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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 16, 1997

(AFTERNOON 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 16th day of
May, A.D., 1997, between the hours of 12:20
o'clock p.m. and 2:55 p.m. at the Texas Law
Center, 1414 Colorado, Room 101, Austin, Texas
78701.

COPY

MAY 16, 1997

MEMBERS PRESENT:

Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Anne L. Gardner
Donald M. Hunt
Gilbert I. Low
John H. Marks Jr.
Anne McNamara
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

EX OFFICIO MEMBERS:

Honorable William Cornelius
O.C. Hamilton
Doris Lange
Mark Sales
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Prof. Alexandra Albright
Hon. Ann T. Cochran
Michael T. Gallagher
Hon. Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Joseph Latting
Thomas S. Leatherbury
Hon. F. Scott McCown
Russell H. McMains
Robert E. Meadows
Richard R. Orsinger
Hon. David Peeples
David L. Perry

EX-OFFICIO MEMBERS ABSENT:

Hon. Nathan L. Hecht
Hon. Paul Womack
Paul N. Gold
David B. Jackson
W. Kenneth Law
Hon. Paul Heath Till

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2 CHAIRMAN SOULES: Let's be in
3 session. Don, you want to -- I think we will
4 just start here on the third supplemental
5 agenda. This is recent stuff that has come
6 in, and you will see the dates on the various
7 inquiries as they come through, all since we
8 started our work two years ago.

9 Most of it looks like it's even in 1996,
10 and with the exception of a few things that we
11 have held over here that Bill talked about, a
12 couple of things that Orsinger has got left,
13 venue by Alex Albright, and the other things
14 we have talked about this morning that are
15 still pending, which are not very many, we
16 have done all the inquiries that were in those
17 huge agendas that we have packed back and
18 forth for a couple of years, and this is
19 information that's come in since those were
20 put together, and a lot of this I think has
21 been done. So why don't we start with Don,
22 and, let's see, is Steve Susman still here?

23 MR. BECK: He's still here.

24 CHAIRMAN SOULES: Okay. Then
25 we will go to Steve and Paula and take the

1 people that are here and get that out of the
2 way. Even the people that are not here that
3 are subcommittee chairs, we may be able to get
4 some of these things done just by going
5 through the agenda, and I suspect we will get
6 done today. Don.

7 MR. HUNT: Thank you,
8 Mr. Chairman. The third supplemental agenda
9 contains only three suggestions. There is a
10 single page, one page, that's laid out for
11 you. It's duplex, back and front, of course.
12 If you can find that one page then you will
13 have that before you, and if you don't have
14 it, they are right up there. Single page.
15 It's denominated "Texas Rule of Civil
16 Procedure 296-331."

17 The subcommittee has met on these three
18 suggestions and recommend no action. We can
19 go through them one by one, and I think you
20 will see why we did. First it was suggested
21 by Luke Soules -- as you may know, he reads
22 every opinion that comes down, and when he
23 reads an opinion that may concern some
24 subcommittee he immediately dispatches it to
25 the subcommittee chair.

1 He sent this to me last November, and it
2 was because the Texarkana court in the opinion
3 of Grossnickle against Grossnickle sort of
4 sent a plea to this body to consider whether
5 Rule 298 should be changed, and the change
6 that the Texarkana court was recommending, or
7 at least the judge who wrote that opinion
8 wanted to change from when the action must be
9 taken from filed to served or mailed, and this
10 comes up in the context of Rule 298.

11 Rule 298 controls the request for
12 additional or amended findings of fact. As
13 the rules are presently constituted there is a
14 ten-day time window in which an agreed
15 litigant who has received the first set of
16 findings of fact may request amended or
17 additional findings, and the opinion was
18 making the point that if the trial judge was a
19 little slow in getting those out to the
20 lawyer, the time in which to do something may
21 well expire before the lawyer ever receives
22 it.

23 Now, what, of course, the court could not
24 have known is that we had already responded to
25 that in a way. Our proposed amendment to Rule

1 298 partially solved that problem by extending
2 the time from 10 to 20 days so that in almost
3 all instances, except perhaps when a trial
4 judge just flat forgets, that extra ten days
5 ought to give enough time to permit the lawyer
6 to receive the notice of the original findings
7 and then request additional findings or
8 amended findings.

9 Now, the extension of that time period
10 from 10 to 20 days in the judgment of the
11 subcommittee ameliorated that problem, to an
12 extent. You can't solve it entirely because
13 sometimes a trial judge puts it in his out
14 basket and it never gets picked up or he puts
15 it back in the shuck or something happens to
16 it. Of course, the remedy there is that the
17 appellate court can grant some relief there in
18 a little different kind of a way, but the
19 subcommittee is making no recommendation of
20 changes.

21 As Bill Dorsaneo commented when we talked
22 about this, that everything else is really
23 triggered on when it's filed, and lawyers have
24 a duty to try to keep up with it, and it would
25 be difficult to, in effect, change our very

1 carefully structured timetables now for
2 appellate purposes to sort of in the middle
3 make it flexible, extendable, depending on
4 whenever the lawyer finally got the original
5 findings. You would never get to Day 120, if
6 the original findings were still sitting in
7 the judge's out box or mistakenly put back in
8 the file.

9 So based on the duty the lawyer has to at
10 least keep up with the case, particularly
11 where findings have been requested and there
12 is a deadline for doing that, a lawyer has got
13 to come in -- if the lawyer who is requesting
14 hasn't received it, the lawyer has got to come
15 in and make a request that the judge act,
16 remind the judge if the judge hadn't acted.
17 If you have got that duty occurring at the
18 same time, it's not much of a problem, really,
19 to impose a duty on the lawyer to check to see
20 that findings have been signed but not mailed
21 out or that the mail has gone astray.

22 So for those reasons we recommend no
23 change. We think the amended rule takes care
24 of most of the problems that can be solved.
25 We can't solve all problems of people who do

1 things, people who make mistakes, but to the
2 extent it can be solved, we think we have
3 solved it with the additional ten days and
4 decline to make any other changes.

5 CHAIRMAN SOULES: Chief Justice
6 Cornelius, I guess I would like to have your
7 input on it. You were on the panel. Of
8 course, this is Judge Grant's opinion.

9 JUSTICE CORNELIUS: Right. I
10 didn't write that opinion, but I agree with
11 Don that the change already made in this rule
12 probably takes care of that. It's very
13 unlikely that the problem will occur again
14 since the period has been extended to 20 days.

15 CHAIRMAN SOULES: Any other
16 discussion on this? Committee recommends no
17 change.

18 Any dissent from that? Okay. Unanimous
19 no change.

20 MR. HUNT: The second
21 suggestion comes from my Lubbock friend Hugh
22 Harrell. I'm not certain to which rule this
23 applies. It may apply to current Rule 300 or
24 301, but Hugh suggests a very good idea, but
25 like a lot of good ideas, I'm not sure that we

1 can do anything about it. He is complaining
2 of the practice that occurs sometimes in
3 Lubbock where a trial judge takes something
4 under advisement and you don't see it for a
5 year, and he wanted a rule that would require
6 a trial judge to act within 30 days after
7 taking a matter under advisement.

8 The subcommittee believed that while that
9 was a worthy idea, like trying to get the bell
10 around the cat's neck we had no mouse that
11 could draft a rule that would make trial
12 judges perfect, and that's really what, I
13 think, the rule contemplates. It's a good
14 idea but --

15 MR. YELENOSKY: Yeah. That's
16 no reason not to try.

17 MR. HUNT: There is no
18 solution. Judge Brister, you might comment on
19 how a rule like that would --

20 MR. YELENOSKY: Yeah. We don't
21 count on 76a.

22 HONORABLE SCOTT BRISTER: Why
23 don't you do what they do in Arizona, where if
24 the judge doesn't rule on it in I think it's
25 30 days you send a letter in to the Supreme

1 Court and his salary stops.

2 MS. SWEENEY: All right. So
3 moved.

4 HONORABLE SCOTT BRISTER: As
5 long as you don't -- you know, the problem
6 with anything like that from a lawyer's
7 perspective is the judge is not ruling, not
8 ruling, you say, "Judge, I mandamused you.
9 You must rule."

10 Judge says, "Okay. I'll rule. You
11 lose." It's a problem. I acknowledge it's a
12 problem, but I don't know what you can do to
13 make --

14 JUSTICE CORNELIUS: Some states
15 have rules for appellate judges to render
16 their decisions within six months or their
17 salary stops.

18 MR. MARKS: Are you for that,
19 Judge?

20 JUSTICE CORNELIUS: No.

21 CHAIRMAN SOULES: Okay.
22 Subcommittee recommends no change.

23 Any dissent? No dissent. That's
24 unanimous for no change.

25 MR. HUNT: The third suggestion

1 comes to us in a curious way. The Court Rules
2 subcommittee had a suggestion made to it.
3 Patrick Hazel is the subcommittee chair, and
4 the suggestion made to that subcommittee was
5 to amend Rule 329b and permit the appealing of
6 the granting of a motion for new trial on an
7 abuse of discretion standard.

8 That subcommittee unanimously rejected
9 that, but because it was a suggestion out that
10 had been proposed Luke again requested that we
11 look at it, and so we did, and we think
12 Patrick Hazel's subcommittee made the right
13 decision, and it's primarily because it's so
14 hard to get a judge to grant a new trial
15 anyway. Most of the time when a new trial is
16 granted they are granted for very good
17 reasons, and that ought to stay nonappealable.

18 That's been the rule for a good long
19 time, and it works. It's so rare that you
20 have an abuse in this area where a trial judge
21 will grant a motion for new trial for little
22 or no reason, and we felt as if that's not a
23 bad trade-off, to give a trial judge the
24 power, even if it's abused once in a hundred
25 times.

1 Because when you start counting a hundred
2 times that the trial judge has granted a
3 motion for new trial, if once it's abused and
4 99 is correct, that's a pretty good batting
5 average, and I'm not sure that I want to take
6 that power away from trial judges to look at a
7 situation in a case that's been tried and for
8 whatever reason grant a new trial. I'm not
9 sure that the appellate courts ought to
10 investigate the reasoning process of a trial
11 judge who is close to the case and knows it,
12 and good, bad, or indifferent, retry it.
13 That's a better solution. So the subcommittee
14 recommends no change.

15 MR. HAMILTON: Well, first of
16 all, I don't think Pat's subcommittee rejected
17 it. Pat's subcommittee had a hard time coming
18 up with a rule, and they are still working on
19 it, but this idea comes about because of the
20 mandate of the Supreme Court on the one hand
21 in trying to reduce costs of litigation.
22 There are many occasions, especially in South
23 Texas, that involve toxic tort cases or
24 whatever that involve weeks and weeks and
25 weeks of trial that cost 2, 3, \$400,000 in

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defense costs to defendant, and some of the judges down there have a practice of every time the plaintiff loses he automatically gets one or two new trials.

So some of the defense firms are just plugging it into their formula that they have to try the case at least three times before they are going to get a judgment that will stand up, and the trial judges will grant the motions for new trial in the interest of justice without any particular reason articulated, and so one of the things that we were looking at is whether the trial judge ought to have to be required to state specifically what the reasons for granting the new trial are and make that appealable because it would certainly be cheaper to appeal that narrow decision on an abuse of discretion than it would be to retry a case and take several weeks to try it.

And it cuts both ways. I mean, if you have a trial judge that favors defendants, who's going to always grant new trials in favor of the defendants, why, it cuts both ways. So there is a lot to be said for an

1 appellate review of an improper granting of a
2 new trial.

3 CHAIRMAN SOULES: Anything else
4 on this? Okay. Those who favor no change
5 show by hands. Five.

6 Those who favor a change to appeal the
7 granting of a new trial show by hands. Six.
8 Six to five it passes.

9 PROFESSOR DORSANEO: Six to
10 six.

11 CHAIRMAN SOULES: Six to six.
12 Let's vote again.

13 MR. BECK: Luke, let me ask a
14 question. Do we know what other states have
15 done in this area? How many states allow the
16 appeal of an order granting a motion for new
17 trial? Do we have any idea at all?

18 CHAIRMAN SOULES: No idea. I
19 know what the Federal system is.

20 MR. BECK: Yeah.

21 CHAIRMAN SOULES: But I don't
22 know what the state practice is.

23 PROFESSOR DORSANEO: It's
24 likely none.

25 CHAIRMAN SOULES: It's probably

1 none. Anne Gardner.

2 MS. GARDNER: Well, I didn't
3 vote, but not because I'm not interested in
4 the subject. I think I have mixed feelings,
5 and I'm not clear what we are voting on. Are
6 we voting on a specific amendment? Because it
7 seems to me that this is an issue that would
8 need further study if we are going to
9 seriously consider it.

10 For example, you know, if the trial judge
11 does retain plenary power to grant a new trial
12 for any reason and in the interest of justice,
13 and so how are you going to review that on an
14 abuse of discretion standard unless you take
15 away that power from the judge to grant a new
16 trial? Sometimes that's a very, very
17 beneficial thing to have when the case
18 wouldn't exactly be reversible on appeal,
19 nevertheless in the whole picture, but it's
20 clear that there was a miscarriage of justice.

21 On the other hand, I had a case where a
22 judge was clearly biased, and I think I have
23 mentioned that case in here before. I will
24 never forget it, where a judge granted a new
25 trial and then promptly recused himself, and

1 everyone knew that he had been biased by
2 something that he had heard from the
3 community, but there was nothing that could be
4 done about it. And, you know, if the order
5 was void, that kind of an order granting a new
6 trial maybe would be appealable, if you could
7 go back and challenge that he was biased.

8 Anyway, my question is regarding how
9 would we write it and who would study it and
10 what are we voting on?

11 CHAIRMAN SOULES: Well, right
12 now we are voting on what's on page 286 of the
13 materials.

14 MS. GARDNER: Just the general
15 concept of should we --

16 CHAIRMAN SOULES: No. There is
17 a rule there.

18 MS. GARDNER: Oh.

19 MR. HAMILTON: Well, Luke, let
20 me say that if this is the rule that Pat Hazel
21 sent, that's not what's on the drawing board
22 now before the Court Rules Committee. There
23 has been some more discussion on that.

24 CHAIRMAN SOULES: Okay. Well,
25 this is all we've got.

1 MR. HAMILTON: Okay. I thought
2 we were just voting on the concept of whether
3 this committee here needed to revisit that.

4 CHAIRMAN SOULES: Well, this is
5 just an unbridled open appeal from a granting
6 of a new trial. That's what the subcommittee
7 has voted against. Justice Duncan.

8 HONORABLE SARAH DUNCAN: I'm
9 against the proposed rule, although, like
10 Anne, I have mixed feelings about it. I don't
11 perceive -- but maybe I'm wrong -- but I don't
12 see this to be a problem in any part of the
13 state other than certain parts of very small
14 certain parts of the state. It causes me to
15 go back to a suggestion I made earlier. I do
16 think we need an interlocutory appeal
17 procedure, certification procedure. I think
18 this is an extremely good example of how it
19 could work.

20 If the grant of a new trial can't
21 adequately be explained, it can be, in my
22 view, an abuse of discretion; and it can cost
23 a huge amount of money and time and use of
24 judicial resources; but I'm against giving
25 everybody in the state the right to appeal the

1 grant of a new trial when it doesn't seem to
2 be a statewide problem; but I think with an
3 interlocutory certification procedure like the
4 Federal courts have you could address the
5 problem in particular cases, whether it's in
6 Fort Worth or in South Texas or wherever it
7 is.

8 And I was supposed to have drafted a rule
9 about that a long time ago, but then the
10 appellate rules got all the treatment they
11 got, and I sort of gave up.

12 CHAIRMAN SOULES: Okay. Any
13 other discussion?

14 MR. BECK: Luke?

15 CHAIRMAN SOULES: David Beck.

16 MR. BECK: Let me make a
17 suggestion. I voted "no," and the reason I
18 voted "no" is because I'm, frankly, interested
19 in taking a closer look at this, but I don't
20 feel that strongly about -- I don't feel that
21 strongly about the right of appeal. I would
22 like to know more information about it. I
23 would like to know, for example, what the
24 statistics show about the number of new trials
25 that are granted. I think that we keep

1 statistics on that. I would like to find out
2 what some other states do, you know, what
3 their body of evidence and data show.

4 And it may be that -- you know, at least
5 my own decision may be that we ought not to
6 have this; but on the other hand, I'd sure
7 like to take a look at it, and I just think
8 it's a pretty important issue. So I would
9 suggest that you appoint somebody to look into
10 it further or have Don's group do it.

11 CHAIRMAN SOULES: All right.

12 MR. BECK: In conjunction with
13 what Pat Hazel's group does.

14 CHAIRMAN SOULES: Well, if
15 Court Rules is working on this, can we just
16 expect something from Court Rules if they want
17 to tender it or if somebody wants to -- David,
18 you can take on -- if somebody wants to
19 volunteer to do this.

20 MR. BECK: I will volunteer to
21 do it.

22 CHAIRMAN SOULES: Don Hunt's
23 committee has already decided we don't need
24 it. If some new committee wants to get
25 together and work on it --

1 MR. BECK: Okay. I will be
2 glad to do it. I will check with Pat Hazel
3 and find out what they're doing because there
4 seems to be some question about what the
5 status of that is.

6 MR. MARKS: I would just like
7 to add something to what David said, and even
8 if statistically we find there aren't many
9 motions for new trial granted, if there is a
10 certain part of the state where this is
11 happening, there certainly should be some
12 means by which that could be addressed, and
13 some abuse of discretion standard or something
14 like that, David, I think would be most
15 appropriate.

16 HONORABLE SARAH DUNCAN: And
17 would David's committee, subcommittee, think
18 about an interlocutory certification
19 procedure?

20 MR. BECK: Okay.

21 CHAIRMAN SOULES: Okay. Anyone
22 who wants to volunteer to help David on that
23 just get to him. Okay. Anne Gardner wants to
24 do it. Who else wants to help on that?
25 Anyone else?

1 MR. MARKS: I'll help.

2 CHAIRMAN SOULES: John Marks.

3 Okay. For July. And in this report that
4 comes through they recall that at one time
5 first granting was not appealable but another
6 one was. What have we got? We have got two
7 new trials can be granted, and that's it?

8 MR. HAMILTON: Yes. Two.

9 CHAIRMAN SOULES: Where is
10 that?

11 PROFESSOR DORSANEO: That's
12 because of evidentiary insufficiency, and if a
13 judge wants to grant a new trial, he can say
14 it's because of something else.

15 PROFESSOR CARLSON: Bad karma.

16 CHAIRMAN SOULES: Where is that
17 rule?

18 PROFESSOR CARLSON: Rule 326,
19 Luke.

20 CHAIRMAN SOULES: 326.

21 MR. HUNT: Luke, that was one
22 of the rules that was not carried forward in
23 the proposal sent to the Supreme Court.

24 PROFESSOR DORSANEO: I think
25 for that reason, is that it's so easily evaded

1 it's hardly worth having.

2 MR. HAMILTON: So that was not
3 carried forward?

4 MR. HUNT: Was not.

5 MR. HAMILTON: Okay.

6 CHAIRMAN SOULES: Well, think
7 about no more than two trials can be granted,
8 period.

9 MR. HAMILTON: So without that
10 rule does that mean now that there is an
11 unlimited number of new trials can be granted?

12 PROFESSOR DORSANEO: With that
13 means that.

14 MR. HUNT: Yes.

15 CHAIRMAN SOULES: Yeah. With
16 or without it.

17 PROFESSOR DORSANEO: Unlimited
18 may be an overstatement.

19 HONORABLE SARAH DUNCAN: Not in
20 South Texas.

21 CHAIRMAN SOULES: Okay. So
22 that rule fails to pass by a tie vote of six
23 to six and then we have taken action on the
24 record here to permit David Beck an ad hoc
25 committee to offer something in its place if

1 they choose to do so. Steve Susman, you've
2 got a report. Where is he? I just saw him.

3 HONORABLE SARAH DUNCAN: He
4 left his stuff. He just stepped out.

5 MR. PARSLEY: I will see if I
6 can get him.

7 CHAIRMAN SOULES: Well, Paula
8 is here. Paula, you want to give your report
9 now and then we will get Steve back in here?

10 Okay. Let's go to Paula. That commences
11 on what page?

12 MS. SWEENEY: One moment,
13 please.

14 It's third supplemental agenda. Look at
15 Bates stamp 227.

16 CHAIRMAN SOULES: 227. Okay.
17 That's where it starts.

18 MS. SWEENEY: And our
19 subcommittee did meet and discuss these
20 suggestions. There are four of them. This
21 first one is a suggestion from Richard
22 Orsinger, and it has to do with a number
23 of -- in summary form I call them Arizona jury
24 rule proposals or things that they have
25 actually adopted out there, allowing lawyers

1 to make brief opening statements at the
2 beginning of each day, make a brief opening
3 statement before the voir dire, that sort of
4 thing.

5 Because there is a committee that has
6 been constituted by Justice Cornyn, a task
7 force I think it's called, on all of these
8 issues, we deemed it would be superfluous for
9 us to consider it. That I understand to be
10 their primary mission, is to look at these
11 Arizona rules and other like rules. So we
12 thought it would be inappropriate or
13 superfluous for us to go into it at this time,
14 and our vote was not to do so, unless this
15 committee chooses to direct us to do so.

16 CHAIRMAN SOULES: Okay. The
17 Supreme Court has a task force working on all
18 of this?

19 MS. SWEENEY: Yes, sir.

20 CHAIRMAN SOULES: Through page
21 what?

22 MS. SWEENEY: Well, that goes
23 all the way through 254, that suggestion.

24 HONORABLE SCOTT BRISTER: Yeah.
25 Both of these suggestions are being debated

1 and will be subject to part of that task force
2 report.

3 MS. SWEENEY: Yeah.

4 HONORABLE SCOTT BRISTER: Which
5 I think it's due this summer.

6 MS. SWEENEY: So they are
7 already right in the middle of that, so unless
8 there is a dissent that would be our
9 suggestion, is that we not pick this up.

10 CHAIRMAN SOULES: Okay. We
11 will table these subject to receiving the task
12 force report, if we are asked to review it.

13 MS. SWEENEY: All right. The
14 next one is on Bates stamp page 255, a
15 suggestion by Judge Brister. I don't know why
16 this is back in this agenda. We have covered
17 this and argued about it.

18 HONORABLE SCOTT BRISTER:
19 That's been voted down already.

20 MS. SWEENEY: Yeah. Three or
21 four or five times.

22 HONORABLE SCOTT BRISTER: But
23 I'm bringing it back up to the task force,
24 just so you'll know.

25 CHAIRMAN SOULES: Do you agree,

1 Judge Brister, that we have got disposition of
2 this?

3 HONORABLE SCOTT BRISTER: Yeah.
4 We have disposed of that.

5 CHAIRMAN SOULES: Okay.

6 MS. SWEENEY: The next one is
7 on the next page over, and there is actually
8 not really a Bates stamp on it, but it's 256.
9 It's Richard Orsinger again, allowing jurors
10 to write questions, and for the same reasons,
11 we suggest that that is already being handled
12 by Justice Cornyn's task force, and the next
13 is on page --

14 CHAIRMAN SOULES: Well, let's
15 see. 256 --

16 MS. SWEENEY: Permits jurors in
17 civil cases to submit written questions and to
18 take notes, and that's, I think, right in the
19 middle of what the task force is doing.

20 HONORABLE SCOTT BRISTER: Yeah.

21 CHAIRMAN SOULES: We have
22 already got the next rule.

23 MS. SWEENEY: You're on 259.6?

24 CHAIRMAN SOULES: No. To
25 permit lawyers to re-argue a case if a jury is

1 deadlocked, at least if the judge gives an
2 instruction of the rule that allows you to
3 argue again.

4 MS. SWEENEY: Right. So that
5 already exists, and the other part of it is
6 being handled by the task force.

7 CHAIRMAN SOULES: Okay. Do we
8 need to do anything further on that? No one
9 thinks so. Okay.

10 MS. SWEENEY: The last is on
11 Bates stamped page 259.6, and it's the same
12 thing, really. It's a suggested change to the
13 rules that would allow jurors to take notes
14 and so on, and again, that's something that's
15 being handled by the task force and not
16 something that we should be involved with.

17 CHAIRMAN SOULES: Okay. We
18 will table that as well then, subject to if we
19 receive a report from the task force and we
20 are asked to review it.

21 MS. SWEENEY: Voila.

22 CHAIRMAN SOULES: Is that the
23 last?

24 MS. SWEENEY: Yes, sir.

25 MR. BECK: Good report, Paula.

1 MS. SWEENEY: Thank you. How
2 was that, guys?

3 (Applause)

4 MS. SWEENEY: This is Teflon.

5 CHAIRMAN SOULES: Well, let's
6 see, there is a long letter here, Paula.
7 Where is this? On page 260 from Louis Muldro
8 about the charge rules.

9 MS. SWEENEY: Sorry. And those
10 have already been addressed in this committee.
11 We went through this -- we have had this
12 letter for awhile, and we went through it.
13 These rules have already been voted on and
14 adopted and sent to the Supreme Court.

15 CHAIRMAN SOULES: Does he raise
16 any issues of concern in the face of our rule
17 that we sent to the Court?

18 MS. SWEENEY: He doesn't raise
19 anything that was not already covered by
20 voluminous correspondence and discussion.

21 CHAIRMAN SOULES: Okay.

22 MS. SWEENEY: And sorry.
23 That's why I didn't bring that back up, but we
24 went through and covered all of that, both at
25 the time of the jury charge task force that

1 Judge Cochran headed starting five years ago
2 and then coming forward from there, but this
3 actual set of suggestions has already been
4 discussed.

5 CHAIRMAN SOULES: Oh, we have
6 actually addressed each one of these?

7 MS. SWEENEY: Yes.

8 CHAIRMAN SOULES: Each one of
9 his --

10 MS. SWEENEY: Yes.

11 CHAIRMAN SOULES: --
12 complaints?

13 MS. SWEENEY: Correct.

14 CHAIRMAN SOULES: Since we got
15 his letter we have talked about it?

16 MS. SWEENEY: Yes. Yes.

17 CHAIRMAN SOULES: Okay.

18 MS. SWEENEY: And that's in the
19 disposition chart.

20 CHAIRMAN SOULES: That's
21 already in your prior disposition chart?

22 MS. SWEENEY: Which is
23 somewhere.

24 CHAIRMAN SOULES: Very good,
25 and that gets us to Don Hunt again. Let's go

1 to 523. The two changes sought in the justice
2 rules, one of them we have already passed,
3 Holly advises me. We have changed the --
4 Bates No. 287. I apologize. 287.

5 First let's go to 290. I think we have
6 already done this. There was a complaint that
7 the 45-day fuse on a trial setting was too
8 long in justice court, and what did we do
9 about that? 290 to 297.

10 MS. GARDNER: Luke, this is
11 Anne Gardner. I think our subcommittee
12 presented that in our disposition chart a
13 couple of meetings ago.

14 CHAIRMAN SOULES: I think we
15 shortened the time. I just want to be sure
16 that we -- what's your memory, Anne, on how we
17 resolved this?

18 MS. GARDNER: My memory is that
19 we approved what the Court Rules recommended
20 and shortened the time.

21 CHAIRMAN SOULES: Okay. Well,
22 in the event that we did not approve Court
23 Rules' recommendation is there any opposition
24 to that? Just basically changing the justice
25 court rules to reasonable notice, no time as

1 far as trial setting is concerned. Notice to
2 the parties, reasonable notice to the parties.
3 No objection? Okay. It's unanimously passed
4 again.

5 And then backing up to 289 there is a
6 justice court rule that they are complaining
7 about that Court Rules has offered a fix. A
8 party with affidavits of two credible persons
9 can always get moved to the next justice
10 precinct. So they are going around town from
11 justice precinct to justice precinct with no
12 limitation. Apparently there is nothing for
13 the judge to decide once the filing has been
14 done, so they want to limit the moves to two.
15 Any opposition to that? No opposition. It's
16 unanimously recommended.

17 Now, let's go to Alex Acosta's agenda,
18 and that will begin on page 1. See what these
19 say. We will just have to wade through these.
20 Richard Orsinger deferred until July. Alex
21 Albright, maybe Steve can cover that, but he's
22 not back yet. So let's just see if we can get
23 through these Rules 1 to 14. 114, Bates 114.
24 114. Justice O'Connor. I don't know enough
25 about computers to -- it looks like it makes

1 sense, but this is really an edit change.

2 MR. YELENOSKY: She's just
3 saying that it would be easier to do a
4 computer search if we call the rule something
5 different. This isn't specific to Rules 1
6 through 14, but rather to all the rules.

7 CHAIRMAN SOULES: New way to
8 cite. Okay. Anybody got a recommendation
9 about this?

10 HONORABLE SARAH DUNCAN: Can
11 you hold on just a second?

12 CHAIRMAN SOULES: Sure.

13 MR. BECK: Luke, I'm not clear
14 what is being asked here. Are they saying
15 that the official citation of the Texas rules
16 should be TRCP? Is that what they are saying?

17 MR. YELENOSKY: That's the way
18 I read it.

19 CHAIRMAN SOULES: Well, it's
20 more than that. What they want to do, instead
21 of in the rule book having it say "rule" here
22 it would say "TRCP" and the TRAP Rules -- oh,
23 wait a minute. That would say, "TRE," I
24 guess.

25 HONORABLE SARAH DUNCAN: CVE.

1 CHAIRMAN SOULES: It's CVE the
2 way she's got it, but if it goes to common
3 rules it would be TRE, and the civil rules
4 would be TRCP, and you wouldn't have "rule"
5 anyplace because if you just say "Rule 326"
6 there may be a lot of Rule 326's pop up.

7 MR. YELENOSKY: But what she
8 wants to do is to be able to search and find
9 references to the rules in a case, and so what
10 that would require us to do is to require
11 judges to use that kind of reference, and even
12 if we could change it in the rules -- and that
13 sounds to be a question of proper form and, I
14 mean, blue book form, I guess, and I don't
15 know how you change that, but I don't know
16 that we can do that.

17 CHAIRMAN SOULES: But she wants
18 a new beginning, with the adoption of the new
19 rules you could make it easier to search if
20 you tag them like that.

21 MR. YELENOSKY: Well, I don't
22 know but --

23 MS. SWEENEY: Boy, I hear gears
24 grinding.

25 MR. YELENOSKY: Technology

1 would seem to catch up with that quicker than
2 we can.

3 CHAIRMAN SOULES: Justice
4 Duncan.

5 HONORABLE SARAH DUNCAN: I have
6 a great deal of respect for Justice O'Connor's
7 research skills, but I don't think this would
8 make any difference for two reasons. One, as
9 Steve says, if you are searching for cases
10 everybody -- we have seven judges on our court
11 and every single one of us uses a different
12 format for citing rules, and even beyond that,
13 all the rules' numbers are changing. Nobody
14 is going to be able to find anything anyway.

15 Westlaw is no longer going to be an
16 efficient tool for looking up cases on rules,
17 so fine. I mean, I just don't see that it
18 would help.

19 MR. YELENOSKY: And also
20 technology is changing, too, in terms of how
21 searches are done, I would imagine, but also,
22 rather than using rule numbers, you can use
23 key words within the rule and because of the
24 number of rule changes you will still get it.

25 HONORABLE SARAH DUNCAN: There

1 is also a third reason, and that is Soules and
2 Dorsaneo may have to go out of business.

3 I was being facetious on the third.

4 MR. YELENOSKY: But the
5 appellate section voted something, so they
6 must have had a reason, and I don't know
7 without hearing what they had to say about it.

8 MR. BECK: Apparently it was
9 unanimous.

10 MR. YELENOSKY: Yeah. But how
11 did they feel that they were going to ensure
12 that judges were going to use that TRAP
13 designation?

14 CHAIRMAN SOULES: Well, they
15 are just asking us to start a new era.

16 MS. BARON: I was just going to
17 point out that I don't think the idea was to
18 force judges to do something, but heading the
19 rules that way would encourage a consistent
20 form of citation. It certainly wouldn't
21 require it.

22 HONORABLE SARAH DUNCAN: It's
23 not blue book.

24 MR. YELENOSKY: Yeah. It's not
25 blue book. It's not blue book form.

1 CHAIRMAN SOULES: Well, why
2 don't we suggest that this be called to the
3 attention of Mr. Garner and let him use his
4 expertise? Any dissent from that?

5 MR. BABCOCK: Second that
6 motion.

7 CHAIRMAN SOULES: All right.
8 That's what we will do.

9 Next is what? 117?

10 MS. DUDERSTADT: Yes, sir.

11 CHAIRMAN SOULES: Next is 117.
12 Judge Tom Lawrence wants us to amend Rule 3a
13 and 3b to provide authority for the Harris
14 County justice courts to make local rules.

15 MR. YELENOSKY: Luke, are we
16 still going to address the justice rules at
17 some point?

18 CHAIRMAN SOULES: I don't know.

19 MR. YELENOSKY: If we are then
20 I would suggest this goes with that.

21 CHAIRMAN SOULES: I don't think
22 the Supreme Court -- obviously the Supreme
23 Court is not restricted by what the rules say
24 as to whether or not it approves local rules,
25 and they are not following 3a and 3b anyway,

1 so why amend it.

2 HONORABLE SARAH DUNCAN: Right.
3 And I think you also might find that there is
4 at least substantial feeling that not only
5 should 3a not be extended, it should be
6 repealed.

7 CHAIRMAN SOULES: It's
8 meaningless.

9 HONORABLE SARAH DUNCAN: It's a
10 source of a lot of problems for a lot of
11 people.

12 CHAIRMAN SOULES: 3a is? And
13 because it authorizes local rules or what?

14 HONORABLE SARAH DUNCAN: Well,
15 it's the local rules themselves that are the
16 problem.

17 CHAIRMAN SOULES: Right. Well,
18 this was written to try to contain the
19 evolution of local rules, but since it was
20 ignored by the Supreme Court, it was not --

21 HONORABLE SARAH DUNCAN: An
22 effective containment procedure.

23 CHAIRMAN SOULES: -- an
24 effective containment. And so somebody make a
25 motion about whether or not to amend 3a and b.

1 Okay. Unanimously no change.

2 Next is Peacock vs. Humble. What's this
3 about? Oh, this is that issue that came up
4 about counting. The Government Code counts
5 different than the rules. I don't know why we
6 would necessarily need that. "Unlike Rule 4,
7 the Code Construction Act has no special
8 provision for calculating time periods of five
9 days or less." I think we have already talked
10 about this, and we have decided not to make a
11 change in the civil rules.

12 HONORABLE SARAH DUNCAN: And we
13 can't change the statute.

14 CHAIRMAN SOULES: Because it's
15 more user-friendly than the code and to the
16 extent the rules govern. Justice Duncan.

17 HONORABLE SARAH DUNCAN: I
18 recognize that we, of course, have no
19 authority to change the statute. It is sort
20 of a problem, though, because no litigant
21 knows going in whether the court is going to
22 apply the rules of procedure or the Government
23 Code Construction Act.

24 CHAIRMAN SOULES: Well, its
25 biggest problem is in the Family Code

1 apparently, because the family lawyers decided
2 to go out and write their own procedure and
3 put it in the Family Code instead of the Rules
4 of Civil Procedure, and now they have gotten
5 themselves in a box that sometime they don't
6 know how to count. If they count Family Code
7 time periods under Rule 4 they get in trouble,
8 because by putting their practice into the
9 Family Code they have fallen under the
10 Government Code for counting times, and we
11 want to have more user-friendly rules in other
12 litigation.

13 It may not be a problem. Anybody see any
14 need for change of our rules in light of this?
15 The reason I put it in here was they are not
16 consistent, but that doesn't seem to be a
17 problem to me, but it may seem to be a problem
18 to somebody else. No problem? No change.
19 And that's it for Acosta.

20 MS. DUDERSTADT: Bill, are you
21 ready to do 15?

22 PROFESSOR DORSANEO: 15?

23 MS. DUDERSTADT: It's on the
24 agenda.

25 CHAIRMAN SOULES: What are the

1 rules?

2 MS. DUDERSTADT: Appellate
3 rules.

4 PROFESSOR DORSANEO: Appellate
5 rules. I think so. I don't have anything to
6 hand out.

7 CHAIRMAN SOULES: 308.

8 PROFESSOR DORSANEO: Well, it
9 starts with 298.

10 CHAIRMAN SOULES: 298.

11 PROFESSOR DORSANEO: Lee can
12 help me on this.

13 CHAIRMAN SOULES: I think the
14 answer to most of this is going to be that the
15 rules are done, but I guess if we see
16 something that's really alarming, we may have
17 a chance to get back to it.

18 PROFESSOR DORSANEO: This
19 Katherine Butler material from the Houston Bar
20 Association raises two concerns. One is the
21 petition for review practice and its
22 propriety; and that, in essence, is a matter
23 that's been considered by the Court and is a
24 done deal. We have replaced the writ of error
25 practice with a petition for review practice,

1 having two steps.

2 CHAIRMAN SOULES: That's
3 history.

4 PROFESSOR DORSANEO: Yes. The
5 second issue involves the requirement that --
6 the perceived requirement that an intermediate
7 appellate court conduct hearings before
8 granting mandamus relief. As I read Rule
9 52.7, that is not a requirement and not a
10 problem anymore. Thank you, Katherine Butler.

11 The next one is from Chairman Soules, and
12 particularly on page 311 in this Cates opinion
13 there is a suggestion by Justice Grant that
14 the procedure for reviewing summary judgment
15 appeals be specifically set forth in the rules
16 of appellate procedure so that all parties
17 would know what to expect on appeal. The
18 appellate rules do not address this, but it's
19 been resolved, if not entirely at least
20 substantially by a Supreme Court decision
21 whose name escapes me at the moment.

22 HONORABLE SARAH DUNCAN: This
23 one. Cates.

24 PROFESSOR DORSANEO: In this
25 case. All right. It is Cates itself. All

1 right.

2 HONORABLE SARAH DUNCAN: First.

3 PROFESSOR DORSANEO: Okay. So
4 that problem has gone away or has been
5 ameliorated to the extent it can be. The next
6 one is from Chairman Soules, and it concerns
7 1a, not 1c, of the appellate rules, and under
8 the appellate rules they have been redrafted.
9 The problem language that caused the opinion
10 to be necessary has been eliminated from TRAP
11 Rule 1.1, which now simply states "These rules
12 govern procedure in appellate courts and
13 before appellate judges" without talking about
14 appeals from district courts, constitutional
15 county courts, county courts of law, and other
16 statutory courts. So that's gone away.

17 CHAIRMAN SOULES: Okay.

18 PROFESSOR DORSANEO: The next
19 one involves the requirement in the former
20 appellate rules that all papers be sent to all
21 parties to the trial court's final judgment.
22 That's been addressed by the Court, which paid
23 heed to this suggestion. Now, and Lee correct
24 me if I'm wrong, the only thing that needs to
25 be served on all parties to the trial court's

1 judgment is the notice of appeal under 25.1(e)
2 unless there is something much later in the
3 process that needs to be served as well
4 involving the Supreme Court, but this problem
5 has been essentially resolved on a policy
6 basis by requiring the notice of appeal to be
7 sent to all parties to the court's judgment,
8 but thereafter to people who get copied or
9 parties to the appeal in the appellate rules
10 as promulgated.

11 CHAIRMAN SOULES: Did we deal
12 with this 2a problem, draft 2a problem?

13 HONORABLE SARAH DUNCAN: I'd
14 like to put my question on the record since
15 Professor Dorsaneo has indicated he doesn't
16 know the answer. How do we know who the
17 parties to the appeal are? We know who is
18 appealing because we will have a notice of
19 appeal by an appellant and any
20 cross-appellants, but how do we know who the
21 remaining parties to the appeal are?

22 MR. PARSLEY: The answer, if I
23 may, Mr. Chairman, is that the Supreme Court
24 picked up the language out of the current
25 rules and how we know who the parties to the

1 appeal are, we know today, we should know
2 tomorrow. The current rule says, and we
3 copied it, "parties to the appeal or review"
4 and that's what's in the current service rule,
5 and that's what we picked back up again as
6 part of the general service requirement.

7 HONORABLE SARAH DUNCAN: If I
8 can just make a comment, the reason we
9 required service all around is because we
10 couldn't determine who the parties to the
11 appeal were under a cost bond, which gives us
12 a lot more information than a notice of
13 appeal. So we will go back to the problem we
14 had before the rule was amended.

15 CHAIRMAN SOULES: That's right.

16 MR. PARSLEY: Well, Justice,
17 the cost bond could name just the clerk, as I
18 recall. So you could file -- an appellant
19 could file a cost bond naming the clerk, and
20 it will give no more information than a notice
21 of appeal. In addition, now, under the new
22 rules, which is probably unpopular, I hesitate
23 to bring it up, but of course, there is now
24 the requirement of additional appeals if you
25 seek to alter the trial court's judgment. And

1 so everyone who seeks to alter the trial
2 court's judgment must perfect their own
3 appeal, which means they are going to have
4 filed a document which indicates that they are
5 in the case.

6 HONORABLE SARAH DUNCAN: And
7 the notice of appeal will be, I think, 100
8 percent complete identification of the
9 appellants. It will not identify the
10 appellees. I have, as you know, Chairman
11 Soules, a particular interest in that rule,
12 because I was the one that didn't get served
13 and nobody could figure out if I was a party
14 to the appeal, so I had to keep filing briefs
15 all the way up the ladder and argue, even
16 though I didn't know if I was a party to the
17 appeal.

18 CHAIRMAN SOULES: That's right.
19 And the appellant doesn't have to serve all
20 the affected parties.

21 HONORABLE SARAH DUNCAN: Right.

22 MR. PARSLEY: No. The
23 appellant, when you file your notice of appeal
24 under the rules you are required to serve all
25 parties to the trial court's final judgment.

1 The notice of appeal must be served on all
2 parties to the trial court's final judgment
3 under the new rules.

4 After that, service is limited to parties
5 to the appeal or review. So it's served on
6 everyone to start with and then after that
7 it's the parties to the appeal or review, and
8 how you determine that I will concede is not
9 abundantly clear. I don't know any better
10 answer to that than that the courts of appeals
11 have told us that they don't want to be
12 required when the appeal involves only two or
13 three parties to have to send out paperwork to
14 hundreds of parties, and it's an expensive
15 system.

16 HONORABLE SARAH DUNCAN: All of
17 the courts of appeals? I don't believe our
18 court has spoken on that issue.

19 MR. PARSLEY: Well, we have not
20 received letters but from the Beaumont court
21 of appeals from my recollection, but I have
22 received comments from -- as my phone rings
23 daily and maybe not on this issue, but this is
24 not the only people who were concerned with
25 this. We got a pretty substantial amount of

1 comment in the Court about that requirement.

2 PROFESSOR DORSANEO: To be
3 thinking about it some more, though, it would
4 no doubt be from the docketing statement filed
5 by the appellant.

6 MR. PARSLEY: I don't think
7 there is a good answer to that. We struggled
8 with it, and that's where we are.

9 HONORABLE SARAH DUNCAN: Well,
10 I don't mean to derail the discussion onto the
11 appellate rules. I apologize.

12 CHAIRMAN SOULES: Well, we
13 changed our policy. We changed our policy
14 from giving parties notice to accommodating
15 the courts of appeals who didn't want to send
16 out all the paper. So we shifted the
17 accommodation from the parties before the
18 courts to the courts.

19 MR. PARSLEY: Well, that's not
20 fair.

21 CHAIRMAN SOULES: That is true,
22 and we said it at the time, but that's what
23 happened.

24 MR. PARSLEY: Well, the parties
25 have to send out all the paper, too. If we

1 all know that although they are part of the
2 final judgment they are no longer in the
3 appeal, if we are required by the rules that
4 parties send out documents to all of those
5 people they are subject to that burden just
6 like the court of appeals is. So the rule
7 suggests that you have got to figure out who
8 they are, but it's not clear on how you figure
9 out who they are, and I don't know how else we
10 do it. We have struggled with it.

11 CHAIRMAN SOULES: The best
12 person to decide whether or not they are
13 affected by what's going on in the appellate
14 court is that person who may be affected.

15 HONORABLE SARAH DUNCAN: In
16 consultation with their lawyer.

17 CHAIRMAN SOULES: He needs to
18 be reading what's going on in the appellate
19 court and getting what's going on in the
20 appellate court so that they can decide
21 whether they need to engage, and we had that
22 policy for years, and we abandoned that
23 policy.

24 MR. PARSLEY: Okay.

25 CHAIRMAN SOULES: Okay. 316,

1 this issue between 1a and 2a, has that gotten
2 fixed?

3 PROFESSOR DORSANEO: Yes.

4 CHAIRMAN SOULES: And how did
5 it get fixed?

6 PROFESSOR DORSANEO: The
7 problem language was deleted from TRAP 1.1.
8 The problem language being the reference to
9 the courts.

10 CHAIRMAN SOULES: "The other
11 statutory courts"?

12 PROFESSOR DORSANEO: Yeah.

13 CHAIRMAN SOULES: Okay. Okay.
14 Next?

15 PROFESSOR DORSANEO: I'm up to
16 what in the agenda is on 320, TRAP 18, and
17 this actually is a proposed former draft of
18 TRAP 18 that put the burden on the clerk to be
19 economically responsible for lost items. The
20 appellate clerk. Well, was that right?

21 Yeah, duties of appellate clerk, and now
22 in 12.3 of the appellate rules under the
23 renumbering that problem has gone away. If
24 the record or any part of it or any other item
25 is missing, something that the clerk must

1 safeguard, the court will make an order for
2 the replacement of the record or item that is
3 just under the circumstances, and presumably
4 that might involve something the clerk
5 wouldn't like, but presumably it would be
6 appropriate. So that's gone --

7 CHAIRMAN SOULES: That's taken
8 care of?

9 PROFESSOR DORSANEO: -- as a
10 result of the way 12.3 ultimately has been
11 worded. The next item, 323 through 333, is
12 about the same thing.

13 CHAIRMAN SOULES: Okay. So
14 that's all been taken care of in a different
15 way?

16 PROFESSOR DORSANEO: Yes. Now,
17 this TRAP 40, 41 on page 334 coming from
18 Chairman Soules is dealt with in the published
19 Appellate Rules 20.1(i). I have here in my
20 notes this might require a further study
21 because it doesn't look to me as if it's been
22 completely solved, the problem with the
23 complex times for dealing with affidavits of
24 indigence, but maybe it has. What do you
25 think, Lee?

1 MR. PARSLEY: I just don't
2 remember the letter.

3 PROFESSOR DORSANEO: So it's a
4 case, and it's talking about, well, you have
5 to do this and then it has to happen like
6 that. It's still highly engineered. I think
7 the specific problem has gone away that the
8 case dealt with, requiring the appellant to
9 notify the court reporter of the filing within
10 two days after the affidavit is filed, because
11 that doesn't appear to be here.

12 MR. PARSLEY: Right. That's
13 out of the new rule.

14 PROFESSOR DORSANEO: Okay.
15 Well, that was a specific problem, and the new
16 rule is still complicated, but that piece of
17 complexity has been removed.

18 CHAIRMAN SOULES: The two-day
19 rule is gone.

20 MR. PARSLEY: The two-day rule
21 is gone. The clerk is required to notify the
22 court reporter of the filing of the affidavit
23 of indigence. Now, the affidavit of indigence
24 is no longer required to perfect an appeal.

25 PROFESSOR DORSANEO: Right.

1 Right.

2 MR. PARSLEY: There is no
3 problem with it being filed and there is lots
4 of cases on it being filed and then a contest
5 sustained and then the perfection is not done
6 correctly after that. That whole problem
7 disappears because it is no longer a
8 perfecting issue.

9 CHAIRMAN SOULES: Okay. Not a
10 problem any longer then.

11 PROFESSOR DORSANEO: 53, which
12 contains -- I mean, pages 338.1 through 338.4,
13 which dealt with former TRAP 53 raises the
14 issue of electronic recordings and that the
15 rules of appellate procedure should deal with
16 this subject. That's been done. They now do.

17 CHAIRMAN SOULES: Okay.

18 PROFESSOR DORSANEO: Pages 339
19 through 341 involve the former problem of
20 there not being a Supreme Court order
21 governing the form of the statement of facts.
22 When the appellate rules were done in 1986 the
23 Court didn't change its former order that
24 provided for the preparation of the statement
25 of facts under the provisions of the former

1 civil procedure rule. The materials published
2 in the Bar Journal now contain such an order
3 that was drafted by members of this committee
4 and then redrafted. So that problem has been
5 solved, too.

6 54. Or I'm reading from this agenda that
7 I know you haven't been provided, so I
8 apologize for mentioning a number that is
9 meaningless to you, but on pages 342 through
10 345 we have another case that deals with
11 current TRAP 54, soon to be former TRAP 54.
12 That problem has gone away, too, because of it
13 being the responsibility of the officials to
14 see that the record is filed if they have been
15 paid or if arrangements to pay them have been
16 made. So that's gone.

17 Agenda 346 through 347, Charles Spain's
18 letter complains about the draft
19 administrative appeal rule, which is in what
20 number now, Lee?

21 MR. PARSLEY: 35.

22 PROFESSOR DORSANEO: 35?

23 MR. PARSLEY: That's what I'm
24 guessing.

25 PROFESSOR DORSANEO: I don't

1 remember. The bottom line is this letter was
2 considered, and the rule was published in the
3 Bar Journal. So I guess the response to
4 Charles is, you know, thanks, but no thanks,
5 huh?

6 CHAIRMAN SOULES: This is
7 letting the administrative order come up in
8 the appeal whether or not it's in the
9 transcript or in the statement of facts,
10 right?

11 PROFESSOR DORSANEO: Right.

12 CHAIRMAN SOULES: What's wrong
13 with that?

14 PROFESSOR DORSANEO: Well, he
15 doesn't like it.

16 CHAIRMAN SOULES: He doesn't
17 like it. We do.

18 MR. PARSLEY: The rules
19 specifically permit it now, as did the case.

20 CHAIRMAN SOULES: As did Texas
21 Health?

22 PROFESSOR DORSANEO: The next
23 segment is 348 through 359, and this problem
24 involved how the docketing statement would be
25 handled. The writers complained about the

1 need for the appellate clerk to mail a
2 docketing statement to the appellant. In 32.1
3 that way of doing things was ultimately
4 changed. 32.1 requires upon the perfecting
5 the appeal the appellant must file in the
6 appellate court a docketing statement so we
7 don't have the procedure of the clerk sending
8 one out. You have to send one in.

9 CHAIRMAN SOULES: Send one in
10 and serve it on everybody.

11 PROFESSOR DORSANEO: Uh-huh.

12 CHAIRMAN SOULES: Okay.
13 Everybody to the trial court's judgment or
14 just everybody to the --

15 MR. PARSLEY: That would be
16 one that would be --

17 CHAIRMAN SOULES: In your
18 perceived universe, limited universe of
19 players.

20 MR. PARSLEY: That's correct,
21 Mr. Chairman.

22 CHAIRMAN SOULES: Okay.

23 PROFESSOR DORSANEO: That is a
24 circle.

25 CHAIRMAN SOULES: It may be an

1 unclosed circle. It may be smaller than
2 satisfactory circle.

3 MR. PARSLEY: I expect to live
4 long enough to hear you-all talk to me about
5 it some more.

6 CHAIRMAN SOULES: Okay.

7 PROFESSOR DORSANEO: The next
8 two items from 360 through 374 deal with
9 former appellate Rule 84, which has been
10 rewritten in response to comments and is now
11 codified as TRAP 45 in the rules published in
12 the Bar Journal. It no longer is restricted
13 to cases where the appeal is taken for delay.
14 It no longer has a limited range of sanctions
15 available to the appellate court. So many, if
16 not most, of the concerns mentioned in Shelby
17 Sharpe's communications and in the case
18 beginning on page 351 have been considered and
19 dealt with by the Court.

20 That takes me to 374 through 383, and
21 really, 374 through 389, I believe. This is
22 the same issue as before about --

23 CHAIRMAN SOULES: Let me ask a
24 question. Does the new TRAP, frivolous appeal
25 TRAP rule, provide for sanctions against the

1 lawyer or the party?

2 PROFESSOR DORSANEO: Well, I'm
3 not sure.

4 MR. PARSLEY: It does not say.

5 PROFESSOR DORSANEO: No.

6 MR. PARSLEY: It says, "The
7 court may award each prevailing party just
8 damages."

9 CHAIRMAN SOULES: Without
10 identifying whether it's the party or the --

11 MR. PARSLEY: Yeah.

12 CHAIRMAN SOULES: Okay. That
13 may fix the rule. The old 84 said "against
14 the party."

15 PROFESSOR DORSANEO: Okay.
16 Thank you, Mr. Chairman. I missed that.

17 CHAIRMAN SOULES: Against such
18 appellant. Now it's -- okay. Okay. What's
19 next? 374?

20 PROFESSOR DORSANEO: Yeah.
21 374.

22 CHAIRMAN SOULES: Page 374.

23 PROFESSOR DORSANEO: Through
24 375, and this has to do with the oral argument
25 matter again in the original proceedings. I

1 think all of these pages deal with that same
2 issue.

3 CHAIRMAN SOULES: This is
4 Kathleen Baron, or just Chief Justice Murphy?

5 PROFESSOR DORSANEO: Uh-huh.
6 And this is those same Houston people who were
7 up there in the first item on 298 through 307.
8 So same response. In 52.7 it is no longer
9 necessary that there be an oral hearing. An
10 argument before the court acts on the petition
11 and response.

12 CHAIRMAN SOULES: We did not
13 write that in, correct?

14 PROFESSOR DORSANEO: Well,
15 where we wrote it was out. In one of our
16 drafts it appeared to say that you couldn't
17 have mandamus until there was an oral
18 argument.

19 CHAIRMAN SOULES: Oh, okay.

20 PROFESSOR DORSANEO: And that's
21 gone.

22 CHAIRMAN SOULES: And that's
23 what they wanted, right?

24 PROFESSOR DORSANEO: Yes.

25 CHAIRMAN SOULES: Gone. Done.

1 Next?

2 PROFESSOR DORSANEO: Now, the
3 next one on 392 is from Carl Hamilton, and he
4 wanted the revisions of the original
5 proceeding rule to have a style that did not
6 identify the respondent, and I gather that was
7 considered and rejected.

8 MR. PARSLEY: No.

9 PROFESSOR DORSANEO: It has it?
10 Is it in there?

11 MR. PARSLEY: The original
12 proceedings under the new rules will be styled
13 "In re," the name of the relator. It will no
14 longer be relator versus respondent.

15 PROFESSOR DORSANEO: Okay.
16 Good.

17 MS. BARON: But the trial court
18 will still be the respondent, but will not be
19 named in the style?

20 MR. PARSLEY: That's correct.
21 The respondent is still the respondent. Real
22 parties in interest are still the real parties
23 in interest. The style is the only thing
24 we've changed, and this committee recommended
25 a change in that regard as well. So that was

1 adopting what this committee did, at least
2 mostly.

3 PROFESSOR DORSANEO: Where does
4 it say that?

5 MS. BARON: 52.1.

6 PROFESSOR DORSANEO: Oh, okay.
7 52.1, Carl.

8 CHAIRMAN SOULES: Now to 394.

9 PROFESSOR DORSANEO: These
10 matters dealing with the technical aspects of
11 the Supreme Court briefing have been addressed
12 and dealt with.

13 CHAIRMAN SOULES: Okay.

14 PROFESSOR DORSANEO: And 397
15 through 401, Pam Baron's concerns and the
16 concerns of her supporters and attractors up
17 through page 409 about replacing the petition
18 for review proposal with a different approach
19 were considered and rejected. Or am I wrong
20 again?

21 CHAIRMAN SOULES: Force-fed.

22 PROFESSOR DORSANEO: Huh?

23 CHAIRMAN SOULES: They were
24 force-fed.

25 PROFESSOR DORSANEO: Force-fed?

1 CHAIRMAN SOULES: Yes. We were
2 force-fed that procedure.

3 PROFESSOR DORSANEO: Oh, all
4 right. And Judge Guittard's comments on 410
5 through 414 were considered by the principal
6 drafter, E. Lee Parsley, and some of them
7 found their way in and some of them did not.

8 CHAIRMAN SOULES: Okay.

9 PROFESSOR DORSANEO: And 415
10 through 503 is a substantial part of the
11 reason why the Court wanted to go to a
12 petition for review practice involving a
13 brief, preliminary brief before a longer brief
14 on the merits because that's the way it's done
15 in all of the other states who responded, and
16 their letters are interesting. I commend them
17 to you. 415 through 503.

18 And really, the same could be said as was
19 said about all of the other 130 through 136
20 letters on 504 through 511 as I've said
21 before, that the court considered all of this
22 correspondence, which it had at the time the
23 final versions of these rules were drafted,
24 and they had whatever influence they had.
25 Some things were changed, but the basic plan

1 stayed the same.

2 So that takes us up to page 512, which is
3 about where I was when I got called on, and I
4 think Charles Spain's suggestion about how the
5 rules should read was also considered, but we
6 have a new rule of appellate procedure on the
7 ability of appellate courts to make particular
8 rulings, and we have considered that in this
9 committee and, you know, those rules are a
10 done deal, too, but it's not, I wouldn't say
11 force-fed. I would say considered and
12 discussed and taken care of in the new
13 appellate rules, Rule No. 43.2 primarily.

14 Shelby Sharpe's letters here at the end
15 concerning frivolous appeals at the Supreme
16 Court level are also dealt with in that TRAP
17 45 that we talked about a minute ago, which
18 pertains to appellate courts at all levels in
19 civil cases.

20 MR. PARSLEY: Well, 65 is the
21 Supreme Court rule.

22 PROFESSOR DORSANEO: Oh, okay.
23 65. I'm sorry.

24 MR. PARSLEY: 45 is the court
25 of appeals. 65 is the Supreme Court.

1 PROFESSOR DORSANEO: Are they
2 worded the same way?

3 MR. PARSLEY: Yes.

4 PROFESSOR DORSANEO: All right.
5 And that completes my report, Mr. Chairman.

6 CHAIRMAN SOULES: Okay. That
7 gets us to the back of the book. Steve
8 Susman, starting at Rule 166. Let's see where
9 that is. 173. If I'm reading this right,
10 start at 173.

11 MR. SUSMAN: Luke, I need to do
12 this in July because we haven't done this
13 again. I mean, these are all old letters. Am
14 I supposed to report on -- I have done this
15 before, I think.

16 PROFESSOR DORSANEO: Didn't
17 Alex do all of this?

18 MR. SUSMAN: I'm not sure what
19 this is all about.

20 PROFESSOR DORSANEO: She did it
21 once, but maybe not on this third agenda.

22 CHAIRMAN SOULES: I don't think
23 they have been done on this. She did all the
24 old ones. She did all the old ones, Steve,
25 but this is -- looking here, she's been

1 through the main agenda.

2 Holly, we were just being asked if Alex
3 has done the third agenda on the Susman
4 subcommittee. Have these been covered in
5 Alex's prior reports, these particular items?

6 MS. DUDERSTADT: It's all new
7 materials in the agenda.

8 CHAIRMAN SOULES: So we have
9 got from 173 to 226 that we still need to do.
10 It's on page 173.

11 MR. SUSMAN: And doing this
12 means what, Luke?

13 CHAIRMAN SOULES: It means we
14 need to review these and see, just like Bill
15 has done on the appellate rules --

16 MR. SUSMAN: I can do that
17 pretty easy. Do I need to do it with the
18 committee, or can I do it here?

19 CHAIRMAN SOULES: Let's try to
20 do it here to the extent we can.

21 MR. SUSMAN: Sure. Page 173 is
22 a 1995 letter about the summary judgment rule,
23 and I don't think there is anything for us to
24 do on the summary judgment rule. It's been
25 done. So all of these are summary judgment

1 proposals over to --

2 CHAIRMAN SOULES: I think all
3 of this, that we talked about the summary
4 judgment proposals that the Court Rules
5 Committee submitted and wound up with no
6 changes except in the new paragraph (e).

7 MR. SUSMAN: Right.

8 CHAIRMAN SOULES: Okay. So
9 that takes us where? 184?

10 MR. SUSMAN: No. 189, I think.
11 All summary judgment over to 189.

12 CHAIRMAN SOULES: We've thought
13 of Celotex and Davis and Davis and then
14 Bradley and Holt and then we will get to 166b.
15 I think everything up to 188 is contained in
16 the product that we sent to the Supreme Court.
17 There has now been a rule promulgated by the
18 Court different than what we sent up there.
19 So 189.

20 MR. SUSMAN: I'm not sure what
21 Paul is asking in 189.

22 PROFESSOR DORSANEO: It has to
23 do with the prophylactic objections.

24 MR. SUSMAN: And we had a
25 provision in our discovery rules that dealt

1 with this, and there was a provision in the
2 discovery rules that indicated if you made too
3 many you are liable to lose them all, as I
4 recall, but I'm not sure that deals
5 specifically with what Paul is saying here.

6 191 through, let's see, 202 deals with --
7 it's Court Rules Committee proposal on
8 revising Rule 167 and Rule 200. The discovery
9 rules we submitted to the Supreme Court did
10 not cover or made no major changes in the
11 request for production of documents, not as
12 extensive as these.

13 CHAIRMAN SOULES: Okay. Could
14 you get your committee together and look at
15 these 193 through, what is it, 200? No, 201,
16 and, what, 202?

17 Okay. 193 through 202 and give us either
18 an oral or written report in July --

19 MR. SUSMAN: Sure. All right.

20 CHAIRMAN SOULES: -- as to
21 whether or not we should send these changes up
22 to the Court to consider along with the other
23 discovery rules. This is document discovery,
24 isn't it? There are probably a lot of good
25 ideas in here. Okay. We will put this -- 193

1 through 202 will be on the agenda for Steve's
2 subcommittee for July. Okay. Next?

3 MR. SUSMAN: 204 is also a
4 letter regarding document production and that
5 would be -- we would cover it, too, in our
6 report.

7 CHAIRMAN SOULES: Okay. Carry
8 that report on through 205.

9 MR. SUSMAN: 206 is covered in
10 a proposed discovery rule that requires that
11 you provide the other side with a floppy disk
12 if you want the questions typed before the
13 answers in responses to interrogatories and
14 requests for admissions.

15 CHAIRMAN SOULES: Okay. Did we
16 provide whether or not supplemental answers to
17 interrogatories had to be verified?

18 MR. SUSMAN: I believe they are
19 covered. I mean, I believe they do have to be
20 verified, Luke.

21 CHAIRMAN SOULES: Well, there
22 is still a stew in the courts of appeals
23 whether that has to be done. Maybe we ought
24 to say so one way or another.

25 MR. PARSLEY: We talked about

1 it. My recollection may be wrong. I know we
2 had a debate on it, and the rules do discuss
3 it, and I have some faint recollection that
4 possibly they suggest that the original
5 verification is deemed to apply to
6 supplements.

7 PROFESSOR DORSANEO: That's
8 what I remember.

9 MR. PARSLEY: So that you don't
10 have to reverify. Just the original
11 verification is deemed to apply to
12 supplements, I think. Does that sound about
13 right to you, Steve? Maybe?

14 MR. SUSMAN: I was in high
15 school when I did that, so I don't remember
16 exactly.

17 MR. PARSLEY: It's done,
18 whatever it is.

19 MR. SUSMAN: Page 212 and 213.

20 MR. HAMILTON: Luke, let me say
21 on those, apparently you got those through the
22 mailing of the -- because you're a member of
23 the Court Rules Committee, but those have not
24 been passed or acted on yet, 212 through 217
25 are still in process.

1 CHAIRMAN SOULES: Okay. We
2 will just --

3 MR. SUSMAN: Defer them?

4 CHAIRMAN SOULES: Well, we will
5 ignore them as being premature. We will watch
6 for anything further to come from Court Rules.
7 These are preliminary. And they are before
8 Court Rules, and they are not ready for us to
9 consider. So we will consider them disposed
10 of at this time in this committee.

11 MR. SUSMAN: 219 to 220 has to
12 do with bringing firearms into the courtroom,
13 which actually is a pretty good idea.

14 HONORABLE SCOTT BRISTER: I'm
15 against it.

16 CHAIRMAN SOULES: Steve, you
17 may need to look at this 209 through 211. Why
18 don't you-all take a look at that and report
19 back and we can try to get that off the
20 agenda, because he's talking about proposed
21 Rule 9 and verification of supplements and
22 calling somebody identified by the other side?

23 MR. SUSMAN: Fine. We will do
24 that.

25 CHAIRMAN SOULES: And that may

1 be something we can tweak before the Court
2 acts.

3 MR. SUSMAN: All right.

4 CHAIRMAN SOULES: If necessary.
5 So let's leave that on the agenda for July,
6 too, and then that will take us to 219.

7 MR. PARSLEY: I believe that
8 Alex Albright in the second supplement already
9 dealt with this.

10 MR. SUSMAN: I think you need a
11 firearms subcommittee. I really don't have
12 any idea what this is about.

13 CHAIRMAN SOULES: I need a fire
14 power subcommittee, just for me. She's
15 already taken care of this, right?

16 MR. PARSLEY: I believe the
17 committee considered and rejected the rule.

18 CHAIRMAN SOULES: Okay. And
19 then 221?

20 MR. SUSMAN: 221 is a new
21 revised deposition rule from the Court Rules
22 Committee that is, of course, different than
23 our deposition rule, but all of these things
24 were, I must say, considered I believe at the
25 time that the deposition rules which are part

1 of the discovery rules were presented. I see
2 nothing new here.

3 MR. HAMILTON: What's new is
4 paragraph 5 that deals with expert's cost. I
5 don't know if that's covered in your version
6 or not on page 223, cost of expert witness
7 depositions.

8 MR. SUSMAN: Yeah. That is
9 new.

10 CHAIRMAN SOULES: What do you
11 mean by a -- as you understand it, Carl, what
12 does the Court Rules Committee mean by a
13 "nonretained expert"?

14 MR. HAMILTON: Like a treating
15 physician.

16 CHAIRMAN SOULES: Okay.

17 MR. SUSMAN: Well, is this a
18 change in anything that goes on now? I'm
19 confused.

20 MR. HAMILTON: I think the
21 purpose of that is because there is confusion
22 now a lot of times about who has to pay the
23 treating physician who's not designated as an
24 expert and then there sometimes is confusion
25 about who's going to pay the experts on

1 depositions. It's plaintiff's expert and
2 defendant wants to take his deposition.
3 Sometimes plaintiffs contend, well, you have
4 got to pay for his expenses, and this is an
5 attempt to eliminate some of the confusion
6 that now exists.

7 MR. SUSMAN: I mean, I have
8 never really confronted this problem very
9 much. I mean, if it's a real problem. Do you
10 ever have this problem come up, Scott?

11 HONORABLE SCOTT BRISTER: Week
12 before last, but that was where a side that
13 was taking a doctor's deposition agreed to pay
14 for his time, but when they started taking
15 their deposition wanted the other side to pay
16 for it, but, you know, it is usually worked
17 out by agreement, you know, but to me it
18 depends on the case.

19 I mean, if the doctor is a treater in a,
20 you know, worker's comp case then that's one
21 thing. If the doctor is the subsequent
22 treating doctor and is going to testify in the
23 med-mal case against the previous doctor,
24 that's a different deal. So it kind of
25 depends on the circumstances I think.

1 MR. SUSMAN: Well, insofar as
2 the first sentence is concerned, the retained
3 expert, I mean, I will say I have never had
4 another lawyer tell me "I'm not going to give
5 you my expert to depose unless you pay for the
6 time it takes for him to prepare and be
7 deposed," and that would particularly, I
8 think, be unjustified with the way we have
9 limited the length of expert depositions under
10 the proposed discovery rules.

11 I mean, one might consider that if the
12 other side wanted to take your expert for
13 three days. You might say, "Well, you know,
14 you get the first six hours on me, but the
15 next two days you pay." But I don't think
16 there is any justification for the party that
17 tenders an expert for a three-hour deposition
18 or four-hour deposition, whatever the rules
19 provide, or six hours. I forget what it is.
20 Maybe it's six hours.

21 HONORABLE SCOTT BRISTER: This
22 would be backwards to the way most parties
23 agree to handle it.

24 MS. SWEENEY: Yeah. It also
25 makes your expert have to try and hustle

1 around to collect their bill from the opponent
2 and then you end up losing a good expert
3 because the other guy won't pay him.

4 CHAIRMAN SOULES: This says it
5 will be paid by the party that retained the
6 expert, so you pay your own expert.

7 MR. SUSMAN: The first sentence
8 is consistent with present practice, is what
9 I'm saying. It's kind of unnecessary.

10 PROFESSOR DORSANEO: Well,
11 there is one case, I forget what court of
12 appeals, that says because our Texas rule does
13 not address this and the Federal rule does,
14 that our rule is different from the Federal
15 rule, and the judge can order you to pay the
16 other side's expert if you want to take his
17 deposition. One court of appeals case says
18 that.

19 CHAIRMAN SOULES: I don't see
20 any problem with the first sentence. The
21 second sentence bothers me, though, because --

22 MR. SUSMAN: The first sentence
23 I think is the clear practice, and I thought
24 it was a clear law until he just mentioned
25 this one case. The question is, do we need to

1 put it in the rule? Does it need to be said
2 in a rule?

3 MR. MARKS: I think it probably
4 does because, you know, if you get in a
5 dispute about this if you are running up on
6 your times in order to --

7 MR. SUSMAN: I have no problem
8 with it.

9 MR. MARKS: -- take it and that
10 sort of thing. I think it's nice to have it
11 clarified one way or the other in the rule and
12 then there is no question about it.

13 CHAIRMAN SOULES: Anybody
14 oppose the first sentence of proposed 5? None
15 opposed.

16 Now, the second sentence concerns me
17 because maybe the doctors get paid,
18 subsequently treating physicians get paid for
19 testifying as fact witnesses or maybe they
20 don't. Depends on whether you put them under
21 a subpoena, but there are a lot of experts
22 that don't get paid. For example, engineers.
23 What if it's an engineer that designed a slab
24 that failed? Is he an expert? What I'm
25 concerned about the second sentence, it says

1 these people are going to get paid, and I
2 don't want to pay them at all. You don't pay
3 them and I don't pay them.

4 MS. SWEENEY: He used the word
5 "retained" though, Luke.

6 CHAIRMAN SOULES: What?

7 MS. SWEENEY: He uses the word
8 "retained."

9 MR. SUSMAN: No.
10 "Nonretained."

11 CHAIRMAN SOULES: This is
12 nonretained. This is the second sentence.

13 MR. SUSMAN: This is the second
14 sentence. We are dealing with the --

15 CHAIRMAN SOULES: Nonretained
16 experts.

17 MR. SUSMAN: The expert who is
18 not under the control of a party.

19 MS. SWEENEY: Sorry.

20 MR. SUSMAN: And you subpoena
21 him for a deposition, and he goes and hires a
22 fancy Wall Street law firm and woodsheds
23 himself for about three days and then his
24 hourly rate is \$750 an hour. You know, I
25 mean, you are going to have a big bill to take

1 this dude's deposition. I think it's
2 outrageous.

3 PROFESSOR DORSANEO: The
4 Supreme Court of Texas sometime back in a case
5 called Lehnard, L-e-h-n-a-r-d, vs. Moore said
6 that if somebody has discoverable information
7 that's in the public domain then that person's
8 deposition can be taken, and he or she is
9 meant to answer the questions. That would be
10 different from requiring somebody to go do
11 work, like prepare a study or evaluate a
12 matter.

13 MR. MARKS: You mean I can
14 notice and subpoena this 750-dollar an hour
15 neurosurgeon who performed an operation on the
16 plaintiff and not pay him a dime and get his
17 deposition?

18 CHAIRMAN SOULES: Yes, sir.

19 PROFESSOR DORSANEO: If you are
20 willing to accept what he has to say.

21 MR. SUSMAN: The answer is that
22 that's part of the price of being a
23 neurosurgeon. I mean, he knows he's going to
24 be subpoenaed.

25 CHAIRMAN SOULES: And part of

1 the price of roughing him around is you may
2 not get what you like.

3 MR. MARKS: May not. Probably
4 not.

5 CHAIRMAN SOULES: But I don't
6 think we should have a rule that says a
7 nonretained expert gets paid for testifying.

8 MR. SUSMAN: I don't either.

9 HONORABLE SCOTT BRISTER: It
10 would definitely be contrary to what I think
11 most people do right now. The average
12 personal injury case, the treating doctor
13 expects to be subpoenaed, and if he gets paid,
14 he expects it from the plaintiff's attorney.

15 CHAIRMAN SOULES: Carl, how do
16 you feel? This kind of comes from a committee
17 that you have had a lot to do with, but it
18 looks to me like maybe they didn't think about
19 the fact that --

20 MR. HAMILTON: Well, no. It
21 was mainly directed at the treating
22 physicians, and the discussion was had like
23 you've just indicated. Why should we pay them
24 at all? But then the answer to that is you're
25 not going to get anything from them unless

1 they get paid. They are not going to appear,
2 you are going to have to subpoena them, and
3 then they are not going to want to testify,
4 and they are just worthless as a witness
5 unless somebody is going to pay them.

6 Well, the plaintiff says, "Well, yeah,
7 they are my treating physician, but I can't
8 afford to pay them," and the defendant doesn't
9 want to have to pay them because nine times
10 out of ten the opinions are going to be
11 against the defendant anyway, so why should
12 the defendant have to pay for adverse
13 testimony that we are getting from this
14 treating physician?

15 So it's a problem that it doesn't have an
16 easy solution to it, but the consensus of our
17 committee seemed to be that if you are going
18 to take his deposition and if he's entitled to
19 be paid anything, that the person taking it
20 ought to pay him. Now, maybe we ought to have
21 something in there that makes it a little
22 clearer that he's not necessarily entitled to
23 be paid, but if he is entitled to be paid then
24 who's going to pay.

25 MR. MARKS: Well, what does

1 this accomplish? I mean, really, I'm sitting
2 here reading it. Does this really add
3 anything to increase your ability to do
4 anything or decrease somebody's ability to do
5 anything? I don't know that it adds anything,
6 Carl.

7 PROFESSOR DORSANEO: I say take
8 the 5th on the nonretained expert, see if you
9 can get it for nothing.

10 CHAIRMAN SOULES: Okay. Second
11 sentence, in or out? In. Those who want it
12 in show by hands.

13 The house. It's unanimous then. Well, I
14 think Carl abstained there.

15 MS. SWEENEY: Did we vote on
16 the first sentence?

17 CHAIRMAN SOULES: Yeah. We
18 voted on the first sentence and said it would
19 be sent to the Court as a recommendation.

20 Okay. Is that it?

21 MS. SWEENEY: Did we really?

22 CHAIRMAN SOULES: We didn't
23 vote on it?

24 MR. MARKS: Huh-uh. We didn't
25 vote on the first one.

1 CHAIRMAN SOULES: Okay. First
2 sentence. Those who want to recommend the
3 first sentence to the Court show by hands.
4 Eight. Those opposed? One.

5 MS. SWEENEY: I'm sorry. I
6 want to be in favor of it.

7 CHAIRMAN SOULES: All right.
8 We didn't need a vote. Everybody is for it,
9 but now we know. Okay. So we will do that.

10 Next is Rule 224 through 226. No. This
11 is more discovery. Steve, look at this 224
12 through 226.

13 MR. SUSMAN: Well, that has
14 been commented on. That's a real old proposal
15 of Rule 200.

16 CHAIRMAN SOULES: Okay. We
17 already digested this into the rules?

18 MR. SUSMAN: Absolutely. We
19 had that on the table when we sat down for our
20 initial meeting.

21 CHAIRMAN SOULES: Yeah. That's
22 December '95. Okay. So what we have left for
23 Steve is two sections of this, and we have
24 noted those are -- it's on 167 and 168 that we
25 will hear from you in July. Steve, you've got

1 that ready. I mean, you've got that, and
2 you'll have it ready in July?

3 MR. SUSMAN: Right.

4 CHAIRMAN SOULES: Okay. We
5 have Orsinger's disposition chart on the
6 beginning of page 122, and we definitely are
7 going to get through today. We will take a
8 break about -- if we are not done by 3:00 we
9 will take a break at 3:00 in case anybody
10 wants to cancel hotels or what have you or
11 make other arrangements.

12 MS. SWEENEY: Just to inform
13 everybody, if you are booked at the Four
14 Seasons they will buy back your room and not
15 charge you for it because they are overbooked
16 because of graduation, and they were saying if
17 you didn't cancel by last Tuesday you will pay
18 for it anyway, but they have rescinded that,
19 so FYI.

20 CHAIRMAN SOULES: Okay. 122,
21 district attorney, Tarrant County, writes on
22 behalf of Tarrant County district clerk saying
23 that the local practice had been to collect
24 for cost of serving process in advance of
25 service. An AG opinion prohibits this, and

1 they want TRCP 17 amended to permit advanced
2 collection of the fee.

3 Recommended action, "No further action
4 necessary. The SCAC has already approved the
5 new clerk's rules submitted by this committee
6 in which we deleted TRCP 17 and amended TRCP
7 126 to permit such fees to be collected in
8 advance. This solves the writer's problem.
9 No further action is necessary." All agreed?

10 MR. HAMILTON: Wait. I have a
11 question. Does anybody remember whether that
12 authorizes the clerk to collect those fees
13 even though you may hire your own process
14 server? Is that just something that's going
15 to be put in the total now every time you file
16 a lawsuit? They are going to add that process
17 service fee in there?

18 CHAIRMAN SOULES: Do we have
19 amended 126 anywhere so we can look at it?

20 PROFESSOR DORSANEO: We may
21 have it somewhere, but we don't have it here.

22 CHAIRMAN SOULES: I don't think
23 the clerk can collect a fee that's not going
24 to get charged. The service fee is the
25 sheriff's fee.

1 MR. HAMILTON: See, our clerks
2 ask you usually, "Do you want the sheriff to
3 serve it, or are you going to have someone
4 else serve it?" If you tell them you are
5 going to have someone else serve it, they
6 don't charge you the fee, but I wondered if
7 the wording of our new rule was going to
8 require that it be paid up-front in all cases.

9 CHAIRMAN SOULES: He says "to
10 permit the collection of the fee."

11 MR. HAMILTON: If it just
12 permits it then that's okay.

13 CHAIRMAN SOULES: That's what
14 his report is. Now, I'm not looking at the
15 rule. Holly, do you have that? I'm sure we
16 have in our records what we passed.

17 MS. DUDERSTADT: I didn't bring
18 all the transcripts.

19 CHAIRMAN SOULES: No, I know,
20 but I'm just wanting to check.

21 MS. DUDERSTADT: I can put a
22 note on here to check.

23 CHAIRMAN SOULES: Yeah. Make a
24 note that if the clerk's collection of the fee
25 is merely permissive, that's okay with you,

1 right, Carl?

2 MR. HAMILTON: Yeah.

3 CHAIRMAN SOULES: If there is
4 some other suggestion, then we may take a look
5 to be sure it's only permissive.

6 PROFESSOR DORSANEO: This
7 should come around the bend again in the
8 clerk's part of Section 10 of the
9 recodification that Bonnie is working on with
10 me.

11 CHAIRMAN SOULES: Okay. Well,
12 let's keep our eye out for that issue, but
13 according to Richard, it's resolved.

14 Next? 138. That's the AG's opinion,
15 takes us over to 138. "This proposal is a
16 revamping of the rule governing recusal and
17 disqualification of judges. The SCAC has
18 already adopted and sent to the Supreme Court
19 a revised Rule 18 that makes the changes
20 decided upon." The subcommittee suggests no
21 further action. These suggestions have been
22 extensively debated with an explanation, and I
23 think that's right. Any objection to that?

24 Okay. So no further action. And no
25 further action on the first one.

1 And next is page 142, proposal to include
2 in TRCP 21 a provision about how to count
3 periods of three days or less. The
4 subcommittee recommends it be rejected. The
5 subcommittee believes that TRCP 4 applies to
6 and explains -- oh, this is that -- we have
7 talked about this one already.

8 MR. HAMILTON: They are the
9 ones still being worked on.

10 PROFESSOR DORSANEO:

11 Mr. Chairman, there is something that jogged
12 my memory here that I forgot earlier that
13 relates to a similar subject. In the draft of
14 either Rule 6 or Rule 10 that we discussed
15 earlier, the time rule that involves use of
16 the United States Postal Service or the
17 service and filing of pleadings rules, while I
18 was looking at the appellate rules for the
19 purpose of conforming to them I noticed that
20 we have in the appellate rules a filing rule
21 when the clerk's office is closed or
22 inaccessible in 4.1(b), which is part in the
23 appellate rules of the time rule, and I
24 neglected to mention this morning that I
25 thought it would be a good idea to include

1 that in these time or filing rules that we
2 discussed this morning, and I would ask the
3 committee's permission to conform the
4 pertinent rules.

5 CHAIRMAN SOULES: To rollover
6 to the next day?

7 PROFESSOR DORSANEO: Yes.

8 CHAIRMAN SOULES: Okay.

9 PROFESSOR DORSANEO: In the
10 same language as appellate Rule 4.1(b), but
11 eliminating any references that would restrict
12 us to appellate filing.

13 CHAIRMAN SOULES: Okay. Any
14 objection to that? No objection. That's
15 approved.

16 PROFESSOR DORSANEO: Sorry.

17 CHAIRMAN SOULES: That's quite
18 all right. No further action on 21. We
19 talked about this last time. Next on 21a,
20 let's see, this will be over here on page 144.
21 I guess we talked about that. Excuse me just
22 a moment.

23 Request for admissions sent on 12-22 and
24 received on 12-28. Deadline for responding
25 was 33 days after date of mailing, not 30 days

1 after requests were received, and I think I
2 agree with the subcommittee. It says, "Case
3 is correctly decided. A party shouldn't have
4 started counting from the day they received
5 them." No action required. Okay.

6 Next is 159. "Due to an inadvertent
7 mistake in amending a petition a party was
8 dropped and limitations ran before the
9 omission was discovered and the party
10 re-included in the petition." The
11 subcommittee recommends no further action. We
12 have already adopted a rule on voluntary
13 dismissals and nonsuits, which we include a
14 relation back for inadvertent omissions from
15 amended pleadings that resolves this problem.
16 No further action. Any objection to that?

17 Next is page 163. "Professor Hazel
18 suggests new venue rules. This is a revision
19 of his prior suggestions containing numerous
20 changes in the current practice." The
21 subcommittee recommends that SCAC continue to
22 review the venue rules. SCAC has decided to
23 take a different approach, and Professor Hazel
24 has stepped back from some of these proposals.
25 So this is on the agenda for July.

1 MR. HAMILTON: Luke, if you
2 will look at the next --

3 CHAIRMAN SOULES: Court Rules
4 is next at 172. Is that what you are going
5 to, Carl?

6 MR. HAMILTON: Yeah.

7 CHAIRMAN SOULES: Why don't you
8 tell us about that?

9 MR. HAMILTON: Professor
10 Hazel's draft here was a preliminary draft and
11 then the Court Rules Committee finally agreed
12 upon the rules in accordance with venue
13 statutes. So those are the next two pages.

14 CHAIRMAN SOULES: I think
15 that's going to have to be carried until next
16 time, too. Do you agree that Alex is to have
17 this all under consideration? Do you agree
18 with that, Carl?

19 MR. HAMILTON: Yes.

20 CHAIRMAN SOULES: Okay. July.
21 And it appears to be the last, 172.15, amend
22 Rule 145 to permit district clerks to
23 challenge a pauper's oath. That was done by
24 this committee already, so that needs no
25 further action. And that takes care of

1 Orsinger. And except for those carryover
2 items on venue for Alex Albright and on paper
3 discovery for Steve Susman and civil evidence
4 702 and 706 for Buddy Low and Bill's ongoing
5 work, that's it. Excuse me just a moment.

6 We also have -- the first 113 pages of
7 this agenda are comments received. I'm
8 looking at the dates.

9 MR. SUSMAN: A long, long time
10 ago, most of them.

11 CHAIRMAN SOULES: Okay. Well,
12 these, they may duplicate some of the things
13 we have looked at, Steve, but these are not --
14 this agenda was sent out in February, and it
15 consisted of materials that we have received
16 since we prepared the second supplemental
17 agenda. So this has really not been dealt
18 with, but I think Alex has told us that she's
19 going to go through this and give us a report.
20 Could you read it, too, Steve, and see if
21 there is anything in there you see?

22 MR. SUSMAN: I have been
23 through it and these, I can tell you, I have
24 absolutely read these things a zillion times.
25 I mean, for example, 008, okay, Odem &

1 Associates letter, page 8. That is a form
2 letter that the Texas Association of Defense
3 Counsel had many members send in to Justice
4 Hecht over the discovery rules. It was part
5 of the big debate last year or the year
6 before. I guess it was last year when we were
7 talking about the discovery rules between the
8 court -- and this was just part of it.

9 CHAIRMAN SOULES: Okay. I
10 understand what you're saying.

11 MR. SUSMAN: See, 14 is an old
12 letter. That's over a year old. January of
13 '96. I mean, these letters were all in the
14 hands of the committee before we approved the
15 discovery rules, and when did we send them on
16 to the Court?

17 MR. PARSLEY: July of '95, I
18 think.

19 CHAIRMAN SOULES: '96.

20 MR. SUSMAN: July '96?

21 MR. PARSLEY: No. I think it
22 was July of '95. I may be crazy, but isn't
23 that right? Anybody want to join me on that?

24 MS. SWEENEY: I can't remember.

25 MR. PARSLEY: I think it was

1 July 21st, '95. I think it's been almost two
2 years now since you-all sent them up.

3 MS. DUDERSTADT: August 3rd,
4 1995.

5 MR. PARSLEY: August 3rd, 1995.

6 CHAIRMAN SOULES: These are all
7 letters since, so it may be that -- well,
8 anyway, in keeping with our commitment to the
9 commentators or inquirers, we need to address
10 these individually in general session. I am
11 satisfied, Steve, that all of these went to
12 your subcommittee as they were received and
13 that your subcommittee considered them in the
14 process.

15 However, we have several things going
16 here, reviewing task forces, which is all
17 over. The book is closed on that except for
18 Bill's work. The subcommittee reports that
19 were done behind that and then the disposition
20 of the individual comments and inquiries that
21 were given to me outside what we are doing
22 now, buttoning up those that we have gotten
23 from the outside. We do not have on the
24 record of this committee as a whole on these
25 particular items, although they probably

1 all -- and I think indeed all were considered
2 by your subcommittee, so if we could just get
3 the disposition chart on pages 1 through 113
4 in July, and that will close the book.

5 MR. SUSMAN: All right. I will
6 bring it back, but I don't really have to
7 convene a meeting of the subcommittee on this,
8 Luke.

9 CHAIRMAN SOULES: All right.

10 MR. SUSMAN: I mean, I can't
11 get them together to go over this because this
12 is old stuff. Page 41 is another example of a
13 form letter that we got after some other
14 association meeting. I mean, this is when the
15 big fight was on over the discovery rules, and
16 we got zillions of form letters, which we all
17 considered.

18 CHAIRMAN SOULES: Yes.

19 PROFESSOR DORSANEO: Didn't you
20 develop a form response?

21 CHAIRMAN SOULES: He'll have
22 one for the next meeting, I imagine.

23 MR. SUSMAN: Okay.

24 CHAIRMAN SOULES: Okay. So I
25 think that's it.

1 PROFESSOR DORSANEO: You write,
2 "Thank you for your form letter. Please
3 consult the records of your organization for
4 our form response."

5 CHAIRMAN SOULES: Has everybody
6 signed this? Don Hunt has got something else,
7 too. Okay, Don.

8 MR. HUNT: Are we going to
9 adress anything on Joe Jamail's letter?

10 CHAIRMAN SOULES: Yeah. I
11 mean, we have a letter from Joe Jamail, and
12 it's been sent to everybody. It's a very
13 analytical piece of work and --

14 MR. SUSMAN: Absolutely right.

15 CHAIRMAN SOULES: -- has a lot
16 of thought put into it and a lot of analysis,
17 most of which I think came before the
18 committee. It's almost as though they either
19 read our minds or read our transcript.

20 HONORABLE SARAH DUNCAN: I'm
21 glad somebody did.

22 CHAIRMAN SOULES: I talked to
23 Chief Justice Phillips on Thursday, or maybe
24 it was Wednesday. Yesterday or the day
25 before, I can't remember. And told him that

1 I'd like to report to the committee what may
2 have occurred in the Supreme Court as to our
3 draft. He told me that the Court was
4 concerned that the legislature was about to
5 pass a bill, so they decided they needed to
6 act in their own interest to protect their
7 rule-making authority and get something done.

8 And I got more specific about certain
9 things. He told me that the Court's feeling
10 was that they definitely didn't need special
11 sanctions in the summary judgment rule given,
12 what is it, Chapter 10 of the Texas Practice
13 and Remedies Code. The Court was going to
14 just let that apply to summary judgment
15 practice.

16 As to the other issues of certifying that
17 the discovery had been reviewed, requiring the
18 court set a discovery period before 166b(e)
19 would be available, and some of the other
20 things that we had in the rule, first he said
21 that they -- on the discovery he didn't know
22 if they were going to have a discovery period,
23 and I told him that that was not germane to
24 what we put into Rule 166b(e). In fact, it
25 was our preference that that be a requirement

1 to use 166b(e), regardless of whether there
2 was a discovery window in the case.

3 If 166b(e) was going to be used, it
4 needed to be a case where the judge had set a
5 discovery cutoff to give people some time to
6 get discovery done, and the upshot of our
7 discussion, which was several minutes, was
8 that the Court would be willing to entertain
9 any further comments that we had and to send
10 them in, that they felt there would not be
11 any -- that the Court could change the summary
12 judgment rule when they issued discovery
13 rules. So that's the report of that
14 conversation.

15 MS. SWEENEY: You mean that we
16 might have a new one for awhile and then
17 another iteration when discovery rules come
18 out?

19 CHAIRMAN SOULES: That's what
20 it sounded like to me, that that's a
21 possibility. I think if that's a possibility,
22 at least it's a hope that 166b(e) may not last
23 a long time.

24 MS. SWEENEY: Do we have any
25 sense on the discovery rules?

1 CHAIRMAN SOULES: I don't. Do
2 you know anything, Lee?

3 MS. SWEENEY: Timing on those
4 or content?

5 MR. PARSLEY: Not much. The
6 Court has not focused on discovery rules, but
7 hopes to return to them, has not recently
8 focused on the discovery rules, but hopes to
9 return to them by, now, really and get a draft
10 back to committee by July 1st when the Court
11 was going to take its summer break.

12 Now the Court is pretty deeply involved
13 in its regular docket, its cases. Whether the
14 Court will get to discovery between now and
15 July the 1st, I just don't know. I think it
16 would be hard for the Court to get there.
17 There are a number of things on its regular
18 docket that the Court is intent on getting
19 done, I think, and so I would be surprised if
20 the Court would get to discovery.

21 So that would mean that when the Court
22 takes its summer break probably Judge Hecht
23 and some other members of the Court will turn
24 their attention to discovery then when the
25 case docket is not as heavy, when the case

1 docket is not as heavy, when they are not
2 under as much pressure on the case docket. So
3 I would guess that July would be the time that
4 the Court will turn back to discovery and then
5 that would mean the September meeting of this
6 group before there might be some caught up
7 back from the Court to this group.

8 MS. SWEENEY: Do we know which
9 Bar Journal the summary judgment rule is going
10 to be in or is it?

11 MR. PARSLEY: It was sent to
12 the Bar in -- well, the day it came out it
13 went over to the Bar, of course, which means
14 it's going to be out in the May Bar Journal.
15 No. May is what just came out. It will be
16 out in the June Bar Journal. It will be in
17 the June Bar Journal.

18 CHAIRMAN SOULES: It's got an
19 effective date of September 1st, doesn't it?

20 MR. PARSLEY: That's correct.

21 CHAIRMAN SOULES: So, Don, do
22 you have -- the floor is open.

23 MR. HUNT: Oh, I have no
24 proposal. It just seemed to me we ought not
25 to let this pass without an opportunity to

1 know where we are, and I have reviewed his
2 letter, and it looked like in one very real
3 way it was complimentary of the work of this
4 committee and suggested that the Court take a
5 look at it, the work of this committee. If
6 it's in the judgment of the Chair or Lee or
7 whoever has knowledge of the Court that it's a
8 done deal then we might as well pass on to
9 something else, but if there is any
10 opportunity for an amendment, and you
11 indicated there might be on the second go
12 around, then that's fine. That's all I wanted
13 to ask.

14 CHAIRMAN SOULES: My own
15 instincts tell me that unless there is a
16 ground swell from the trial bench there is not
17 much likelihood of it being changed. My
18 instincts also tell me that if the trial bench
19 really understands what that means that there
20 will be a ground swell, because we are going
21 to hear, and legitimately so, CLE speakers
22 saying that if you do not file a 166b(e)
23 motion for summary judgment you are committing
24 malpractice, the same malpractice that you
25 would have committed if you did not file

1 standard interrogatories. It is a discovery
2 tool. It is a must. You cannot let it go,
3 and it will be in every case, and I don't
4 think that's what the trial judges want.

5 HONORABLE SARAH DUNCAN: I
6 think I can say for the appellate judges, we
7 don't want it, because there are going to be a
8 lot of them granted and reversed.

9 MR. HUNT: Isn't there a
10 realistic possibility given today's date that
11 no bill will come out of the legislature?

12 CHAIRMAN SOULES: No. The bill
13 in the legislature has been scuddled
14 completely.

15 MR. HUNT: So there may be real
16 opportunity to rework that rule in July or
17 August if the Court gets to it. Who knows
18 what they will do.

19 CHAIRMAN SOULES: Well, don't
20 be reluctant to advise the Court, and I know
21 that one of our members intends to do that
22 with the request that they read the
23 transcript, maybe even provide copies of the
24 transcript. Not me, but others, and so maybe
25 there can be something done about it.

1 MS. SWEENEY: Do all of the
2 district judges have a copy of the rule?

3 CHAIRMAN SOULES: They will
4 when the Bar Journal comes out.

5 MS. SWEENEY: But, I mean, as
6 of now it's just sort of happenstance if you
7 hear about it and get it?

8 CHAIRMAN SOULES: Probably so.
9 It was published in the appellate section of
10 the newsletter that just came out, and Pat
11 Hazel is casting around for someone to write
12 in the Litigation Counsel's Advocate. He
13 called me. I didn't have time to do it. Did
14 he call you, Justice Duncan?

15 HONORABLE SARAH DUNCAN: No. I
16 got a copy -- I don't know where I even got
17 the copy -- of a letter from Paul Gold.

18 MR. HUNT: He faxed it to you.

19 CHAIRMAN SOULES: We ought to
20 just send him Joe Jamail's letter. It's a
21 pretty good piece for Pat to work with. Maybe
22 I will do that. Anybody have any objection to
23 that?

24 MS. SWEENEY: No. It's a good
25 idea.

1 MR. SUSMAN: Send Joe's letter
2 to who?

3 CHAIRMAN SOULES: To Pat Hazel
4 to publish in the --

5 MR. SUSMAN: I think we ought
6 to call Joe and tell him he ought to publish
7 it in the Texas Bar Journal in May or June, at
8 the same time -- he ought to put it in in
9 June, and he ought to solicit some
10 heavyweights to sign it as well as him because
11 it's a good letter. I mean, obviously someone
12 wrote it other than Joe.

13 CHAIRMAN SOULES: Oh, I
14 wouldn't say that.

15 MR. SUSMAN: An intellectual
16 heavyweight.

17 CHAIRMAN SOULES: It sure looks
18 like Joe's style to me.

19 MR. SUSMAN: Yeah, right.

20 MR. MARKS: Well, maybe the
21 last paragraph.

22 CHAIRMAN SOULES: Any other
23 comments on that? Any other business?

24 Okay. We are adjourned then until July
25 11th, is it? And thank you all. I

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 16, 1997, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$ 655.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 23rd day of May, 1997.

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