogether.

21 HONORABLE C. A. GUITTARD: Is
22 this provision in the Code of Criminal
23 Procedure?

24 PROFESSOR DORSANEO: I don't
25 know. It strikes me that in criminal cases,

1 and I wish someone would correct me if I'm
2 wrong, that the judges upstairs take on an
3 additional responsibility to cover the
4 disqualification matter because the Court of
5 Criminal Appeals requires it, and I am not in
6 any way, shape, or form sure of that, but I
7 think that's so and I'm recalling more what
8 I've seen happen in front of me in criminal
9 cases where I have been on the panel --

10 HONORABLE C. A. GUITTARD: Some
11 of them do.

12 PROFESSOR DORSANEO: -- more
13 than any Court of Criminal Appeals decision
14 that I have read because I don't read those.

15 MS. SWEENEY: So what's the
16 sense of the --

17 HONORABLE DAVID PEEPLES: Can I
18 make a comment?

19 CHAIRMAN SOULES: Judge
20 Peeples.

21 HONORABLE DAVID PEEPLES: This
22 is more of a problem now than before because
23 there are more criminals and accused persons
24 now than there were 50 years ago and also
25 because we have driver's license, you know,

1 input into the jury pools and not just
2 registered voters. One way to handle it, I
3 don't want to clutter up the instructions in
4 226a any more, but we could just add an
5 instruction to the first group. It's now
6 under Roman numeral one, on what you tell them
7 when they first come in, and we could stick a
8 sentence that says something like, "If any
9 person on this panel has been convicted of a
10 felony," or the rest of them, under
11 indictment, "when we take a recess if you will
12 approach the bailiff and ask to talk to me."

13 PROFESSOR DORSANEO: That's an
14 excellent idea.

15 MR. LATTING: Let's do that.

16 MR. JACKS: That's a good idea.

17 HONORABLE DAVID PEEPLES: And
18 that way they don't have to do it in front of
19 the panel. Even if the first break is when
20 people are going to make their strikes, you
21 would find out about it and you would bring
22 everybody in and correct it if you have to.

23 MS. SWEENEY: So we would draft
24 an amendment because that's already gone to
25 the Court.

1 HONORABLE DAVID PEEPLES: I
2 think that's already gone to the Supreme
3 Court. Yeah. And that's one way where the
4 lawyers don't have to do it, and nobody is
5 going to be embarrassed.

6 MR. YELENOSKY: Well, people
7 are going to be coming up for other reasons,
8 too, right?

9 HONORABLE DAVID PEEPLES:
10 Sometimes.

11 MR. YELENOSKY: The only
12 embarrassment I can see is if people think,
13 "If I go up there, they are going to think I'm
14 a convicted felon."

15 HONORABLE SCOTT BRISTER: In
16 Harris County, now, this is all done at the
17 jury room.

18 HONORABLE DAVID PEEPLES: It's
19 supposed to be.

20 HONORABLE SCOTT BRISTER: You
21 go through the whole list of things and so a
22 whole bunch of people come up, but of course,
23 there is no record on that and then you run
24 into the problem proving that the judge over
25 in the jury assembly room did ask that

1 question and you relied on that so you didn't
2 waive it.

3 CHAIRMAN SOULES: Okay.

4 HONORABLE SCOTT BRISTER: I
5 would move we just drop it.

6 CHAIRMAN SOULES: Well, this
7 RRE vs. Glenn case was reversed and remanded
8 because a convicted felon sat on the jury and
9 the lawyer was never -- couldn't ask the
10 question, and it was reversed and remanded
11 after the trial.

12 HONORABLE SCOTT BRISTER: And
13 if you drop it, you allow the judge or the
14 attorneys -- you know, there is sometimes
15 maybe, I don't know, criminal attorneys or
16 other attorneys may want to do it, want to
17 backstop the judge, doesn't think the judge
18 made it clear.

19 CHAIRMAN SOULES: Well, I mean,
20 if somebody has been convicted of a felony and
21 you ask them and they have to tell you, what's
22 wrong with that? They are convicted of a
23 felony. I mean, it's a stigma, sure, but so
24 what? They did whatever they did.

25 MR. MARKS: Well, why wouldn't

1 Judge Peeples' instruction take care of that?
2 And if they are going to not come forward,
3 they are going to lie about it anyway, and
4 it's going to be reversible either way. So it
5 seems to me that the instruction would do it.

6 CHAIRMAN SOULES: Bonnie
7 Wolbrueck.

8 MS. WOLBRUECK: The
9 disqualification is also listed in the
10 statutes so that it is one of the instructions
11 that the judge impaneling the jury will use,
12 including the exemptions that are listed in
13 the statutes along with the qualifications,
14 and most jury summons probably include those
15 exemptions and qualifications. The jury has
16 the option of circling that, that I'm
17 convicted of a felony, and returning it to the
18 clerk.

19 We get a lot of those, but I'm sorry,
20 many people are not that honest and they will
21 appear on the jury panel and the judge will
22 instruct them also. And we have had it happen
23 before that we have found out later on, only
24 because somebody happened to know somebody
25 that knew somebody that was sitting out there

1 that -- you know, I'm sorry, people are not
2 always that honest. They will not always come
3 up before the judge. Our judges that impanel
4 our juries always mention those
5 qualifications, make sure that everybody
6 understands very clearly what it means, but
7 you know, and I'm not sure what the answer is.
8 You know, another instruction, you know, they
9 have already been instructed once by the judge
10 impaneling.

11 MS. SWEENEY: I would suggest
12 we do what David suggested, which is that we
13 amend 226a, which has already gone to the
14 Court, to add a paragraph where the trial
15 judges say in his or her initial instructions,
16 "Hey, you know, all you felons come up and see
17 me at the break." We will draft it more
18 artfully than that, but does that satisfy
19 the --

20 MR. LATTING: Yes.

21 MS. SWEENEY: -- body? And
22 then we will --

23 CHAIRMAN SOULES: Everybody
24 agree with that? Anybody disagree?

25 HONORABLE SCOTT BRISTER: Well,

1 it's just, I mean --

2 HONORABLE DAVID PEEPLES: It's
3 just one more thing.

4 HONORABLE SCOTT BRISTER: Well,
5 it duplicates. The practice is it's done in
6 the jury assembly room. I always do it and
7 duplicate it anyway just because I don't like
8 to try cases twice, but it is duplicative of
9 current practice for impaneling juries. It's
10 triplicative if you consider the summons sent
11 out that asks the same question, and I would
12 prefer just to drop 230 and don't mandate
13 whether you do or don't have to do it. If
14 people want to do it, they can. If judges
15 want to do it, they can. If they don't want
16 to do it, they can take the risk. If
17 attorneys don't want to do it, they can take
18 the risk. I mean, let's leave a little bit.
19 I thought you-all were the ones that wanted
20 options. I mean, in my car wreck cases they
21 don't care whether there is felons on there or
22 not.

23 PROFESSOR DORSANEO: True.

24 CHAIRMAN SOULES: Okay.

25 Anything else on this?

1 MS. SWEENEY: Can we get a
2 vote?

3 CHAIRMAN SOULES: Okay. Paula
4 then has suggested, and I heard a second, that
5 there be an instruction in 226a for the judge
6 to inquire in the trial courtroom of the panel
7 members whether there would be anyone
8 convicted of a felony.

9 Now, that's got to be done I guess not
10 just "come see me at the break," but it's got
11 to be done in such a way as to invoke a
12 response.

13 MS. SWEENEY: What I would
14 suggest is that we get a sense of either do we
15 do that, or do we just delete the rule and
16 leave it up to the parties?

17 MR. YELENOSKY: Yeah. Once
18 again, we have three options. Like yesterday.

19 HONORABLE C. A. GUITTARD: Are
20 we going to delete the rule either way?

21 MR. MARKS: This Rule 230
22 doesn't say that the party shall not ask. It
23 says, "He shall not be asked." It sounds to
24 me like that includes the judge, too.

25 HONORABLE SCOTT BRISTER:

1 Widely ignored.

2 MR. MCMAINS: But he is
3 already.

4 HONORABLE SCOTT BRISTER: I do
5 on every trial.

6 MR. MCMAINS: You're in
7 violation of the rules.

8 CHAIRMAN SOULES: Richard
9 Orsinger.

10 MR. ORSINGER: So far we have
11 been talking about a statutory disability
12 based on a conviction, but the rule also talks
13 about a pending criminal charge. Is that in
14 the statute, or is that not in the statute?

15 HONORABLE DAVID PEEPLES: I
16 think it is.

17 MR. ORSINGER: It's in the
18 statute, also?

19 HONORABLE C. A. GUITTARD:
20 Right.

21 HONORABLE SCOTT BRISTER:
22 Interestingly, not for civil. If you are
23 accused of a misdemeanor theft, you are
24 disqualified. If you are convicted, you're
25 fine. No joke. As long as you're convicted

1 of the misdemeanor theft, it's no problem.
2 Opposite rule for criminal. Interestingly
3 enough for civil --

4 MR. YELENOSKY: So if you're
5 trial is on now --

6 HONORABLE SCOTT BRISTER: As
7 long as you are just accused, we don't want
8 you, but if you are actually convicted of
9 misdemeanor theft...

10 CHAIRMAN SOULES: Okay.
11 Somebody make a recommendation on what we do.

12 MR. ORSINGER: I would like you
13 to offer the alternative of deleting the rule
14 to be included in the vote because that's what
15 I think. So maybe we could either leave it
16 the same, adopt David Peeples' recommendation,
17 or drop the rule.

18 MR. MARKS: Do both.

19 PROFESSOR DORSANEO: Both.

20 JUSTICE CORNELIUS: Yeah, both.

21 CHAIRMAN SOULES: Okay. So --

22 MS. SWEENEY: Well, how about
23 first does everybody agree we should drop the
24 rule? Because I think everybody does, I
25 think.

1 CHAIRMAN SOULES: Okay. Those
2 in favor of dropping Rule 230 and doing
3 something else show by hands.

4 MR. ORSINGER: I don't want to
5 do something else.

6 CHAIRMAN SOULES: Okay. Those
7 in favor of dropping 230, period, show your
8 hands. 17 in favor of repealing Rule 230
9 then.

10 Those in favor of preserving it? None.
11 Okay. Now what on 230?

12 MS. SWEENEY: I think the
13 choice now is, A, don't do anything else about
14 it and just leave it silent and let things
15 shake out as they will, which is sort of
16 what's been happening, or B, add an
17 instruction to 226a for the trial judge to be
18 required to read in every instance.

19 CHAIRMAN SOULES: Okay. Those
20 in favor of A.

21 MS. BARON: Which was what?

22 JUSTICE CORNELIUS: What is A?

23 CHAIRMAN SOULES: A is do
24 nothing other than repeal 230. Five.

25 Those in favor of putting an instruction

1 in 226a? 13. So 13 to 5 we draft an
2 instruction in 226a.

3 So 230 is going to be repealed and an
4 instruction is going to be put into 226a, and
5 I guess we are silent on whether the lawyer is
6 doing anything in addition to 226a
7 instruction.

8 PROFESSOR DORSANEO: What I
9 would interpret that is that the lawyers can
10 voir dire the jury on that and remind them
11 what the judge said in the instructions and
12 feel more comfortable asking, "Anybody on the
13 first row? Anybody on the second or anybody
14 on the third row?" That won't take very much
15 time and it's not very obtrusive, either.

16 MS. SWEENEY: We will draft
17 something and submit it back for the next
18 meeting on that.

19 Okay. The next one to direct your
20 attention to if I can is Rule 241, and Judge
21 Peeples, can you discuss this? It's the
22 liquidated/unliquidated default.

23 HONORABLE DAVID PEEPLES: Yes.

24 It's on pages --

25 MS. SWEENEY: 802 to 805.

1 HONORABLE DAVID PEEPLES: Judge
2 Bill Coker from Dallas had two points. He
3 wants us to change the Rule 47, which says
4 when you are suing on an unliquidated claim
5 you don't mention an amount, and he says, you
6 know, "You people have got to tell me in
7 special exceptions. That's the time for it,"
8 and then he says once that's done, then when
9 there is a default judgment on an unliquidated
10 claim where the petition names an amount you
11 shouldn't have to hear evidence on it, and we
12 are against both of those. I don't feel that
13 strongly about 47. I heard Jim Cronzer say
14 way, way, way back the reason for that was
15 when people would name an astronomical amount,
16 never produce papers and, therefore, don't do
17 it.

18 MR. MCMAINS: Of course, they
19 do it anyway.

20 HONORABLE DAVID PEEPLES: Yeah.
21 But we thought that there is something healthy
22 about people having to come in and eyeball the
23 judge, even if it's just for a minute, to put
24 on proof about your unliquidated damages.
25 There might be some questions, and there is

1 less chances for games and so forth. And so
2 we ought to keep the unliquidated/liquidated
3 differences --

4 HONORABLE C. A. GUITTARD:

5 Amen.

6 HONORABLE DAVID PEEPLES:

7 -- that we have in Rules 241 and 243.

8 CHAIRMAN SOULES: So the
9 subcommittee recommends no change at all on
10 Rule 241?

11 HONORABLE DAVID PEEPLES: Yes.

12 Right.

13 CHAIRMAN SOULES: Okay. Let's
14 vote on that first. Those who agree no change
15 show your hands.

16 Anyone disagree?

17 PROFESSOR DORSANEO: Well, I
18 have a slight disagreement. Let me see if
19 that's in this rule.

20 No, it's not. I beg your pardon.

21 CHAIRMAN SOULES: Okay. So
22 it's unanimous no change.

23 HONORABLE DAVID PEEPLES: Now,
24 the next one has to do with Rule 243. Again,
25 we have a letter saying this business about a

1 writ of inquiry never happens, nobody knows
2 what it is, and so forth, and we agreed. And
3 so basically --

4 MR. MCMAINS: It does happen.

5 HONORABLE DAVID PEEPLES: Writ
6 of inquiry happens?

7 MR. MCMAINS: Yeah. There are
8 several reported cases about that in the last
9 couple of years.

10 HONORABLE DAVID PEEPLES: What
11 does it look like?

12 PROFESSOR DORSANEO: The writ
13 of inquiry practice is not common.

14 JUSTICE CORNELIUS: Are you
15 talking about a court of inquiry or --

16 HONORABLE DAVID PEEPLES: We
17 needed Rusty on our subcommittee. What is it,
18 Rusty?

19 PROFESSOR DORSANEO: As I
20 understand it the writ of inquiry would have
21 actually had some court functionary go out
22 into the community and investigate and provide
23 information about the damages, and that may
24 once upon a time have been the way it was
25 done, but it's not the way it's done now and

1 the language should be replaced with what's
2 done now.

3 MR. MCMAINS: Which is they
4 just impanel a jury.

5 CHAIRMAN SOULES: Yeah.

6 HONORABLE DAVID PEEPLES: This
7 is not a big issue in the state of Texas, but
8 we thought it just looks ridiculous.

9 CHAIRMAN SOULES: Well, the
10 Supreme Court had a decision on this, and it
11 was argued that because this rule exists the
12 trial judge had to convene the jury to try a
13 default judgment case.

14 HONORABLE DAVID PEEPLES: Well,
15 we are not saying take out the jury stuff.
16 It's just writ of inquiry.

17 CHAIRMAN SOULES: And another
18 rule says that if you default, you have waived
19 your jury, and the Supreme Court went with the
20 other rule, saying basically this didn't
21 control it, and it doesn't mean anything now
22 that the Supreme Court has resolved that
23 difference.

24 PROFESSOR DORSANEO: But still
25 the language, if you go and -- if you went and

1 researched it, it says that historically a
2 procedure that we don't follow is the
3 procedure to follow, and evidence needs to be
4 presented if it's an unliquidated claim, and
5 the judge needs to determine the damages on
6 the basis of that evidence. And rather than
7 saying a writ of inquiry is awarded, which is
8 if it means something -- if it means what I
9 just said, it's a very odd way of saying it.

10 HONORABLE DAVID PEEPLES: It's
11 not hurting anything to be in the rule, and
12 frankly, I couldn't care less about it.

13 HONORABLE C. A. GUITTARD: All
14 the practical effect of it is that you can go
15 in and ask for a default judgment and then
16 prove it up later. That's all a writ of
17 inquiry means from the current practice, isn't
18 it?

19 CHAIRMAN SOULES: I guess it's
20 conceivable that it could be a -- it can't
21 really be a no answer default. There could be
22 a default on the liability and then the
23 defendants show up and ask for a jury on
24 damages, but it only happens when a defendant
25 has made a jury demand. And there is another

1 rule, and I'm not sure which one it is, I'd
2 have to look, where it said that in a
3 postanswer default situation when the
4 defendant doesn't show up, even though he's
5 made a jury trial, jury demand, he waives his
6 jury and the court can hear the case and
7 decide the case in a postanswer default.

8 243 contradicts that, and that was the
9 point that went to the Court. "If the cause
10 of action is unliquidated, or be not proved by
11 an instrument in writing, the court shall hear
12 evidence as to damages and shall render
13 judgment there-for." We could stop, period,
14 right there no problem, but then the rest of
15 it is a problem, "unless the defendant shall
16 demand and be entitled to a trial by jury, in
17 which case the judgment by a default shall be
18 noted, a writ of inquiry awarded, and the
19 cause entered on the jury docket." All the
20 rest of that stuff suggests that the judge has
21 to have a jury trial where the defendant is
22 not even in the courtroom and it's a
23 postanswer default.

24 We can fix this by stopping "shall hear
25 evidence as to damages and shall render

1 judgment" and strike the rest of the rule and
2 then it conforms to whatever other rule it is
3 that we amended some time ago that said that
4 in a postanswer default situation you don't
5 have to conduct a jury trial if it will be a
6 jury demand.

7 PROFESSOR DORSANEO: That would
8 be 220 that I think you are talking about.

9 HONORABLE DAVID PEEPLES: There
10 is comparable language in Rule 241 which deals
11 with liquidated damages.

12 PROFESSOR DORSANEO: I think if
13 you just take out the -- after I look at it
14 more closely, just take out "a writ of inquiry
15 awarded," and it would work just fine. There
16 can be default cases where you get notice of
17 an interlocutory default and you make a
18 request for a jury determination of
19 unliquidated damages in time to be entitled to
20 have that matter done before a jury.

21 It doesn't happen very often, but it's
22 conceivable that someone would be able to
23 litigate the damage question before a jury and
24 wouldn't find out about the interlocutory
25 default within time to do that, but this "writ

1 of inquiry awarded" is really not right. I
2 see that it's restricted to the jury case, and
3 it's not right and not helpful and just
4 screwy.

5 MS. SWEENEY: And that's the
6 suggestion that was made to the advisory
7 committee, was simply to delete those five
8 words and leave the rest of it the way it was,
9 just take "a writ of inquiry awarded" and
10 leave it as-is, with which we concur.

11 CHAIRMAN SOULES: So you're
12 suggesting what, now?

13 MS. SWEENEY: Delete those
14 words.

15 CHAIRMAN SOULES: Delete what
16 words?

17 MS. SWEENEY: "A writ of
18 inquiry awarded."

19 HONORABLE C. A. GUITTARD: So
20 moved.

21 CHAIRMAN SOULES: And you want
22 to leave in "unless the defendant shall demand
23 and be entitled to a trial by jury in which
24 case the judge by default shall be noted and
25 the cause entered on the jury docket," leave

1 all of that in? Okay? Okay with me. I guess
2 the other rule would trump this one because
3 the "and be entitled to a trial by jury" would
4 be --

5 HONORABLE SCOTT BRISTER: Could
6 be waived when you don't show up to actually
7 try -- when you don't show up to actually try
8 it.

9 JUSTICE CORNELIUS: Well, the
10 rules provide you waive it now if you don't
11 show up for trial.

12 CHAIRMAN SOULES: That's right.
13 But because of all of this language there was
14 an appellate case. Okay. Those in favor of
15 deleting --

16 MR. ORSINGER: I wanted to
17 say --

18 CHAIRMAN SOULES: Richard
19 Orsinger.

20 MR. ORSINGER: 241 and 243
21 seems to me to be folded in together because
22 although all of these rules, 239 through 244
23 relate to default judgments, 243 doesn't say
24 that it relates to default judgments, and
25 since it doesn't -- and at the beginning of

1 it, it says, "If the cause of action is
2 unliquidated, the court shall hear evidence
3 unless the defendant shall demand a jury, in
4 which event judgment by default shall be
5 noted." It seems to me that that section is
6 dangling and it ought to be part of 241 and
7 241 ought to have some kind of proviso that it
8 only relates to default judgments.

9 PROFESSOR DORSANEO: Well, the
10 task force has recommended that this section
11 to the rule book be revised for a number of
12 reasons, and the revision would basically
13 create one default judgment rule somewhat like
14 the Federal default judgment rule rather than
15 20 rules that were written more than a hundred
16 years ago and that have been kind of copied
17 forward without any change whatsoever.

18 MR. ORSINGER: Bill, did the
19 task force propose a rule?

20 PROFESSOR DORSANEO: Yes.

21 MR. ORSINGER: Well, I would
22 move that Paula's committee look at the task
23 force proposed rule of consolidated default
24 judgments and then report back maybe if we can
25 modernize it or --

1 MS. SWEENEY: Where is that?

2 PROFESSOR DORSANEO: It's in
3 the judgment section of the task force report.
4 It's called "Default Judgments." That's a
5 choice you would make, is to whether you put
6 it in the judgment sections of the rule book
7 or you put it up here in the trial section,
8 but in the Federal rule book default judgments
9 are in the judgment part and we decided that
10 that organization was sensible from the
11 standpoint of somebody finding it.

12 MR. ORSINGER: The task force
13 report was passed out at one of our first
14 meetings, and I think that Holly still has
15 some copies, and she can mail you one if you
16 don't have one.

17 MS. SWEENEY: What does the
18 cover sheet say?

19 MR. ORSINGER: Report of Texas
20 Supreme Court Task Force on the Rules of Civil
21 Procedure and cover letter from Bill Dorsaneo
22 on the inside to Justice Hecht.

23 PROFESSOR DORSANEO: I can send
24 it to you if you don't have it.

25 MS. SWEENEY: Would you,

1 please?

2 PROFESSOR DORSANEO: But in
3 this same section of the rule book it says
4 some other odd stuff. "On the appearance day
5 of a particular defendant and at the hour
6 named in the citation," et cetera, "the court
7 or clerk in open court shall call in their
8 order all the cases on the docket." That
9 doesn't happen, and that maybe once upon a
10 time happened when people were issuing writs
11 of inquiry.

12 HONORABLE DAVID PEEPLES: Luke,
13 I think we need to move on.

14 CHAIRMAN SOULES: All right.
15 Move on by doing what?

16 HONORABLE DAVID PEEPLES:
17 Voting on what you called --

18 HONORABLE C. A. GUITTARD: May
19 I ask this with respect to 241? If it's a
20 default judgment and the claim is liquidated,
21 how is there a jury issue?

22 MS. SWEENEY: We are not in
23 that rule. That's 241.

24 CHAIRMAN SOULES: 243 is if the
25 cause is unliquidated.

1 HONORABLE C. A. GUITTARD: 241.

2 In 241 it says if the cause is liquidated and
3 proved by an instrument in writing then you
4 may demand a jury, but what kind of a jury
5 issue is there?

6 CHAIRMAN SOULES: Okay. Well,
7 this is going to get --

8 MS. SWEENEY: We will look at
9 the task force recommendation on defaults and
10 draft something.

11 CHAIRMAN SOULES: In any event,
12 those in favor of deleting "a writ of inquiry
13 awarded" show by hands.

14 Those opposed? No one? Bonnie
15 Wolbrueck.

16 MS. WOLBRUECK: I just have one
17 more comment. It says "and the cause entered
18 on the jury docket." We would propose that
19 Rule 218 be repealed, that that reference back
20 to that jury docket it says that the clerk
21 shall keep a jury docket in which shall be
22 entered in their order the cases in which the
23 jury fees have been paid, and that's an
24 obsolete practice that's no longer done. And
25 so just so that the subcommittee knows not to

1 make that reference back to that jury docket.

2 MS. SWEENEY: Right.

3 MS. WOLBRUECK: I would assume
4 that that's the reference that goes back to
5 Rule 218.

6 MS. SWEENEY: Okay. Judge
7 Peeples, you still have --

8 HONORABLE DAVID PEEPLES: Okay.
9 On page 817 of Volume 2 there is a letter from
10 Hadley Edgar which points out a mild conflict.

11 CHAIRMAN SOULES: I'm sorry.
12 What rule, Judge? I was trying to catch up.
13 257?

14 HONORABLE DAVID PEEPLES: Yes.

15 CHAIRMAN SOULES: Okay. Thank
16 you.

17 HONORABLE DAVID PEEPLES: It's
18 on page 817 of the materials. The Civil
19 Practice and Remedies Code conflicts with 257
20 and 86(1) of the venue rule. The remedies
21 code says basically that if you file a motion
22 with your answer you can have venue changed
23 because you can't get a fair trial in that
24 county. It doesn't actually come out and say
25 you waive it if you file it after your answer,

1 but it sort of tends in that direction. 86(1)
2 says if you can't get a fair trial it's
3 handled under 257, and 257 says nothing about
4 time deadlines or a certain deadline.

5 PROFESSOR DORSANEO: I think
6 all of that was intentional. It was believed
7 at the time we did the venue rules shortly
8 after -- I guess we are probably talking about
9 1984, shortly after the legislature
10 surprisingly passed the new venue statute that
11 their section on motions to transfer was
12 drafted in a curious and probably literally
13 inaccurate manner from the standpoint of
14 legislative intent, because it seems to say on
15 its face that all motions to transfer are
16 subject to due order principles, including
17 inability to obtain an unfair -- inability to
18 obtain a fair trial and ones done even by
19 agreement.

20 And the committee at an earlier time
21 thought that the law probably continued to be,
22 notwithstanding some odd statutory language,
23 that it was a motion to transfer on the basis
24 of an inability to obtain a fair trial, that
25 that could be raised by anyone once that

1 became apparent, which I believe has been the
2 law historically, and that if people wanted to
3 agree to change venue pursuant to whatever
4 rule in the 250s that's about, that they could
5 make that agreement even though someone didn't
6 file a motion to transfer in anticipation of
7 such an agreement being made at some
8 subsequent time.

9 And I think the problem is really with
10 the statute and not with our rules, which
11 frankly, have tried to fix the statute on the
12 theory that these rules are as authoritative
13 as any other Texas Supreme Court
14 pronouncement.

15 CHAIRMAN SOULES: Our reaction
16 to the venue statute when it was passed was
17 that it didn't deal with 257. It just dealt
18 with original selection of venue, mandatory
19 venues, and wrestling with the old 1995
20 problems and not 257 problems, and we just
21 kind of by sheer brute force ignored it as it
22 might apply to 257.

23 MS. SWEENEY: So in essence
24 this committee has already made the decision
25 that this letter is about and we have our own

1 internal stare decisis that traditionally we
2 have not revisited issues unless something
3 else has happened. Nothing else has happened.

4 CHAIRMAN SOULES: Well, let's
5 see. When was the --

6 HONORABLE DAVID PEEPLES: 1990
7 is the letter.

8 CHAIRMAN SOULES: When did they
9 pass the new venue statute?

10 MR. HUNT: '83.

11 PROFESSOR DORSANEO: '83.

12 CHAIRMAN SOULES: '83. So this
13 is after the statute and after the venue rules
14 were amended that this comes up saying that
15 there is a conflict, but we didn't think there
16 was a conflict at the time.

17 MS. SWEENEY: Right.

18 CHAIRMAN SOULES: We just
19 thought that the venue statute didn't have
20 anything to do with 257. That was a separate
21 problem. It was really not a choice as far as
22 prejudicial forum.

23 MS. SWEENEY: So the committee
24 has already looked at it?

25 CHAIRMAN SOULES: Yeah.

1 HONORABLE DAVID PEEPLES: The
2 problem is that this provision of the Civil
3 Practice and Remedies Code expressly used the
4 same language "an impartial trial cannot be
5 had," same language that's used in 257, but I
6 don't know what we can do it about it. We
7 can't change the statute.

8 CHAIRMAN SOULES: Well, the
9 Court permits this and I think we want the
10 Court to continue to permit it and the rules
11 permit it, so I guess --

12 MS. SWEENEY: So our response
13 to the letter is this has already been -- this
14 was decided years ago by this committee, and
15 we are not going to revisit it again?

16 CHAIRMAN SOULES: Probably.

17 MS. SWEENEY: Okay.

18 PROFESSOR DORSANEO: Well,
19 there are inconsistencies. There are other
20 ones. This is not the only one, and that
21 particular statutory provision you are talking
22 about is a nuisance because it makes some very
23 bad suggestions, but I have not minded arguing
24 that a statute doesn't mean what it seems to
25 say because that's too stupid for it to mean

1 that in the past, and that would be the
2 argument that I would make now.

3 CHAIRMAN SOULES: Richard
4 Orsinger.

5 MR. ORSINGER: My subcommittee
6 is rewriting the venue rule because of Rules
7 86 through 89, but Alex Albright is doing that
8 for us and I'm wondering at the suggestion
9 that perhaps we ought to take these rules and
10 combine them with Rules 86 through 89 and come
11 up with one venue set of rules that we put
12 together somewhere rather than having venue
13 covered in two different places.

14 And if you want, we can bring 257 in
15 exactly the way it's written, but I do think
16 that it makes sense. I mean, one of the
17 things that we are trying to do in our area of
18 the rules is to -- issues came up as part of
19 pleadings, like 86 through 89, pleadings of
20 the defendant. So you have got some venue
21 rules in there that relate to pleadings of the
22 defendant, but then you have venue rules later
23 on that would apply to either the plaintiff or
24 the defendant, and there is no good logic in
25 segregating venue between the venue that's in

1 a defendant's pleading and venue that's in a
2 motion filed later in the case. It seems to
3 me like all the venue rules ought to be
4 together. We ought to consider the fact that
5 you stick some them somewhere in the rules, so
6 I would suggest that if the committee wants
7 that, we can fold those rules into our rules
8 and come back with an integrated package.

9 CHAIRMAN SOULES: I don't know
10 how good an idea that is. I like 257 being
11 way over there someplace and totally
12 different, but it's up to you-all.

13 MR. ORSINGER: I certainly --
14 we don't have to write it in there. We have
15 got one set of statutes, though, that kind of
16 slop over all of it, don't we?

17 CHAIRMAN SOULES: Apparently
18 so. Okay.

19 MS. SWEENEY: I think we should
20 move on from that because there is one more we
21 need.

22 CHAIRMAN SOULES: Anyway, at
23 this time we are not going to recommend any
24 change, and Orsinger's group is going to
25 rewrite the 80 series of venue statutes.

1 Right, at this time no change in 257?

2 MS. SWEENEY: Right.

3 CHAIRMAN SOULES: Okay.

4 Unanimously no change in 257 at this time.

5 MS. SWEENEY: The last thing we
6 need direction on -- Pam, are you ready to
7 talk on it -- is the disqualification of
8 jurors issues. You want to lay that out?

9 MS. BARON: Yeah. Rule 292, we
10 have two letters at pages 870 through 72 of
11 the second volume of the agenda. We found
12 that comments in both of these letters have
13 merit and basically have three suggestions for
14 changes to Rule 292 that we want to bring
15 before the committee. I'd like to start with
16 the second letter first, which talks about how
17 this -- yeah, also I have a discussion at the
18 end of the materials, if that would help.

19 MS. SWEENEY: Yeah. You guys
20 have this in the materials we just gave you.

21 CHAIRMAN SOULES: Okay. Where
22 are we?

23 MR. ORSINGER: 292.

24 MS. SWEENEY: I think it's the
25 last three pages of what Lee handed out.

1 MS. BARON: The first problem
2 we have is how this rule provision works with
3 the alternate juror statute. We now have the
4 ability to have up to, I think, 4 extra jurors
5 on a panel of 12 who are considered to be
6 replacements if, in fact, a jury is disabled
7 or disqualified in the middle or during the
8 trial, but the way the rule is written is it
9 requires the concurrence of the vote of ten of
10 the original jurors and does not contemplate
11 alternates, and there is a case out of the
12 Dallas Court of Appeals that held if one of
13 the alternates is one of the ten votes, then
14 you don't have a verdict, and so what we
15 propose to do is to write -- make changes to
16 the rule that would contemplate a useful role
17 for the alternate jurors when they are, in
18 fact, made part of the panel of 12. Can we
19 get a vote on that just to begin with?

20 MS. SWEENEY: Yeah. Yeah.

21 CHAIRMAN SOULES: Let me see.
22 So looking at 292 itself you say it's the last
23 three pages in these materials?

24 MS. SWEENEY: Yeah.

25 PROFESSOR DORSANEO: Why not

1 take out the word "original"?

2 HONORABLE DAVID PEEPLES: Pam
3 has a draft rule that's on the next to the
4 last page, a redlined version and a clean
5 version on the last two pages of this handout.

6 MS. BARON: It's not the most
7 artful in that you have to keep referring to
8 alternate jurors, but because "original" was
9 so prominent in the rule initially we thought
10 we needed to do that just to make it clear. I
11 would prefer that we not necessarily discuss
12 the wording right now.

13 MS. SWEENEY: But the concept.

14 CHAIRMAN SOULES: Okay. Well,
15 that has to --

16 MS. BARON: The concept that we
17 are trying to protect is that what we want --

18 CHAIRMAN SOULES: Okay. And
19 the concept is that an alternate juror has the
20 same right to vote among the 12 as the
21 original 12?

22 MS. SWEENEY: Or if you end up
23 with less than, which we are going to get to
24 in a minute.

25 HONORABLE DAVID PEEPLES: It

1 can help make up the majority if you have to
2 use some.

3 CHAIRMAN SOULES: Okay. Those
4 in favor show by hands.

5 Any opposition? That's unanimous, and
6 the drafting can be resubmitted in case you
7 want to do any polishing on that. That's 292.

8 MS. BARON: Okay. The second
9 problem is a letter referred to us from the
10 court rules committee, and they proposed a
11 change to the rule that increases the bases on
12 which the jurors are excused. Right now it's
13 death, whether they die or are disabled. They
14 propose language that would say "or be
15 discharged from further service for any
16 reason" in order to address the situation in
17 which a juror is later found to have a legal
18 disqualification and is then excused from the
19 jury, which would not be death or disabled as
20 those are currently defined, possibly.

21 We thought that the language that the
22 court rules committee proposed was much too
23 broad because it would not be limited simply
24 to the disqualification standards, which are
25 fairly readily available in the statute, and

1 what we would propose to do would be to add
2 disqualification as a ground on which jurors
3 may be excused, and you can reduce the number.

4 CHAIRMAN SOULES: Bill
5 Dorsaneo.

6 PROFESSOR DORSANEO: Someone
7 correct me if I'm wrong. Isn't the problem
8 that they were talking about the word
9 "disabled" and whether "disabled" means that
10 you can't get to the courthouse because there
11 is a flood in Houston?

12 MS. BARON: Well, we also
13 addressed that. I think we have a couple of
14 different issues. We have a definitional
15 problem on what is disabled. Disabled is used
16 in the Texas constitution in Article 5,
17 Section 13, and there are very confusing
18 decisions from miscellaneous courts of appeals
19 and the Texas Supreme Court on what
20 constitutes being disabled on the part of a
21 juror.

22 And very early on in the 1800s the
23 Supreme Court held that if a family member was
24 severely ill, that would not render a juror
25 disabled and then there have been glosses on

1 that. Now if the juror comes in and says, "I
2 feel sick or physically or mentally impaired
3 because there is an illness in my family,"
4 then in that case they can be, but if they are
5 just distraught generally they can't be. And
6 we did want to take care of at least that
7 problem that if you have a severe illness or
8 death of a near relative that the juror should
9 be rightfully excused at that point without
10 affecting the validity of the trial. That's
11 one issue.

12 The second issue or issues that we just
13 didn't feel like we could resolve in the
14 rules, which are the issues when a juror is
15 stuck in a flood, weather. We can't write the
16 rule for every situation that can come up, and
17 the Supreme Court in McDaniel vs. Yarborough,
18 which was decided last fall, I think, was a
19 five-four split on whether a juror down in
20 Houston where flooding was just horrible and
21 couldn't get to the courthouse could, in fact,
22 be thought of as disabled and the trial could
23 continue. And the Court held that, no, that
24 was not -- did not constitute being disabled
25 within the meaning of the constitution and the

1 rule. We just didn't feel like we could
2 address every permutation of what a disability
3 is but that we could address severe illness
4 and death of a near relative.

5 PROFESSOR DORSANEO: Well, but
6 the Supreme Court, it seems to me they have
7 considered this issue recently and decided on
8 policy grounds that "disabled" is going to
9 have to mean disabled because of the right to
10 a jury trial that a litigant has, and I
11 wouldn't personally feel that this needs any
12 reconsideration by us, despite the fact that
13 it may have been five to four.

14 CHAIRMAN SOULES: We are really
15 talking about a couple of things here, and
16 what we are fixing is that, I guess, any
17 number of alternates can be seated, no limit,
18 and so that's one problem. And any of those
19 can sit, I guess, in some order. I never have
20 known exactly how they are seated but
21 ordinarily it's the 13th who goes on the jury
22 and then the 14th and the 15th. No rule says
23 exactly how that happens, but so that we keep
24 12.

25 MS. BARON: Right.

1 CHAIRMAN SOULES: Now we are
2 talking about shrinking 12 down to 9.

3 MS. BARON: Yes.

4 CHAIRMAN SOULES: That was
5 something that could have been taken care of
6 at the beginning of the trial by getting
7 alternates if you get enough alternates.

8 MS. BARON: Right.

9 CHAIRMAN SOULES: I think
10 whenever you get your jury panel down to under
11 12 there ought to be some serious reason why
12 parties have to get the case finished by a
13 jury smaller than 12, and disabled or death
14 may be the right standard for that.

15 Comments? Judge Brister.

16 HONORABLE SCOTT BRISTER: That
17 basically then contemplates a regime where you
18 have alternates on every case, which is
19 expensive, and this arises very rarely, but
20 that Yarborough case was very unpopular in
21 Houston, especially with trial judges, and
22 there are more former trial judges on the
23 court now than there were when Yarborough was
24 entered.

25 Because it's a big city, some jurors -- I

1 have had this once or twice -- actually just
2 disappear during trial. No phone, no
3 response, no nothing. So we shut the trial
4 down, even though I've got 11 people left who
5 go back in the jury room and decide 11-0 or
6 10-1 to do something, and we're saying that's
7 no good. That's not justice. I don't think
8 there's -- you know, I mean, I would go with
9 the dissent in that case rather than the
10 majority.

11 I mean, I think there ought to be some
12 good cause. I don't think I would just do it
13 because the juror is creating trouble with my
14 bailiff or something like that. There ought
15 to be some good cause kind of standard. You
16 ought to have the right to object to it and be
17 heard about it, whether that's enough, but I
18 do have jurors call in, "I'm sick. I have
19 thrown up three times." Make a record on it.
20 Okay. Well, now, is that sick enough, or is
21 that not sick enough?

22 And a judge has got to have some
23 discretion to make a call there rather than
24 just stopping. We will stop until this juror
25 gets well. That just is very inconvenient in

1 a busy urban court setting, not to say that it
2 can't be abused and you ought not be able to
3 challenge it in an important case, et cetera,
4 but it's expensive to have jurors, alternates
5 in every case, and it's expensive to just stop
6 when somebody disappears.

7 CHAIRMAN SOULES: Well, does
8 disability include the illness of the juror
9 rendering him unable to serve day-to-day, the
10 next day?

11 MS. BARON: Well --

12 HONORABLE SCOTT BRISTER: But
13 that's the question.

14 MS. SWEENEY: There is no time
15 period.

16 HONORABLE SCOTT BRISTER: You
17 know, and who makes that call? I mean, I get
18 them on the phone and we discuss what their
19 symptoms are and what their problem is.

20 MS. SWEENEY: Make a diagnosis,
21 call in a prescription.

22 HONORABLE SCOTT BRISTER: Well,
23 I mean, I feel like I have to.

24 CHAIRMAN SOULES: There are
25 lots of venues, lots of trial judges, and lots

1 of room for scary things if there are not some
2 limitations on --

3 HONORABLE SCOTT BRISTER: I'm
4 just reporting it's very unpopular with
5 Houston judges because it stops lots of
6 trials, is the fear.

7 CHAIRMAN SOULES: Well, I think
8 a juror that can't cross the creek is pretty
9 much disabled to serve.

10 HONORABLE SCOTT BRISTER:
11 That's what I would have thought, too.

12 CHAIRMAN SOULES: But the
13 Supreme Court doesn't, but that's not --

14 MR. ORSINGER: Weren't you in
15 the dissent on that one?

16 JUSTICE HECHT: I was.

17 HONORABLE SCOTT BRISTER: I
18 thought so.

19 JUSTICE HECHT: Where were
20 you-all when I needed you?

21 MS. BARON: Well, but, Luke, we
22 did not feel we could write a rule that would
23 address a flooding problem. We left it to
24 "disabled," which the courts are grappling
25 with, even though we wanted to give a little

1 bit more guidance to make clear that that
2 included statutory constitutional
3 disqualification and that it would include
4 illness or death within a family.

5 We didn't feel like we could do much more
6 beyond that without getting into the problem
7 that you have stated, which is that we could
8 get all sorts of reasons and all sorts of
9 problems depending on where you are on letting
10 these jurors off, and we have got to balance
11 the rights of the litigants to exercise their
12 strikes and have some role in selecting the
13 jury with going forward expeditiously, and it
14 takes a while, you know, to get down to -- we
15 have given enough categories. We have also
16 got alternates for the big, long cases which
17 we might want to use, but in the short cases
18 maybe sometimes it's just going to be bad
19 luck.

20 CHAIRMAN SOULES: Okay. Just
21 so we don't get into a problem of whether this
22 is inclusive and exclusive will you add
23 "illness of the juror or a near relative"?

24 MS. SWEENEY: Good point.

25 CHAIRMAN SOULES: Okay. Vote

1 on 292. Those in favor of 292 as proposed by
2 the subcommittee show by hands.

3 HONORABLE SCOTT BRISTER: Wait.
4 Is that to add disability or broaden
5 disability or what?

6 MS. BARON: Maybe we should
7 take it a step at a time.

8 HONORABLE DAVID PEEPLES: There
9 is a third issue. Disqualification we haven't
10 gotten to, and Pam's language is in the last
11 sentence of the rule which is at the end of
12 these materials that Lee passed out.

13 CHAIRMAN SOULES: Okay. Vote
14 on it except for the last sentence. Those in
15 favor of 292 as proposed except for the last
16 sentence. That's taking out "ten members of
17 an original or five members of an original"
18 and putting the replacements -- giving them
19 authority to serve as jurors. That's what
20 that does.

21 Is there any objection to that? No
22 objection. So that's unanimously passed. The
23 last sentence would read now, "The trial court
24 may properly determine that a juror is
25 disabled because of the death or severe

1 illness of the juror or a near relative.

2 MS. BARON: We need to rewrite
3 that, but that would be the concept. We have
4 already got death of the juror in there.

5 MR. LATTING: You don't want to
6 say the trial court may determine he's
7 disabled because of death. That's just silly.

8 MS. SWEENEY: We will work on
9 the language. It's the concept we want
10 you-all's input on.

11 HONORABLE DAVID PEEPLES: The
12 issue that Judge Brister raised is, you know,
13 it might not be a severe illness if they are
14 throwing up and so forth. I wouldn't call it
15 severe, but it keeps them from being there for
16 a day or two, and if we want that, the judge
17 to have the discretion to excuse that juror
18 and kick in the 10-1 verdict, we might want to
19 say something about "temporarily disabled." I
20 don't know, but this might be too -- the
21 language too strong to cover that situation.

22 HONORABLE SCOTT BRISTER: Yeah.
23 I would like broader than this, actually.

24 HONORABLE DAVID PEEPLES: Have
25 you got any wording?

1 CHAIRMAN SOULES: All right.
2 Write up a standard, and we will look at it
3 next time.

4 MS. BARON: Okay. Luke, can we
5 do one more thing?

6 CHAIRMAN SOULES: Yes. Let me
7 just get my --

8 HONORABLE SCOTT BRISTER: Could
9 you-all try drafting a broader one, too, or
10 present us an alternative?

11 MS. BARON: Okay.

12 HONORABLE SCOTT BRISTER:
13 Thanks.

14 CHAIRMAN SOULES: Okay. Now,
15 on the next to the last page, same place we
16 were looking at 292 but right above there,
17 says, "The rule does not address jurors
18 impaneled but subsequently found to be
19 disqualified. A juror may be impaneled and
20 then later be found to be disqualified. The
21 alternate juror statute contemplates such an
22 event."

23 HONORABLE DAVID PEEPLES: Luke,
24 can I just say what this does?

25 You find out that a felon got on the

1 jury. You try it, but there is somebody on
2 there. This gives the judge the right to say,
3 "You're out of here," and you can go with a
4 10-1 verdict.

5 MS. BARON: Right.

6 HONORABLE DAVID PEEPLES: Just
7 as though the person were disabled or dead,
8 the juror who lied and didn't tell us they
9 were a felon.

10 CHAIRMAN SOULES: That's
11 disqualified we are talking about?

12 HONORABLE DAVID PEEPLES: Yes.

13 MS. SWEENEY: Disqualified.

14 CHAIRMAN SOULES:

15 Disqualification. Any opposition to that?

16 Okay. If the juror is disqualified, you
17 can shrink the jury down to ultimately
18 denying, I guess, some of that. Okay.

19 Okay. We are adjourned until our March
20 meeting which will be here at the Bar center,
21 and thank you very much.

22 (Meeting adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 20, 1996, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$ 4,083.00.
CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 8th day of February, 1996.

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